

139 FERC ¶ 61,157
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Power Authority

Docket No. ER12-1806-000

ORDER GRANTING WAIVER REQUEST

(Issued May 25, 2012)

1. On May 16, 2012, the New York Power Authority (NYPA) submitted a request for a limited waiver of section 5.12.11.1.1 of the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff) and of section 4.12.4.1 of the NYISO Installed Capacity Manual (ICAP Manual) to allow for a new submission period for average coincident load (ACL) baseline values to be reported to NYISO for the summer 2011 ACL verification. As discussed below, we grant waiver of section 5.12.11.1.1 of NYISO's Services Tariff to the extent necessary to provide all similarly situated responsible interface parties that failed to submit their ACL data verification to NYISO for the summer 2011 capability period by the deadline for such submissions, an extended period for that submission. The submission period is hereby extended to and including four calendar days from the date of this order.

Background

2. In an order issued April 11, 2011,¹ the Commission accepted, subject to condition,² NYISO's proposed revisions to section 5 of the Services Tariff to enhance the

¹ *New York Independent System Operator, Inc.*, 135 FERC ¶ 61,020 (2011) (April 11, 2011 Order); *see also New York Independent System Operator, Inc.*, Docket No. ER11-2906-001 (May 31, 2011) (delegated letter order).

² Acceptance was conditional upon NYISO filing to incorporate the ACL provisions of section 4.12.2.3 of the ICAP Manual and the provisional ACL provisions of section 4.12.3.4 of the ICAP Manual into its Services Tariff. April 11, 2011 Order, 135 FERC ¶ 61,020 at P 15.

rules that allow for the participation of Special Case Resources (SCR) in NYISO's ICAP market. The revisions included the replacement of the average peak monthly demand (APMD) baseline methodology with a new approach, the ACL baseline methodology. The ACL baseline methodology requires the baseline load level for each SCR to be calculated as part of the SCR's enrollment for each capability period using an average of the top 20 hours of its measured load that are coincident with the top 40 coincident hours of the New York Control Area (NYCA) peak load during the prior equivalent capability period, as adjusted to account for verified load reduction in a Transmission Owner's (TO) demand response program in hours coincident with any of the to 40 NYPA peak load hours.

3. Section 5.12.11.1.1 of the Services Tariff provides that the responsible interface party must calculate the ACL for each SCR that it registers, with the exception of new SCRs³ and must provide NYISO with the ACLs or Provisional ACLs. Failure to report interval data for any hour in which interval data was expected for verification of the summer 2011 ACL, results in those hours being set to zero.⁴ Further, section 5.12.11.1.2 of the Services Tariff requires responsible interface parties to provide NYISO with the actual ACL for any SCR previously enrolled with a provisional ACL in the preceding capability period. If the responsible interface party fails to do so by a deadline, the ACL of such resource will be set to zero and the responsible interface party may be subject to deficiency penalties.

4. The April 11, 2011 Order acknowledged that the ACL methodology would be implemented for the summer 2011 without the required Demand Response Information System (DRIS) software functionality which would be unavailable until winter 2011/2012 (e.g., the software lacked the ability to receive the 50 hours of meter load for each SCR that were used to calculate each SCR's ACL baseline) and used interim measures that allowed the ACL baselines to be implemented for the summer of 2011 in accordance with a specific *ex post facto* ACL data reporting and verification procedure, which applied only to the summer 2011 ACL data reporting and verification.⁵

³ New SCRs submit provisional estimates of their ACL because they do not have historical metered data to determine their actual ACLs.

⁴ NYISO ICAP Manual, § 4.12.4.1.

⁵ For all capability period after summer 2011, the Services Tariff and ISO Procedures require that the ACL data reporting and verification happen at the time the SCR is first enrolled to participate in each Capability Period. See NYISO's Services Tariff, § 5.12.11.1.1.

5. Specifically, according to NYISO's interim measures, for the summer 2011 capability period only, instead of using the top 40 SCR Load Zone Peak Hours as required by its proposal, NYISO would identify the top 50 SCR Load Zone Peak Hours to be used by responsible interface parties in calculating the ACL values for their Special Case Resources. Further, the adjustment for TO demand response deployments would not be made for the summer 2011 capability period.⁶

NYPA's May 16, 2012 Filing

6. On May 16, 2012, NYPA submitted a limited waiver request of NYISO tariff provisions and the corresponding NYISO procedures relating to data reporting and verification for SCRs that participated in NYISO's SCR program for the summer 2011 capability period. NYPA states that, in order to verify the ACL used for the summer 2011 SCR program, it was required to submit a summer 2011 ACL verification into DRIS between October 3, 2011 and November 18, 2011. According to NYPA, it understood that it had correctly made the required submission, but only recently learned that it did not import the required data within the allotted period. NYPA states that, as a result, its SCRs were assigned performance factors of zero for summer 2011.

7. Therefore, NYPA seeks a waiver NYISO's tariff and procedural provisions that apply to the reporting of each SCR's ACL baseline values found in section 5.12.11.1.1 of NYISO's Services Tariff and section 4.12.4.1 of NYISO's ICAP Manual in order that the subject SCRs may continue to participate and sell capacity in NYISO markets going forward in the summer 2012 and winter 2012/2013 capability periods at levels consistent with their performance during the summer 2011 capability period. NYPA requests expedited action on or before May 25, 2012, in order for the corrected calculations to be reflected in the July ICAP auction. NYPA states that it requests this limited waiver to allow it to provide to NYISO a new submission for summer 2011 ACL verification and for the purpose of re-opening the data upload period so that the missing data can be imported and NYISO can conduct the necessary calculations in order to have the SCR capability properly reflected.

8. NYPA states that, in determining whether to authorize a tariff waiver to alleviate the effects of an error, the Commission evaluates whether: (1) a concrete problem needs to be remedied; (2) the underlying error was made in good faith; (3) the waiver is of

⁶ April 11, 2011 Order. 135 FERC ¶ 61,020 at P 4.

limited scope; and (4) the waiver will not have undesirable consequences, such as harming third parties.⁷ NYPA asserts that in the instant case these criteria are met.

9. NYPA states that a concrete problem exists in that significant market impacts will result from NYPA's inability to get a tariff waiver. NYPA states that the total capacity of the affected resources in its SCR portfolio is approximately 250 MW. NYPA asserts that, unless corrected, the diminished supply of SCRs will lead to lower capacity supply, and in turn, lead to increased capacity prices for New York consumers. NYPA estimates that, absent a granting of the waiver, there will be an approximate monthly market impact between \$6,000,000/month for the remaining 2012 summer capability period and \$7,000,000/month for the 2012/2013 winter capability period in additional capacity costs (i.e., approximately \$0.59/kW-Month).

10. NYPA also states that its underlying errors were made in good faith in that this oversight represents a unique occurrence as the ACL baseline methodology was instituted for the first time during the summer 2011 capability period, and this was the first time that an ACL verification file was required.

11. NYPA asserts that the waiver request is of limited scope and the waiver will not have any undesirable consequences. With respect to the latter, NYPA argues that the converse is true, i.e., the loss of this capacity could significantly diminish the reliability benefits provided by the SCR program and have significant market impacts.

Notice of Filing and Responsive Pleadings

12. Notice of NYPA's May 16, 2012 filing was published in the *Federal Register*, 77 Fed. Reg. 30,519 (2012) with comments, protests and interventions due on or before May 23, 2012. North American Power Partners, LLC; EnerNOC, Inc.; Digital Energy Corp; Innoventive Power LLC, Exelon Corporation; Gen on Parties;⁸ Independent Power Producers of New York, Inc.; Entergy Nuclear Power Marketing, LLC; and Demand Response Partners, Inc. filed motions to intervene.

13. Viridity Energy, Inc. (Viridity), Smart Grid Solutions LLC (Smart Grid Solutions), NYISO, and TC Ravenswood, LLC (TC Ravenswood) filed motions to intervene and

⁷ NYPA May 16, 2011 Filing at 5 (citing *e.g.*, *PJM Interconnection, LLC*, 137 FERC ¶ 61,184, at P 13 (2011); *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,193, at P 67 (2011)).

⁸ GenOn Parties consist of GenOn Energy Management, LLC, and GenOn Bowline, LLC.

comments. On May 23, 2012, NYISO filed supplemental comments. The NRG Companies⁹ filed a motion to intervene and limited protest.

14. Hess Corporation; and Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc (jointly) filed motions to intervene out of time. Multiple Intervenors and the City on New York (collectively, Multiple Intervenors) and North American Power Partners, LLC (NAPP) filed motions to intervene out of time and comments. Viridity filed an answer to NRG Companies' protest.

15. In its May 18, 2012 comments, NYISO states that it supports NYPA's waiver request. NYISO states that during the preparations for May 2012 ICAP spot market auction, which was held in April 2012, it learned that NYPA had failed to submit the ACL data verification during the 45-day reporting period (October 3, 2011 and running through November 18, 2011). It states that NYPA requested that NYISO accept a late submission of the ACL data. However, according to NYISO, its staff determined that section 5.12.11.1.1 of NYISO's Services Tariff and section 4.12.4.1 of ICAP Manual prohibited such relief. NYISO concurs with NYPA's estimation that the 250 MW derating of their SCR capacity would impact ICAP clearing prices for the NYISO spot auction by approximately \$0.59/kW-Month. NYISO states that it agrees with NYPA that application of the tariff and corresponding NYISO procedure results in an unintended and unnecessary market distortion.

16. NYISO states that after further investigation, it identified a total of nine other responsible interface parties that failed to provide this ACL verification data.¹⁰ NYISO requests that the Commission make any relief it grants NYPA applicable to all 10 of the similarly situated responsible interface parties it has subsequently identified that are similarly situated. NYISO estimates that the omission of data by all ten of the identified similarly situated responsible interface parties results in derating of approximately 380 MW of SCR capacity. NYISO further estimates that with this cumulative derating of capacity, the price impact increases to over \$0.89/kW-Month, which NYISO argues could result in a 51 percent increase in NYPA's estimated cost impact to loads, and

⁹ For purposes of this filing, the NRG Companies consist of NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

¹⁰ NYISO states that on May 17, 2012 it became aware of another responsible interface party that had correctly uploaded ACL data for over 80 SCRs, but had failed to upload ACL data for two SCRs. NYISO asserts that this responsible interface party is not similarly situated to the other with the responsible interface parties discussed above. NYISO May 18, 2012 Comments at 10, n. 13.

ultimately to consumers. In its May 23, 2012 supplemental comments, NYISO clarifies that two of the nine responsible interface parties that it had previously discussed in its May 18, 2012 comments, did in fact provide the ACL baseline verification data to the NYISO within the appropriate data reporting period, which ran from October 3, 2011 to November 18, 2011. NYISO states that these two responsible interface parties represented eight SCRs totaling approximately 22 MW of eligible capacity that NYISO had previously reported as derated and as a result, the estimated price impact decreases by six percent, from \$0.89/kW-month⁵ to \$0.84/kW-month.

17. NYISO also supports NYPA's request for expedited action. NYISO states that because of time constraints, a Commission order granting the waiver requested by NYPA on or before May 25, 2012, presents the only possible manner for NYISO to implement the waiver in time for the July ICAP auction.¹¹ NYISO further states that four calendar days from the issuance of any waiver would be appropriate for the affected responsible interface parties to upload the data into the DRIS, whereupon, it will then take NYISO at least three days to execute and review the calculations that the new ACL data necessitates.

18. NYISO adds that if the Commission cannot issue an order on or before May 25, 2012, NYISO will work to allow these resources to fully participate in the August 2012 ICAP Auction.¹²

19. In its comments TC Ravenswood states that the Commission should grant the waiver request only if NYPA and others provide sufficient support for their errors and such support meets the standards for granting waiver requests. Specifically, TC Ravenswood states that the Commission should consider granting a waiver with respect to the winter 2012/2013 capability period and if granted, the Commission should make clear that it does so because the request meets the Commission's standards for granting such requests, rather than because it will reduce market prices. TC Ravenswood argues that, to date, neither NYPA, nor the similarly situated responsible interface parties, have sufficiently established that the waiver request in this proceeding meets the standards set by the Commission. TC Ravenswood argues that, at a minimum, NYPA and all the responsible interface parties need to explain in further detail what happened, why, and how the waiver request meets the standards set by the Commission. TC Ravenswood also suggests that NYPA should also be required to demonstrate that the changes to previously published information provided by the NYISO would not harm the settled expectations of the market and settled auctions. TC Ravenswood argues that while a

¹¹ NYISO's July ICAP Auction is scheduled for June 8 – 11, 2012.

¹² SCR Enrollment for the August ICAP Auction opens on June 22, 2012 and closes on July 9, 2012.

short term reduction in market prices may be attractive in the short term; such an outcome may not be beneficial to the market in general or market participants in the long run.

20. In its comments, Smart Grid Solutions states that it joins with NYPA in asking the Commission to grant a limited waiver of the Services Tariff to permit the submission of the summer 2012 ACL verification data. It states that it is a responsible interface party representing 20 customers (resources) representing almost 20 MWs of demand reduction capability. It asserts that it understood that it had correctly made its data submission but was informed that it failed to import its ACL verification data during the allotted timeframe. It reiterates the same reasons for granting waiver to it as NYPA recounted in its waiver request. It asks the Commission to take expedited action before May 25, 2012.

21. Multiple Intervenors state that they strongly support the requested waiver and NYISO's request that the Commission make any relief it grants NYPA applicable to all of the similarly situated responsible interface parties but differ in how these similarly situated responsible interface parties should be determined. Multiple Intervenors state that such relief should be granted to all the affected responsible interface parties and SCR participants, regardless of whether such affected parties have intervened.

22. Multiple Intervenors state that the Commission should issue two directives to NYISO in its order. First, they state that the Commission should direct NYISO to correct the identified problem in time for the July 2012 ICAP spot market auction. Second, Multiple Intervenors state that the Commission should direct NYISO to clarify, or modify, as needed, its Service Tariff to invest NYISO with discretionary authority. Multiple Intervenors state that NYISO's Services Tariff provides NYISO with the authority to accept and process data submissions related to the SCR program out-of-time based upon a showing of extraordinary circumstances. Multiple Intervenors point specifically to section 5.12.6.2 of NYISO's Services Tariff.¹³ Since NYISO's position in this proceeding is that it lacks this authority, Multiple Intervenors argue that the Commission should direct the NYISO to either: (1) clarify section 5.12.6.2 of the Services Tariff to explicitly state that the discretionary authority provided therein applies equally to the data submission requirements of SCR participants and their respective responsible interface parties; or (2) modify the Services Tariff and ICAP Manual, as necessary, to provide similar discretionary authority to NYISO as it relates to SCR program data submissions.

¹³ Multiple Intervenors state that, "Section 5.12.6.2 expressly provides that '[u]pon a showing of extraordinary circumstances, the ISO retains discretion to accept at any time Operating Data which have not been submitted in a timely manner, or which do not fully conform with the ISO Procedures.'" Multiple Intervenors at Point II.

23. In their comments, Viridity and NAPP request that either the waiver be applied to all responsible interface parties that failed to provide timely ACL verification data during the reporting period or that the Commission grant Viridity and NAPP, respectively, the same waiver of the above-referenced provisions of the Services Tariff and ICAP Manual that NYPA has requested.¹⁴ They state that they also agree with NYPA and NYISO that expedited action is necessary. They also acknowledge that they failed to import their ACL verification data during the allotted timeframe.

24. In their protest, the NRG Companies state that they do not oppose NYPA's waiver request. However, they state that they do oppose the suggestion that the Commission grant similar relief to the other nine responsible interface parties to which NYISO refers. The NRG Companies argue that, consistent with Commission precedent, the Commission should require any similarly situated responsible interface parties to individually file a waiver request in order to allow the Commission the opportunity to evaluate their individual circumstances and the justifications provided for the waiver. Absent such a showing, the NRG Companies state that it is impossible to determine whether each of the other similarly situated responsible interface parties, to which NYISO refers, meet the Commission's standard for the granting of a waiver. The NRG Companies state that evaluating the responsible interface parties on a case-by-case basis would be consistent with Commission precedent.¹⁵

Commission Determination

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d), 18 C.F.R. § 385.214(d) (2011), the Commission will grant the late filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

26. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NYISO's May 23, 2012 supplemental comments and Viridity's May 24, 2012 answer because they have provided information that assisted us in our decision-making process.

¹⁴ Viridity May 22, 2012 Comments at 1.

¹⁵ NRG Protest at 3 (citing *ISO New England*, 117 FERC ¶ 61,171, at P 21 (2006). See also *Gulf South Pipeline Co., L.P.*, 112 FERC ¶ 61,294 (2005); *California Independent Sys. Operator Corp.*, 118 FERC ¶ 61,226 (2007); *Great Lakes Gas Transmission Co., Limited Partnership*, 102 FERC ¶ 61,330 (2003)).

27. As discussed below, we grant waiver of section 5.12.11.1.1 of NYISO's tariff, as it applies to the reporting of each SCR's ACL baseline values, for all similarly situated responsible interface parties that failed to timely submit the required data for the summer 2011 capability period. Accordingly, we extend the period for the submission of their ACL data verification to NYISO to and including four days from the date of this order. Further, for the reasons for which we grant NYPA's waiver request as outlined below, we find that this waiver applies equally to all other similarly situated responsible interface parties. We find that it would be unduly discriminatory to limit the applicability of this waiver to only certain affected responsible interface parties, as some of the commenters and the protestor contend. Therefore, we grant waiver to all similarly situated responsible interface parties, as described above, to permit the deadline for submission of the required data to be extended to and including four calendar days from the date of this order.

28. The Commission has previously granted limited waivers of provisions when: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties.¹⁶ We find that NYPA and the commenters have demonstrated good cause to grant the request for limited tariff waiver. Waiver of section 5.12.11.1.1 satisfies the aforementioned conditions.

29. First, we find that NYPA has acted in good faith and we have no reason to believe any of the responsible interface parties' failure to submit the ACL baseline data was anything but inadvertent. Further, we note NYISO's support for NYPA's request.

30. Second, the requested waiver is of limited scope. The waiver will excuse untimely ACL data verification for only the summer 2011 capability period, which was subject to special interim procedures.¹⁷ As NYISO stated, the procedures for ACL data verification for subsequent capability periods have different procedures, as codified in

¹⁶ See, e.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,184, at P 13 (2011); *PJM Interconnection, LLC*, 137 FERC ¶ 61,109, at P 11 (2011); *PJM Interconnection, LLC*, 135 FERC ¶ 61,069, at P 8 (2011); *ISO-New England, Inc.*, 134 FERC ¶ 61,182, at P 8 (2011); *California Independent System Operator Corp.*, , 132 FERC ¶ 61,004, at P 10 (2010); *Hudson Transmission Partners*, 131 FERC ¶ 61,157, at P 10 (2010); *Pittsfield Generating Co., L.P.*, 130 FERC ¶ 61,182, at PP 9-10 (2010); *ISO New England Inc. - EnerNOC*, 122 FERC ¶ 61,297 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

¹⁷ NYISO May 18, 2012 Comments at 3.

NYISO's Services Tariff.¹⁸ Therefore, we find that the waiver is limited to the specific and unique facts presented here and does not constitute precedent allowing market participants to avoid these or any other conditions set forth in the Services Tariff.

31. Third, the waiver will remedy a concrete problem. Absent waiver, NYISO would have to continue its monthly ICAP spot auctions reflecting inaccurate, erroneous data for the available capacity of enrolled SCRs as a result of inadvertent errors by the responsible interface parties, which will continue to distort the market.

32. Fourth, we find that granting the waiver will not lead to undesirable consequences. We find that no harm would result from the waiver because granting this waiver merely corrects what would otherwise be a market distortion as the ACLs of SCRs of responsible interface parties that inadvertently failed to submit timely data are in actuality higher than the values being used. In addition, this limited waiver of the tariff will have beneficial consequences in that it will ensure the participation of SCRs that have demonstrated their capability to reduce load when called upon by NYISO and that, absent the waiver, could not participate. The consequent loss of capacity could reduce the reliability benefits provided by the SCR program and result in higher energy costs to New York consumers.

33. We will decline to issue the directives requested by Multiple Intervenors. We note that NYISO has indicated that if waiver is granted on an expedited basis, it will make a good faith effort to rectify the error at issue in this proceeding in time for the affected resources to enroll and participate in the July ICAP spot auction with an accurate ACL baseline. Given NYISO support for this waiver even in light of the expected workload, we find it unnecessary to issue a directive that the identified problem be corrected in time for the July 2012 ICAP spot market auction. We find Multiple Intervenors' request that the Commission direct NYISO to clarify, or modify, as needed, its Service Tariff to invest the NYISO with discretionary authority is outside the scope of this proceeding.

34. Accordingly, for the foregoing reasons, we grant limited waiver of section 5.12.11.1.1 of NYISO's Services Tariff effective May 25, 2012, as requested, to all similarly situated responsible interface parties, as described above, to permit the deadline for submission of the required data to be extended to and including four calendar days from the date of this order.

¹⁸ *Id.* n.7.

The Commission orders:

Waiver of section 5.12.11.1.1 of NYISO's Services Tariff is hereby granted to the extent discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.