

147 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Invenergy Nelson LLC

Docket No. ER14-1475-000

ORDER GRANTING WAIVER

(Issued April 25, 2014)

1. On March 12, 2014, pursuant to section 207(a)(5) of to the Commission's Rules of Practice and Procedure,¹ Invenergy Nelson LLC (Nelson) filed a petition for waiver of the must-offer requirement in section 6.6(g) of Attachment DD to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (PJM Tariff), in order to offer less than the full amount of its 600 MW facility (Nelson Facility), in the upcoming May 2014 Base Residual Auction (May 2014 Auction) for the 2017-2018 Delivery Year. Specifically, Nelson seeks waiver of the deadlines to request a partial exception to its must-offer requirement for the May 2014 Auction. For the reasons discussed more fully below, we grant Nelson's request for waiver.

I. Background

2. PJM secures capacity commitments under the Reliability Pricing Model through an Auction held three years before the delivery year.² Attachment DD of the PJM Tariff sets forth the terms and conditions governing the Reliability Pricing Model. Pursuant to section 6.6(g) of Attachment DD of the PJM Tariff, a Capacity Market Seller may request an exception to the must-offer requirement in any PJM Auction by showing, among other things, that it has a financially and physically firm commitment to an external sale of its capacity.³ Section 6.6(g) of Attachment DD states that a Capacity Market Seller may

¹ 18 C.F.R. § 385.207(a)(5) (2013).

² A delivery year is a twelve-month period beginning on June 1 and ending on May 31. *See* PJM, Intra-PJM Tariffs, OATT, OATT Attachment DD.2, Definitions, 15.0.0, §§ 2.5 and 2.34, *available at* <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=154931>.

³ *Id.*

seek such an exception by submitting a written request, along with its supporting data and documentation, to PJM and the Market Monitor by no later than 120 days prior to the start of the applicable Auction. For the May 2014 Auction, the deadline for requesting such an exception was January 12, 2014.⁴ However, Section 6.6(g) also provides for the following exception to allow filings after the deadline:

[i]f a Capacity Market Seller doesn't timely seek to remove a Generation Capacity Resource from Capacity Resource status or timely submit a request for an exception to the must-offer requirement, the Generation Capacity Resource shall only be removed from Capacity Resource status, and may only be approved for an exception to the must-offer requirement, upon the Capacity Market Seller requesting and receiving an order from FERC, prior to the close of the offer period for the applicable RPM Auction, directing the Office of the Interconnection to remove the resource from Capacity Resource status and/or granting an exception to the must-offer requirement or a waiver of the must-offer requirement as to such resource.⁵

3. Nelson is developing the Nelson Facility, a 600 MW combined-cycle gas turbine generating facility within PJM, which is expected to go into operation in 2015. The Nelson Facility was offered into and cleared the PJM Auction for the 2016-2017 Delivery Year. Therefore, the Nelson Facility is considered an Existing Generation Capacity Resource under the PJM Tariff and is required to offer its capacity into the May 2014 Auction for the 2017-2018 Delivery Year, unless it is granted an exception.

II. Waiver Request

4. Nelson asserts that it qualifies for a partial exception to the must-offer requirement to allow it to remove 15.6 percent (approximately 90 MW) of the 600 MW capacity of the Nelson Facility from the May 2014 Auction because it has entered into a financially and physically firm commitment to sell that portion of its capacity to a load-serving entity external to PJM. Specifically, Nelson states that, on March 12, 2014, it executed an agreement with WPPI Energy under which WPPI Energy will purchase 15.6 percent of the Nelson Facility's output for a 20-year term beginning on June 1, 2017. Nelson explains that WPPI Energy serves loads in the Midcontinent Independent System Operator, Inc. (MISO) Region and that WPPI Energy intends to designate this capacity as

⁴ Nelson Transmittal at 6.

⁵ OATT ATT DD.6, OATT ATTACHMENT DD.6. MARKET POWER MITIGATION, 7.0.0.

a firm network resource in support of its MISO network adequacy requirements.⁶ Nelson avers that the capacity amount under the agreement will coordinate with WPPI Energy's termination of its rights to purchase a comparable amount of capacity that also originates in PJM, under an agreement with another generator.⁷

5. Because Nelson missed the January 12, 2014 deadline for requesting an exception under the PJM Tariff, Nelson requests the Commission grant waiver to allow for a partial exception from the must-offer requirement. Nelson also requests waiver of deadlines specified in the PJM Tariff in connection with the submission and processing of exception requests.⁸

6. Nelson argues that there is good cause to grant waiver. Nelson states that the error was made in good faith because it did not yet have a firm commitment for the external sale to WPPI Energy until after the January 12, 2014, deadline and it submitted its request for waiver promptly thereafter.

7. Nelson states that the waiver request is limited in scope because it is a one-time waiver. Nelson asserts that it seeks waiver of section 6.6(g) only with respect to the May 2014 Auction and only for the specific portion of the Nelson Facility that is committed to WPPI Energy under the parties' agreement.

8. Nelson explains that the waiver would remedy a concrete problem because it now has a firm commitment to export a percentage of its capacity to WPPI Energy commencing on June 1, 2017. Nelson states that WPPI Energy will use the capacity acquired under this agreement to meet its load requirements. Nelson claims that granting waiver will not cause any undesirable consequences, stating that it is making the request in advance of the offer period for the May 2014 Auction. Nelson further claims that it previously alerted PJM and the Market Monitor on the need for and its plans to request a waiver.

⁶ Nelson Transmittal at 4.

⁷ Nelson Transmittal at 6.

⁸ In addition to the 120-day deadline referenced in section 6.6(g) of Attachment DD, Nelson notes that there are a number of other deadlines in connection with the processing of an exception request that also cannot be met, including: at least 90 days prior to the commencement of the Auction, the Market Monitor make a determination on whether to grant an exception; PJM then has 25 days to determine whether it agrees or disagrees with the Market Monitor's determination and the Capacity Market Seller must notify the Market Monitor and PJM whether it intends to implement such exception. Nelson Transmittal at 5.

9. Finally, Nelson requests a shortened comment period of 14 days and Commission action on its request for waiver by April 21, 2014, or as soon as practicable thereafter, to provide the Market Monitor with one week to complete his review of the exception request and an additional week for PJM to conclude its review.

III. Notice of Filing and Responsive Pleadings

10. Notice of the Nelson's waiver request was published in the *Federal Register*, at 79 Fed. Reg. 15,737 (2014), with interventions and protests due on or before March 26, 2014. On March 13, 2014, a timely motion to intervene and supporting comments was filed by WPPI Energy. A timely motion to intervene was also filed by the Market Monitor on March 13, 2014. PJM filed a timely motion to intervene on March 24, 2014.

11. On March 26, 2014, the Market Monitor filed a protest and on March 28, 2014, Nelson and WPPI Energy filed a joint answer to the Market Monitor's protest.

12. In its comments, WPPI Energy states that it strongly supports prompt Commission action granting Nelson's requested waiver to allow removal of the capacity sold to WPPI Energy from the May 2014 Auction. WPPI Energy asserts that this capacity will enable it to meet its load-serving entity obligations in MISO. WPPI Energy states the 90 MWs of capacity is structured to replace WPPI Energy's long-term purchase from another unit in the PJM footprint (currently excluded from the May 2014 Auction) that WPPI Energy has been relying on to serve its MISO load and to meet its MISO resource adequacy requirements since 2002. Specifically, WPPI Energy states it has had a long-term power purchase agreement to purchase a portion of the output (averaging about 90 MW over the contract period but currently about 85 MW) of a 270 MW unit in Kendall County, Illinois, which is now owned by Dynegy Marketing and Trading LLC (Dynegy). WPPI Energy asserts that this long-term agreement was scheduled to terminate on September 16, 2017, but the Dynegy agreement will now terminate on May 31, 2017, so that the May 2014 Auction will not be deprived of the Dynegy capacity as well as the Nelson Facility's 90 MW of capacity.

13. Therefore, WPPI Energy requests that the Commission find that Nelson has satisfied the Commission's standards for waiver of the PJM Tariff and grant the requested waiver.

14. On March 26, 2014, the Market Monitor filed comments, stating that it opposes Nelson's request for waiver because Nelson has not indicated a valid reason for granting the waiver. The Market Monitor asserts that Nelson executed the agreement with WPPI Energy to export approximately 90 MWs of capacity subject to the must-offer requirement on March 12, 2014. The Market Monitor states that the March 12 date was fully two months after the applicable deadline for requesting an exception to the must-offer requirement for the May 2014 Auction. The Market Monitor argues that Nelson's sole justification for requesting a waiver is that it agreed to export capacity two months

after the PJM Tariff deadlines and therefore, could not meet those deadlines. The Market Monitor contends that accepting export arrangements entered into after the deadline for an exception to permit such exports nullifies the deadlines.

15. In addition, the Market Monitor states that Nelson does not satisfy the Commission's standards for granting such waiver requests. The Market Monitor asserts that Nelson cannot claim that the underlying error in failing to request a timely exception was made in good faith because Nelson has not shown or claimed that it made an error. The Market Monitor argues that Nelson fails to show limited scope because its rationale would apply indefinitely and for any participant who finds the rules inconvenient. The Market Monitor avers that no concrete problem needing a remedy existed until two months after the deadline that Nelson seeks to waive, at which point Nelson created the problem. The Market Monitor also argues that granting this waiver would create a harmful precedent, as it would allow participants to disregard the tariff rules in the expectation of a waiver.

16. Finally, the Market Monitor states that the Commission has received a number of requests for waivers of deadlines for the May 2014 Auction and the Market Monitor has not opposed these requests because the participants made credible claims that they did not understand that the deadlines applied to units in their circumstances or because the participants stated the units would be decertified during the specific delivery year in question. The Market Monitor states that it has not opposed waivers under those circumstances, and it takes no position on whether those requests met the Commission's criteria for granting waivers. The Market Monitor argues, however, that Nelson's request can be distinguished from others that have been filed in connection with the May 2014 Auction. In this case, the Market Monitor states that it seems that Nelson did not consider the deadline when it agreed to export capacity subject to the deadline two months after it had already passed.

17. In their answer, Nelson and WPPI Energy state that the Commission should reject the Market Monitor's arguments because Nelson has satisfied the requirements for waiver given the unusual circumstances. Nelson and WPPI Energy state that grant of the limited, one-time waiver request is needed to preserve a 20-year contract that will enable WPPI Energy to meet its long-term load obligations and resource adequacy requirements, and will not appreciably diminish the capacity available to May 2014 Auction. Nelson and WPPI Energy argue that the Market Monitor has advanced no valid justification to deny the request, even while at the same time choosing not to oppose a waiver request

made by Dynegy⁹ that has been triggered by the very same circumstances which are the predicate for the instant request.

18. Nelson and WPPI Energy state that granting the waiver is necessary to enable WPPI Energy to make the attestations required to designate the agreement as a network resource upon termination of its agreement with Dynegy.¹⁰ Nelson and WPPI Energy argue that, instead of arguing that Nelson does not qualify for an exception, the Market Monitor states that Nelson's waiver request does not meet the Commission's standards for waiver. Nelson and WPPI Energy assert that it appears the only basis for the Market Monitor's opposition to the waiver request is that the agreement was entered into after the deadline for requesting an exception and that accepting export arrangements entered into after the deadline nullifies the deadlines. Nelson and WPPI Energy state that the Market Monitor also contends that Nelson does not qualify for a waiver because Nelson created this problem by entering into the agreement which now requires a waiver and that this sets a bad precedent for participants requesting waivers by allowing them to disregard the deadlines.

19. Nelson and WPPI Energy state that they strongly dispute the Market Monitor's characterizations of Nelson's waiver request and the Commission should reject these arguments. Nelson and WPPI Energy contend that Nelson did not create the need for the waiver or disregard the rules. Nelson and WPPI Energy argue that the fact that Nelson and WPPI Energy reached an agreement in March 2014 is the reason that the waiver is warranted, not a reason for denying the request. Moreover, Nelson and WPPI Energy state that a denial of this waiver request, paired with grant of the pending Dynegy waiver request, would artificially increase the capacity available to PJM for the 2017-2018 Delivery Year and undermine a 20-year agreement between Nelson and WPPI Energy.

20. Finally, Nelson and WPPI Energy contend that the Market Monitor's assertion that granting the waiver creates the precedent that participants are free to ignore deadlines in the PJM Tariff is also incorrect. Nelson and WPPI Energy state the Commission grants waivers only when its standards are met and Nelson has demonstrated that it meets those

⁹ Nelson and WPPI Energy Joint Answer at 2-3 (citing *Dynegy Kendall Energy, LLC and Dynegy Marketing and Trade, LLC*, Request for Limited Waiver, Docket No. ER14-1585-000 (filed March 25, 2014)).

¹⁰ Nelson and WPPI Energy Joint Answer at 4. WPPI Energy states granting the waiver will also enable WPPI Energy to utilize its rollover rights under section 2.2 under the MISO and PJM Tariffs to confirm transmission service needed to use the agreement with Nelson to service its load and qualify as a Capacity Resource for MISO resource adequacy purposes over the 20-year term of the agreement.

requirements in its waiver request. Nelson and WPPI Energy also argue that these circumstances are unique and unlikely to be repeated.

IV. Commission Determination

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules and Practice and Procedures, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serves to make the entities that filed them parties to this proceeding. We accept Nelson and WPPI Energy's joint answer to the Market Monitor's protest because it has assisted us in our decision making process.¹¹

B. Substantive Matters

22. Nelson is seeking a waiver of the deadlines in section 6.6(g) of Attachment DD to the PJM Tariff for requesting a partial exception to its must-offer requirement for the May 2014 Auction.

23. The Commission has previously granted requests for waiver from the PJM Tariff's requirements in situations where: (1) the applicant has been unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) the waiver would address a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹² We find that, based on the record before

¹¹ Although Nelson and WPPI Energy styled their joint response as an answer to comments pursuant to Rule 213(a)(3) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(a)(3) (2013)), it is an answer to the protest filed by the Market Monitor (*see Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984)) under Rule 213(a)(2).

¹² *See, e.g., Southwest Power Pool, Inc.*, 146 FERC ¶ 61,110, at P 10 (2014); *PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,060, at P 12 (2013); *New York Independent System Operator, Inc.*, 144 FERC ¶ 61,147, at P 8 (2013); *New York Independent System Operator, Inc.*, 139 FERC ¶ 61,108, at P 14 (2012); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184, at P 13 (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).

us, the particular circumstances of this case justify granting the requested waiver¹³ and we, therefore, find good cause to grant Nelson's request for waiver of the deadlines in section 6.6(g) of Attachment DD to the PJM Tariff to submit a partial exception to its must-offer requirement.

24. We conclude that Nelson's failure to comply with the January 12, 2014, deadline at issue was in good faith. Nelson did not yet have a firm commitment for the external sale to WPPI Energy until after the deadline and it submitted its request for waiver promptly thereafter, having already alerted PJM about the likely need for a partial exception before the agreement with WPPI Energy was finalized.

25. Nelson's request is limited in scope in that the waiver is only applicable for the 2014 Auction. We find that granting the waiver will remedy a concrete problem by allowing Nelson to obtain a partial exception to the must-offer requirement that it would otherwise be entitled to claim under the PJM Tariff because it has a firm commitment to export a percentage of its capacity to WPPI Energy commencing June 2017.

26. Finally, we find that granting the waiver would have no undesirable consequences. While we appreciate the Market Monitor's concern regarding the contract execution after the January 12, 2014 deadline, we do not believe that this warrants rejecting the waiver in this case. Given the overall size of the PJM market, 90 MW is a relatively small amount of capacity. Therefore, granting the waiver would only have a similarly de minimis effect on the capacity in PJM's May 2014 Auction. Also, no protestor demonstrated that the capacity amount or waiver, if granted, would harm the market.

¹³ Tariff waivers are typically filed by a utility requesting the Commission to authorize a deviation from the utility's tariff for a short period of time or for particular short-lived circumstances in cases in which changing the tariff itself would be inefficient. Utilities sometimes prefer to have its customers make these filings, and when such filings are not opposed by the utility, the Commission treats the request as one initiated by the utility. Here, PJM does not oppose the waiver.

The Commission orders:

Nelson's request for waiver of the deadlines in section 6.6(g) of Attachment DD of the PJM Tariff to seek a partial exception to its must-offer requirement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.