

152 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Innovative Power LLC

Docket No. ER15-1926-000

ORDER GRANTING WAIVER REQUEST

(Issued July 17, 2015)

1. On June 16, 2015, Innovative Power LLC (Innovative) submitted a request for a limited waiver of section 5.12.11.1 of New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff)¹ to allow for its late submission of Special Case Resource (SCR) performance data to NYISO for the March 3, 2015 SCR test. For the reasons discussed below, we grant Innovative's request for waiver of section 5.12.11.1 of NYISO's Services Tariff.²

I. Background

2. NYISO's installed capacity (ICAP) market design includes a provision for SCRs, defined as demand response resources and certain behind-the-meter generators,³ to sell capacity in NYISO's capacity auctions. SCRs are represented in the market by

¹ NYISO, Services Tariff, § 5.12.11.1 (11.0.0).

² Innovative also asks for waiver of corollary provisions in section 4.4.7.1 of NYISO's Installed Capacity Manual (ICAP Manual), but we need not address that request because the ICAP Manual is not part of the Commission-approved Tariff.

³ Section 2.19 of the Services Tariff defines SCRs as "demand side resources whose load is capable of being interrupted upon demand at the direction of NYISO, and/or demand side resources that have a local generator, which is not visible to NYISO's Market Information System and is rated 100 kW or higher, that can be operated to reduce load from the New York State transmission system or the distribution system at the direction of NYISO." NYISO, Services Tariff, § 2.19 (19.0.0).

Responsible Interface Parties,⁴ which act as aggregators of individual SCRs to facilitate the SCR's participation in the program. Responsible Interface Parties that enroll qualified SCRs receive capacity payments in return for the commitment to reduce load when called upon by NYISO. Innoventive is a Responsible Interface Party participating in NYISO's ICAP market.

3. NYISO activates the SCR program in response to the following events: (1) a forecasted reserves shortage; (2) a Major Emergency state declared by NYISO; or (3) a request for load relief purposes, or as the result of a local reliability rule. NYISO also activates SCRs for performance tests in each Capability Period, during which SCRs must demonstrate their ability to meet their capacity obligation. Although NYISO did not activate its SCRs for any events in the Winter 2014/2015 Capability Period, NYISO conducted a performance test on March 3, 2015.

4. With regard to SCR performance tests, section 5.12.11.1 of the Services Tariff provides that:

Responsible Interface Parties that were requested to reduce Load in any month shall submit performance data to NYISO, within 75 days of each called event or test, in accordance with [NYISO] Procedures. Failure by a Responsible Interface Party to submit performance data for any Special Case Resources required to respond to the event or test within the 75-day limit will result in zero performance attributed to those Special Case Resources for purposes of satisfying the Special Case Resource's capacity obligation as well as for determining energy payments.⁵

Non-performance for an event or test impacts the unforced capacity the SCR is able to sell in the ICAP market and may result in ICAP shortfalls and related deficiency charges.

II. Request for Waiver

5. In its request for waiver, Innoventive explains that, in response to NYISO's SCR capacity performance test on March 3, 2015, it notified its clients of the test and its

⁴ Section 2.18 of the Services Tariff defines Responsible Interface Party as “[a] Customer that is authorized by NYISO to be the Installed Capacity Supplier for one or more Special Case Resources and that agrees to certain notification and other requirements in this Services Tariff and in the ISO Procedures.” NYISO, Services Tariff, § 2.18 (18.0.0).

⁵ NYISO Services Tariff, § 5.12.11.1 (11.0.0).

facilities responded by curtailing demand. Innoventive states that it collected, compiled and processed the performance data from the SCR test by May 1, 2015. However, Innoventive states that on May 18, 2015 it became aware that the SCR test performance data had not been imported into NYISO's Demand Response Information System by the requisite deadline, which was 75 days from March 3, 2015, or May 17, 2015.⁶ According to Innoventive, an internal investigation revealed that the May 17, 2015 deadline was missed due to an employee mislabeling the SCR performance test as having occurred on March 9, 2015 instead of March 3, 2015, leading Innoventive to believe that the submission deadline was May 23, 2015 rather than May 17, 2015. Innoventive states that it notified NYISO immediately upon learning of the missed deadline and emailed its complete SCR test performance data to NYISO on May 18, 2015 within 24 hours of the missed deadline.⁷

6. Innoventive requests a waiver of section 5.12.11.1 of the Services Tariff to allow for its late submission of SCR test performance data which it already sent to NYISO one day late, on May 18, 2015. Innoventive states that its inadvertent failure to submit the SCR test performance data by the May 17, 2015 deadline does not warrant the severe outcomes that would result absent the waiver requested herein.⁸ Innoventive asserts that the Commission has previously granted limited waivers in similar instances 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.⁹ Innoventive further asserts that there is precedent for the Commission granting limited waivers specifically to Responsible Interface Parties that failed to submit SCR data on time.¹⁰

7. Innoventive argues that the underlying error was made in good faith and that the missed deadline was caused by an isolated breakdown of internal controls that was immediately addressed. Innoventive states that it collected and processed all relevant data from the SCR performance test in advance of the submission deadline, but submitted

⁶ Innoventive June 16, 2015 Filing at 3.

⁷ *Id.* at 4.

⁸ *Id.* at 5.

⁹ *Id.*

¹⁰ *Id.* at 7 (citing *N.Y. Power Auth.*, 139 FERC ¶ 61,157, at P 6 (2012); *Demand Response Partners, Inc.*, 140 FERC ¶ 61,093 (2012)).

the data one day late due to a scheduling error. Innoventive states that it has implemented corrective measures to ensure that this mistake is not repeated.¹¹

8. Innoventive asserts that the scope of the waiver is very limited because it concerns a procedural rather than a substantive issue. Innoventive states that it is not seeking to avoid any substantive requirements related to the SCR program and that its request is limited to a one-day extension for one test event within one Capability Period.

9. Innoventive states that the requested waiver remedies a concrete problem because, absent the waiver, NYISO will not recognize Innoventive's Winter 2014/2015 Capability Period SCR performance data. Innoventive notes that the March 3, 2015 SCR test was the only required demonstration of performance for the Winter 2014/2015 Capability Period and failure to accept and process its performance data would result in Innoventive's resources receiving a zero performance for the March 3, 2015 SCR performance test. Innoventive claims that failure to recognize the performance data could result in the imposition of more than \$2 million in deficiency charges against Innoventive as well as the derating of its resources, resulting in as much as a 50 percent reduction in the amount of capacity they can provide in future Capability Periods. Innoventive claims that the removal from the market of capacity associated with its affected resources as a consequence of derating could cause an increase in capacity costs for consumers of more than \$50 million over the Winter 2015/2016 and Summer 2016 Capability Periods.¹²

10. Finally, Innoventive claims that granting the waiver would not lead to undesirable consequences. Innoventive contends that the Commission has previously recognized the importance of avoiding undesirable outcomes that would result absent a waiver.¹³ Innoventive claims that granting the waiver would correct a market distortion preventing an artificial increase in capacity costs for consumers, and allow Innoventive to avoid unwarranted severe penalties given that its SCRs performed during the March 3, 2015 test. Innoventive suggests that the submission of its performance data less than 24 hours after the submission deadline will not affect any market outcomes and would cause no harm to NYISO's administration of the markets because the performance data was submitted well before NYISO needed to take any action.¹⁴

¹¹ *Id.* at 5-6.

¹² *Id.* at 8-9

¹³ *Id.* at 9-10 (citing *N.Y. Power Auth.*, 139 FERC ¶ 61,157 at P 32).

¹⁴ *Id.* at 9-10.

11. Innoventive requests Commission action on or before July 17, 2015 to allow NYISO sufficient time to incorporate Innoventive's resource performance data into the calculations of SCR performance factors for the Winter 2014/2015 Capability Period which are scheduled to be released August 1, 2015.¹⁵

III. Notice of Filing and Responsive Pleadings

12. Notice of Innoventive's waiver request was published in the *Federal Register*, 80 Fed. Reg. 35,644 (2015), with interventions and protests due on or before June 26, 2015. On June 26, 2015, Multiple Intervenors¹⁶ and NYISO filed motions to intervene and comments, and the New York Public Service Commission (New York Commission) filed a notice of intervention and comments.

13. Multiple Intervenors and the New York Commission support Innoventive's request for waiver.¹⁷ The New York Commission contends that Innoventive has shown good cause to grant the limited waiver request, stating that the requested waiver satisfies the four factors the Commission previously identified in granting waiver requests.¹⁸ Both the New York Commission and Multiple Intervenors point to the significant consumer impacts of derating Innoventive's SCRs.¹⁹ The New York Commission further states that this derating may diminish the likelihood that these resources will participate in the SCR program in the future.²⁰ Multiple Intervenors contend that deratings would be particularly unjustified for SCRs that actually performed in response to the March 3, 2015 SCR test, especially in light of the considerable benefits such resources provide

¹⁵ *Id.* at 2.

¹⁶ Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. Multiple Intervenors submitted combined comments in this proceeding with comments on a similar request for waiver filed in Docket No. ER15-1951-000 by the New York Power Authority.

¹⁷ Multiple Intervenors June 26, 2015 Comments at 4; New York Commission June 26, 2015 Comments at 2.

¹⁸ New York Commission June 26, 2015 Comments at 3 (citations omitted).

¹⁹ Multiple Intervenors June 26, 2015 Comments at 5; New York Commission June 26, 2015 Comments at 3.

²⁰ New York Commission June 26, 2015 Comments at 3.

during extreme peak load events.²¹ Moreover, Multiple Intervenors add that the resulting deratings are especially severe in this particular case because the March 3, 2015 SCR test was the only demonstration of performance that NYISO required for SCR participants during the Winter 2014/2015 Capability Period.²²

14. In its comments, NYISO states that it does not oppose Innoventive's waiver request.²³ NYISO expresses concern that a waiver in this proceeding may raise questions regarding the applicability of the data reporting requirements in future Capability Periods and as they apply to other Responsible Interface Parties which, although administrative, are nonetheless necessary for certainty and transparency. However, NYISO states that the potential for an undesirable impact on NYISO's capacity market if Innoventive's SCRs were to stop participating in the SCR program (i.e., increased capacity costs) offsets NYISO's desire for strict adherence to the SCR data submission deadline.²⁴

15. NYISO states that it agrees with Innoventive's estimate of the market impact of derating its SCRs and notes that this increase is due to the combined effect of two separate factors: (1) Innoventive's failure to submit performance data for its entire SCR portfolio; and (2) there only being one hour of data on which to calculate SCR performance for the relevant Capability Periods.²⁵ NYISO states that the potential market impacts of the Commission denying Innoventive's request would be particularly severe due to the specific facts and circumstances of this matter.

16. NYISO further acknowledges the promptness with which Innoventive discovered and notified NYISO of the error and submitted its waiver request. NYISO states that it has begun its preparation for the Winter 2015/2016 Capability Period, which includes reviewing data and completing the various calculations necessary from all SCRs. NYISO explains that, if the Commission grants the waiver request by July 17, 2015, NYISO will have sufficient time to process and review the data, complete all required calculations

²¹ Multiple Intervenors June 26, 2015 Comments at 5.

²² *Id.* at 4.

²³ NYISO June 26, 2015 Comments at 5.

²⁴ *Id.* at 5-6. NYISO notes that, if Innoventive's SCRs were to remain in the market at a derated capacity, there is not likely to be a significant market impact. However, NYISO concedes that it has not received an indication as to whether the affected resources would remain in, or leave, the market. *Id.* at 6 n.10.

²⁵ *Id.* at 6.

prior to the seasonal set-up for the Winter 2015/2016 Capability Period, and post the performance factors for the upcoming Capability Period by the August 1, 2015 deadline.

IV. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene and the notice of intervention serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

18. As discussed below, we grant Innoventive's request for waiver of section 5.12.11.1 of NYISO's Services Tariff, to allow NYISO to process the SCR test performance data that Innoventive previously submitted to NYISO on May 18, 2015.²⁶

19. The Commission has previously granted limited waivers of tariff 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.²⁷ We find that Innoventive's requested waiver of section 5.12.11.1 of NYISO's Services Tariff satisfies the aforementioned conditions in this case.

20. First, we find that Innoventive's failure to submit the required information due to a scheduling error was in good faith. As noted by Innoventive, the failure was due to an administrative oversight and Innoventive took immediate corrective action by promptly

²⁶ Innoventive June 16, 2015 Filing at 4.

²⁷ See, e.g., *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184, at P 13 (2011); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,109, at P 11 (2011); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,069, at P 8 (2011); *ISO New England Inc.*, 134 FERC ¶ 61,182, at P 8 (2011); *Cal. Indep. Sys. 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.*, 122 FERC ¶ 61,297, at P 13 (2008); *Cent. Vt. Pub. Serv. Corp.*, 121 FERC ¶ 61,225, at P 28 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007, at P 31 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045, at P 14 (2008).

contacting NYISO and sending the performance data within 24 hours of the submission deadline. Innoventive also implemented internal corrective measures such as retraining appropriate personnel and assigning additional oversight to Innoventive's scheduling functions.

21. Second, we find that the requested waiver is of limited scope because it allows an extension of the deadline for NYISO to be able to process the data that Innoventive previously submitted, which is related to only the March 3, 2015 SCR test and for only one Capability Period.

22. Third, we find that Innoventive's waiver request remedies a concrete problem. Absent a waiver, the capacity of Innoventive's SCRs cannot be sold to their full extent and will result in an artificially diminished supply of SCR capacity that will distort market prices upward. Consequently, Innoventive and commenters agree that capacity prices for New York consumers could increase over the Winter 2015/2016 and Summer 2016 Capability Periods by an estimated \$50 million.

23. Fourth, we find that granting the waiver will not lead to undesirable consequences. We find that no harm will result from granting the waiver by July 17, 2015 because it would not upset any settled expectations, as NYISO has not yet published any performance factors and has not yet conducted an auction that uses them. We further note that no party opposes Innoventive's waiver request.

24. We stress that this is a limited waiver based on the specific circumstances here and that, as a general matter, market participants are required to abide by tariff deadlines to ensure certainty and transparency. As NYISO emphasizes in its comments, the importance of complying with tariff rules and deadlines in order to effectively administer NYISO's ICAP market cannot be overstated.

25. For the foregoing reasons, we grant Innoventive's request for a limited waiver of section 5.12.11.1 of NYISO's Services Tariff as requested, to allow NYISO to accept and process the data already submitted by Innoventive on March 18, 2015.

The Commission orders:

Innoventive's request for waiver of section 5.12.11.1 of NYISO's Services Tariff is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.