

148 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER14-2142-000

ORDER GRANTING WAIVER REQUEST

(Issued August 4, 2014)

1. On June 5, 2014, New York Independent System Operator, Inc. (NYISO) submitted for filing a Notification of Tariff Implementation Error and a request for a limited waiver of the market power mitigation measures (Mitigation Measures) of NYISO's Market Administration and Control Area Services Tariff (Services Tariff)¹ as necessary to excuse NYISO from the obligation to review any possible instances of portfolio physical withholding that might have occurred prior to April 1, 2012. For the reasons discussed below, we grant NYISO's request for waiver.

I. Background

2. NYISO states that the subject tariff sections require it to look for instances where five percent (or more) or 200 MW (or more)² of the total capability of a market party and its affiliates might have been withheld from NYISO's day-ahead or real-time energy markets, and to determine if such withholding had a market impact. NYISO explains that it refers to this as the "portfolio" withholding standard to differentiate it from NYISO's generator-specific screening of each and every New York Control Area (NYCA) generator. NYISO states that the Mitigation Measures require it to apply a financial sanction for portfolio withholding when it determines that the following three requirements are met: (1) available MWs exceeding the conduct thresholds were, in fact, withheld;³ (2) the withholding would not be in the economic interest of the market party

¹ NYISO states that the relevant provisions of the Mitigation Measures of the Services Tariff include §§ 23.3.1.1.1.1 (iii) and (iv), 23.3.2.1, and 23.4.3.2(i). NYISO June 5, 2014 Filing at n.20.

² For generation portfolios located in the New York City constrained area, the MW threshold is 100 MW.

³ Services Tariff §§ 23.2.4.1.1 and 23.3.1.1.

or its affiliates in the absence of market power (i.e., the failure to offer is not competitively justified);⁴ and (3) the withholding caused a market clearing price or guarantee payment impact that exceeds the applicable impact threshold.⁵ NYISO adds that a financial sanction cannot be applied until NYISO provides a market party the opportunity to explain the reasons why it did not offer its generating capacity into the market.

II. NYISO's June 5, 2014 Filing

3. NYISO states that it submits this Notification of Tariff Implementation Error and Request for Limited Tariff Waiver (Waiver Request) to formally notify the Commission that one of several tools NYISO previously used to screen for possible physical withholding of New York Control Area (NYCA) generation portfolios was only partially effective and that it has worked with its independent, external Market Monitor Unit (MMU) to review possible instances of portfolio withholding that might have occurred between April 1, 2012 and April 8, 2013. NYISO states that it did not identify any instances in which it failed to assess a physical withholding sanction that it should have assessed.

4. NYISO states that the screening software it had in place from 2005 to April 8, 2013, that was intended to screen for possible physical withholding of NYCA generation portfolios (Portfolio Screening Software) was only partially effective. NYISO states that the screening test that the Portfolio Screening Software performed did not conform to the portfolio physical withholding conduct test specified in the Mitigation Measures. NYISO explains that the Portfolio Screening Software took the total MWs that were not offered over the course of the day from a portfolio, divided that total by the number of generator-hours in which MWs were withheld, and reported the result. NYISO states that the Portfolio Screening Software did not always identify the hours in which five percent or more of the total MW capability included in a portfolio was not offered, or the hours when the total number of MWs not offered from a portfolio exceeded 200 MW (100 MW in a constrained area), which are the conduct thresholds specified in the Mitigation Measures.

5. NYISO states that on April 8, 2013, it identified an instance in which more than five percent of a market party's portfolio was not offered into the real-time market, but the Portfolio Screening Software did not flag the behavior as a possible violation of the physical withholding conduct tests set forth in the Mitigation Measures. NYISO states that it immediately investigated and discovered that the screening performed by the Portfolio Screening Software diverges from the portfolio physical withholding conduct

⁴ Services Tariff § 23.2.4.1.1(ii).

⁵ Services Tariff § 23.3.2.1.

tests, whereupon NYISO instituted a tariff-compliant manual screening process. NYISO states that upon discovering the issue, it informed its stakeholders and the Commission's Office of Enforcement staff in an expeditious manner.

6. NYISO further states that it has employed other methods since 2005 to ensure available generation is offered into its markets. First, in addition to identifying possible portfolio withholding, the Mitigation Measures require NYISO to look for generator-specific physical withholding. NYISO states that, if a market party fails to offer ten percent (or more), or 100 MW (or more) of a generator's capability into NYISO's day-ahead market or real-time market, then NYISO's generator-specific physical withholding screen identifies that generator for further evaluation.⁶ Second, NYISO explains that the 99 percent of NYCA generators that sell unforced capacity (UCAP) to NYISO are required to either offer their energy into the day-ahead market, or to be scheduled to supply a bilateral transaction, or to declare that the generator is unavailable due to a maintenance outage or a forced outage.⁷ Third, NYISO states that it uses Generator Availability Data Systems (GADS) reporting to determine generator availability for purposes of calculating how much UCAP can be sold from each NYCA generator. NYISO states that in order to ensure that GADS data is reported accurately, NYISO reviews generator outage logs to ensure consistency between reported data and outage scheduling rules. NYISO further states that in addition to the monitoring performed by NYISO, the MMU reviews real-time market outcomes and investigates instances where Locational Based Marginal Prices or uplift payments deviate significantly from the competitive range that would be expected given system conditions. NYISO adds that, when such anomalous market outcomes occur, the MMU screens for unoffered capacity, which may represent physical withholding, assesses whether generator conduct that is identified by these screens is likely to have a competitive justification, and discusses with NYISO any candidates for potential mitigation.

7. NYISO states that it worked with its MMU to re-screen offering behavior that occurred between April 1, 2012, and April 8, 2013, using corrected software to determine if NYISO had failed to apply a financial sanction for portfolio physical withholding that the Mitigation Measures require it to apply. NYISO asserts that a key reason it did not fail to assess a required sanction was because it had several, overlapping monitoring methods in place to identify possible physical withholding, and was not relying solely on the portfolio screen in the Portfolio Screening Software. NYISO asserts that it is

⁶ See Mitigation Measures sections 23.3.1.1.1(i) and (ii).

⁷ See section 5.12.7 of the NYISO's Market Administration and Control Area Services Tariff.

“extremely unlikely” that any such conduct occurred that would not have been identified by other processes that NYISO and its MMU employed.⁸

8. NYISO requests that, for the period from February 1, 2005, to March 31, 2012, the Commission grant such waivers as may be necessary to excuse NYISO from reviewing offering behavior to identify violations of the portfolio physical withholding conduct thresholds, performing market impact assessments, and imposing financial sanctions for portfolio physical withholding. NYISO asserts that the Commission should grant its request because: (1) NYISO had a process in place for reviewing possible instances of potential portfolio physical withholding conduct, which was effective in some instances; (2) the portfolio screen is only one of several methods NYISO and the MMU use to identify possible instances of physical withholding; (3) NYISO and the MMU, upon correctly screening for the period from April 1, 2012 to April 8, 2013, found no instances in which a financial sanction for portfolio physical withholding needed to be imposed; and (4) asking generation owners to respond to specific questions about why they did not offer a particular generator into the day-ahead or real-time market several years after the fact could result in the imposition of penalties simply because the generation owner is no longer able to explain the offering behavior in question.

9. NYISO contends that its request for waiver is consistent with prior situations in which the Commission has granted a waiver. NYISO asserts that the underlying error was in good faith in that the Portfolio Screening Software was designed to identify portfolio withholding conduct and as soon as NYISO discovered the problem, it implemented a remedy and promptly notified its market participants and Commission Office of Enforcement Staff. NYISO asserts that the scope of the requested waiver is limited insofar as it addresses NYISO’s obligation to re-screen for possible physical withholding conduct, to consult with market parties to determine if there was a competitive justification for the failure to offer portfolio MWs, to determine if the failure to offer had a substantial market clearing price or guarantee payment impact, and to assess a financial sanction where warranted for the period from February 1, 2005, to March 31, 2012. NYISO asserts that the waiver would remedy a concrete problem in that re-reviewing, consulting and imposing retroactive penalties this long after-the-fact could prove inequitable. In addition, NYISO asserts that granting the waiver request will prevent harm to market participants by ensuring that their settled expectations about historic market outcomes are not disrupted and by promoting financial certainty in the NYISO-administered markets.

III. Notice and Interventions

10. Notice of NYISO’s filing was published in the *Federal Register*, 79 Fed. Reg. 33,916 (2014), with interventions and protests due on or before June 26, 2014.

⁸ NYISO June 5, 2014 Filing at 1.

NRG Companies⁹ and New York Transmission Owners¹⁰ filed motions to intervene. No protests were filed. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

IV. Commission Determination

11. The Commission has previously evaluated a number of issues in determining whether to authorize a tariff waiver to alleviate the effects of an error. These include whether: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver will not have undesirable consequences, such as harming third parties.¹¹

12. We find that NYISO has demonstrated good cause to grant the request for a tariff waiver for the period prior to April 1, 2012, because we find that NYISO's requested waiver satisfies the aforementioned conditions. We find that the error was made in good faith as the Portfolio Screening Software was designed to identify portfolio withholding conduct but failed to do so and, as soon as the error was discovered, NYISO acted in good faith in quickly implementing a manual screening process to ensure full tariff compliance on a going-forward basis and in quickly informing the MMU and the Commission's Office of Enforcement Staff of the error it identified.

13. The requested waiver is limited to a specific period of time and to specific concerns raised by one of several screening tools that NYISO used.¹² Moreover, granting the waiver will remedy a concrete problem because NYISO would otherwise have to re-review long-settled market outcomes and mitigation results. Further, we agree with NYISO that, in this case, it is highly unlikely that the flaw in the portfolio screening tool led to incidents of portfolio physical withholding that would merit sanctions being

⁹ For the purpose of this filing, the NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

¹⁰ New York Transmission Owners consists of: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Power Supply Long Island, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

¹¹ 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).

¹² NYISO and its MMU should be proactive in the future in ensuring that NYISO's screens operate effectively to identify all potential abuses of market power.

overlooked. NYISO uses multiple methods to screen for possible physical withholding. NYISO's use of generator-specific tools, and the MMU's review of market outcomes, in conjunction with the fact that rescreening for the period from April 1, 2012, to April 8, 2013, identified no instances meriting a physical withholding sanction convince us that NYISO's requested waiver is appropriate and will not lead to undesirable consequences.

14. Accordingly, we grant NYISO's request for a limited tariff waiver.

The Commission orders:

NYISO's request for a limited tariff waiver is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.