

156 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER16-1904-000

ORDER GRANTING WAIVER

(Issued August 8, 2016)

1. On June 9, 2016, ISO New England Inc. (ISO-NE) submitted a request for a limited waiver of sections III.13.1.4.2.5.2, III.13.1.4.3.1.2, and III.13.1.2.3.1.1 of its Transmission, Markets and Services Tariff (Tariff) to allow Real-Time Emergency Generation (RTEG) Resources to change their resource type to Real-Time Demand Response (RTDR) Resources. ISO-NE also requests waiver of the Commission's 60-day notice requirement¹ so that waiver of the Static De-List Bid deadline in section III.13.1.2.3.1.1 can become effective on June 21, 2016, to allow the Internal Market Monitor sufficient time to finalize Static De-List Bids by the September 30, 2016 deadline. For the reasons discussed below, we grant ISO-NE's request for waiver.

I. Background

2. In ISO-NE's Forward Capacity Market (FCM), capacity resources compete in an annual Forward Capacity Auction (FCA) to provide capacity for a one-year Capacity Commitment Period three years in advance. According to the terms of the Tariff, both RTEG Resources and RTDR Resources may participate in the FCM.²

¹ 16 U.S.C. § 824d(d) (2012)

² ISO-NE explains that under Tariff revisions that will provide for the full integration of demand response into energy and reserve markets that will become effective on June 1, 2018, RTDR Resources will become Demand Response Capacity Resources (DRCR), and further explains that in its request for limited waiver, both RTDR and DRCR are generally referred to as RTDR. ISO-NE Filing at 1.

3. ISO-NE explains that, in 2013, the U.S. Environmental Protection Agency (EPA) issued a final rule that modified the National Emission Standards for Hazardous Air Pollutants and the related performance standards to allow backup generators to operate without emissions controls for up to 100 hours per year as part of an emergency demand-response program.³ On May 1, 2015, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed the EPA's rules that contain the 100-hour exemption for operation of emergency engines for purposes of emergency demand response under the National Emissions Standards, but, upon motion from the EPA, delayed issuance of its mandate, which vacated the provisions, until May 4, 2016.⁴ On April 15, 2016, the EPA issued a guidance memorandum stating that it would not develop an alternative to the vacated provisions.

4. ISO-NE states that the Tariff defines an RTEG Resource as distributed generation whose federal, state, and/or local air quality permits, rules, or regulations limit operation in response to requests from ISO-NE to the times when ISO-NE implements voltage reductions of five percent of normal operating voltage that require more than 10 minutes to implement. ISO-NE further states that, given the D.C. Circuit mandate, RTEG Resources can no longer operate when ISO-NE implements voltage reductions and can only operate when their host facilities lose off-site power, unless they are retrofitted to comply with the EPA's National Emissions Standards. Once retrofitted, according to ISO-NE, some resources may be able to operate as RTDR Resources pursuant to ISO-NE's Tariff and operating documents. Thus, ISO-NE concludes that it is appropriate to give market participants the option to change the Demand Resource type for their resources from RTEG Resources to RTDR Resources.

II. Request for Waiver

5. ISO-NE states that under section III.13.1.4.2.5.2 of the Tariff, if an existing Demand Resource wishes to change its Demand Resource type for an FCA, it must notify ISO-NE within five (5) business days of receipt of the qualified capacity notification and submit an updated measurement and verification plan to reflect the change in its Demand Resource Type. ISO-NE states that for the upcoming eleventh FCA (FCA 11), the original deadline for notification of changes in Demand Resource was May 20, 2016. ISO-NE notes, however, that in ISO-NE's FCM retirement reforms, the deadline was

³ The 100-hour exemption, specified, among other things, that emergency engines could operate for a limited number of hours in two situations: (1) emergency demand response when the reliability coordinator has declared an Energy Emergency Alert Level 2, and (2) when there is a deviation of voltage or frequency of five percent or greater below standard voltage or frequency. ISO-NE Filing at 3-4.

⁴ ISO-NE Filing at 3-4.

moved to February 29, 2016.⁵ ISO-NE further states that, given that the EPA issued its memorandum on April 15, 2016, and the D.C. Circuit entered its mandate on May 4, 2016, it was not possible for existing RTEG Resources seeking to participate in FCA 11 to request a change of Demand Resource type from RTEG Resource to RTDR Resource. Accordingly, ISO-NE seeks waiver of section III.13.1.4.2.5.2 of the Tariff to allow existing RTEG Resources to change their Demand Resource type to RTDR Resources so they can participate in FCA 11, which will be held in February 2017.

6. Further, ISO-NE states that section III.13.1.4.2.5.2 of the Tariff also prohibits changes to the Demand Resource type of resources that have acquired Capacity Supply Obligations (CSO) and that section III.13.1.4.3.1.2 of the Tariff prohibits modification in the updated measurement and verification plan of a resource's Demand Resource type for the duration of the Capacity Commitment Period. Accordingly, ISO-NE seeks waiver of sections III.13.1.4.2.5.2 and III.13.1.4.3.1.2 of the Tariff to allow existing RTEG Resources that have acquired CSOs in the eighth, ninth, and tenth FCAs (FCA 8, FCA 9, and FCA 10, respectively) to change their Demand Resource type to RTDR Resources, if they desire, so that they can keep their CSOs for the 2017-2018, 2018-2019, and 2019-2020 Capacity Commitment Periods, provided that they can comply with the Tariff requirements for RTDR Resources.

7. In addition, ISO-NE states that the deadline for submitting Static De-List Bids under section III.13.1.2.3.1.1 of the Tariff, which is a market participant's means of removing a resource from the next auction, was June 6, 2016, and that if a Static De-List Bid is not submitted, a resource with a CSO will be included in the next FCA. Accordingly, ISO-NE seeks waiver of the deadline for submitting Static De-List Bids under section III.13.1.2.3.1.1 of the Tariff and proposes to change the deadline to June 21, 2016. According to ISO-NE, this would allow affected market participants time to evaluate their options and to de-list any RTEG Resources that are not changed to RTDR Resources for the Capacity Commitment Period associated with FCA 11 and beyond, and it would provide time for the ISO-NE Internal Market Monitor to work with market participants during summer 2016 and finalize determinations regarding Static De-List Bids by the Static De-List Bid determination deadline of September 30, 2016.

8. ISO-NE states that its waiver request meets the Commission's criteria for granting waivers. ISO-NE states: (1) it is acting in good faith in light of the D.C. Circuit's mandate and the EPA memorandum; (2) the waiver is of limited scope because it is a one-time waiver that solely applies to one Demand Resource-type change, permitting the change from RTEG Resource to RTDR Resource, and the waiver for the deadline for submission of Static De-List Bids applies only to RTEG Resources that can no longer operate given the D.C. Circuit mandate and the EPA Memorandum and only applies to

⁵ *ISO New England Inc.*, 155 FERC ¶ 61,029 (2016).

the qualification process for FCA 11; (3) the waiver resolves the concrete problem resulting from the reversal of the EPA rules under which RTEG Resources had been operating; and (4) the waiver will not have undesirable consequences, in that, with respect to resources seeking to participate in the eleventh FCA, it is still early in the qualification process and the waiver would simply allow existing capacity resources to continue to participate in FCA 11. Further, ISO-NE states that, with respect to resources that have CSOs in Capacity Commitment Periods associated with previous FCAs, the resources will be able to continue to operate to satisfy their CSOs. ISO-NE also explains that there is no harm because RTDR Resources are superior to RTEG Resources since they can be dispatched by ISO-NE in response to a variety of system conditions.

III. Notice and Filing of Responsive Pleadings

9. Notice of ISO-NE's filing was published in the *Federal Register*, 81 Fed. Reg. 39,260-61 (2016), with interventions and protests due on or before June 30, 2016. Timely motions to intervene were filed by: Enerwise Global Technologies, Inc. (CPower); National Grid; New England States Committee on Electricity; Exelon Corp.; NRG Power Marketing LLC and GenOn Energy Management, LLC; Dominion Resources Services, Inc.; and Eversource Energy Service Co. Timely comments were filed by CPower. A motion to intervene out of time was filed after 5:00 pm on June 30, 2016, by New England Power Pool Participants Committee. On July 15, 2016, ISO-NE filed an answer to CPower's comments. On July 22, 2016, CPower responded to ISO-NE's answer.

10. CPower contends that the ISO-NE proposal does not fully address the problems posed by the D.C. Circuit mandate. It contends that RTEG CSO holders will not be able to convert some or all of their RTEG assets to RTDR Resources or otherwise shed all of their CSOs based on current market conditions for the 2017-2018 Capacity Commitment Period, and as a result, they will be subject to harmful punitive financial penalties that are out of their control. CPower argues that, for the Capacity Commitment Period 2017-2018 only, and in the limited circumstance where an RTEG Resource CSO holder cannot convert or shed some or all of its CSO due to market conditions, section III.13.4.2.1.3 of the Tariff should be waived so that demand bids entered in the Third Annual Reconfiguration Auction for remaining RTEG CSOs will be at the original FCA Payment Rate and not at the currently-required FCA Starting Price. CPower contends that, to the extent it is unable to reassign its CSO, it should be able to buy out of its position at the FCA Payment Rate in FCA 11 (\$7.025/kW-month, except for the NEMA zone) and not be subject to a punitive rate equal to the FCA Starting Price (\$15.819/kW-month) for the Third Annual Reconfiguration Auction.

11. CPower argues that its proposed modification would meet the Commission's standards of accepting waivers, because it would allow ISO-NE's waiver request to fully address the concrete problem caused by the vacatur of EPA's 100-hour rule. Further, according to CPower, its proposed modification would avoid harm to RTEG CSO holders

and avoid undesirable consequences by retaining incentives for RTEG CSO holders to convert or shed their obligations prior to being compelled to pay the FCA Payment Rate in the Third Annual Reconfiguration Auction. CPower asserts that there are timing constraints and financial burdens associated with retrofitting and/or converting its resources from RTEG to RTDR, and it further asserts that market conditions are not financially favorable to shedding its CSOs in the Annual Reconfiguration Auction.

12. In its answer, ISO-NE states that CPower's request is outside the scope of this proceeding and that ISO-NE has met the Commission's standards for granting waivers. ISO-NE asserts that the provision CPower seeks to waive, section III.13.4.2.1.3(b), is not affected by ISO-NE's limited waiver request. ISO-NE further asserts that the limited waiver request has no undesirable consequences. ISO-NE also states that CPower's additional request for waiver does not meet the Commission's standards for granting waivers, because CPower's proposed waiver does not address a concrete problem. ISO-NE states that CPower's contention that RTEG market participants will be unable to shed their resources' CSOs so that ISO-NE would have to enter demand bids on their behalf in the Third Annual Reconfiguration Auction is uncertain. ISO-NE also asserts that CPower's claim that the FCA Starting Price is punitive is speculative as it could result in a payment instead of a charge.⁶ Moreover, according to ISO-NE CPower's proposed waiver would decrease incentives for RTEG market participants to exhaust remedies, e.g., to shed CSOs by reaching out to other market participants through bilateral contracts.⁷ ISO-NE further states that CPower's modification request is a collateral attack on the Commission orders that accepted section III.13.4.2.1.3(b) of the Tariff. ISO-NE asserts that if CPower believes the section as applied is not just and reasonable, it should file a complaint under section 206 of the Federal Power Act; however, according to ISO-NE, CPower's proposal would provide unduly preferential treatment for RTEG Resources and, therefore, would not meet the section 206 burden of proof.

13. In its response to ISO-NE, among other things CPower disagrees that its request is outside the scope of the proceeding, that its modification excuses RTEG CSO holders from exhausting all available Tariff remedies, and that the financial harm it posits is speculative.

⁶ ISO-NE explains that, although ISO-NE would enter demand bids in the Third Annual Reconfiguration Auction at the (higher) FCA Starting Price, the auction could clear at a price that is between the FCA Payment Rate for the eighth FCA and the FCA Starting Price, or even at a price that is lower than the FCA Payment Rate for the eighth FCA. ISO-NE states that, in the latter case, the RTEG Resources could receive a payment instead of being charged. ISO-NE Answer at 7.

⁷ ISO-NE Answer at 7 & n.13.

IV. Commission Determination

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), we grant New England Power Pool Participants Committee's late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept ISO-NE's and CPower's answers because they have provided information that assisted us in our decision-making process.

17. We grant ISO-NE's request for waiver, effective June 21, 2016, as requested. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.⁸

18. We find that the foregoing conditions have been satisfied here. First, we find that ISO-NE is acting in good faith, in light of the D.C. Circuit's mandate and the EPA's memorandum. Second, the request for waiver is limited in scope because it is a one-time waiver that provides a window of opportunity for a single type of Demand Resource to change to a different type of Demand Resource, if it qualifies to do so. In addition, the waiver of the Static De-List Bid submission deadline only applies to RTEG Resources and only for FCA 11. Third, we find that allowing RTEG Resources to change their Demand Resource type to RTDR Resources solves a concrete problem resulting from the reversal of the EPA rules under which RTEG Resources had been operating. Absent the waiver, RTEG Resources, retrofitted to comply with the definition of RTDR would, nonetheless, be unable to participate in FCA 11. Finally, we find that granting the waiver will not have undesirable consequences.⁹ We agree with ISO-NE that, with respect to resources seeking to participate in FCA 11, there is no harm since it is still early in the

⁸ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Servs., Inc.*, 154 FERC ¶ 61,082, at P 12 (2016); *New York Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015).

⁹ In making this finding, we note that no party has argued that granting waiver will have undesirable consequences.

qualification process and the waiver would allow existing capacity resources to continue to participate in FCA 11. Further, we agree with ISO-NE that, with respect to resources that have CSOs in Capacity Commitment Periods associated with previous FCAs, the waiver will allow these resources, if retrofitted, to satisfy their CSOs with superior RTDR resources, rather than with limited RTEG resources. We also find that granting waiver will not restrict or negatively affect other market participants.

19. CPower's proposed modification is, in essence, a separate request for waiver of an additional provision of the Tariff and is beyond the scope of ISO-NE's instant proposal. Moreover, we agree with ISO-NE that CPower's proposed waiver modification would decrease incentives for RTEG market participants to exhaust existing remedies. Further, we find speculative CPower's characterization that applying the FCA Starting Price to the Third Annual Reconfiguration Auction, rather than the FCA Payment Rate, would essentially cause a "penalty." ISO-NE points out that it would enter demand bids in the Third Annual Reconfiguration Auction at the FCA Starting Price, but the auction could clear at a price that is between the FCA Payment Rate for the eighth FCA and the FCA Starting Price, or even at a price that is lower than the FCA Payment Rate for the eighth FCA, resulting in a payment for RTEG Resources instead of a charge.

20. Based upon the foregoing, we grant ISO-NE's request for a one-time waiver of the rules set forth in sections III.13.1.4.2.5.2, III.13.1.4.3.1.2, and III.13.1.2.3.1.1 of the Tariff.

The Commission orders:

ISO-NE's request for waiver is hereby granted, effective June 21, 2016, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.