

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

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

Enerwise Global Technologies, Inc.

Docket No. ER18-185-000

ORDER DENYING TARIFF WAIVER

(Issued January 25, 2018)

1. On October 30, 2017, Enerwise Global Technologies, Inc. d/b/a CPower (CPower) requested a limited waiver (Waiver Request) of sections III.13.6.1.5.4.1(c) and III.13.6.1.5.4.5 of the ISO New England Inc. (ISO-NE) Transmission, Markets and Services Tariff (Tariff). The requested waiver would permit CPower to substitute the results of a July 26, 2017 audit of CPower's Real-Time Demand Response (RTDR) Resources (July 26 Audit) for the results of the original audit, conducted on July 19, 2017 (July 19 Audit), which had "zero" reduction performance results. For the reasons discussed below, the Commission denies the requested waiver.

**ISO-NE's Tariff**

2. ISO-NE's Tariff requires that RTDR Resources be tested (audited) seasonally to establish their capabilities and to ensure that they are available to respond during an emergency event. The summer Demand Response Auditing Period, of relevance here, begins on June 1 and ends on August 31. Audits performed during the summer Demand Response Auditing Period are used to establish the Audited Demand Reduction value for the months of June through November, and the following April and May.<sup>1</sup> Market

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<sup>1</sup> ISO-NE Tariff at section III.13.6.1.5.4.3.1.

participants must request a Seasonal Demand Response Audit,<sup>2</sup> and the audit must be performed within 20 business days of the date of such request.<sup>3</sup>

### **Background**

3. CPower describes the following circumstances leading to its waiver request. On July 10, 2017, CPower requested an audit for its RTDR Resources. ISO-NE initiated the audit nine days later, the July 19 Audit, by sending a dispatch signal through CPower's communications service vendor, SmartCloud, Inc. (SmartCloud).<sup>4</sup> Previously, however, on July 12, 2017, SmartCloud's leased data center had experienced a power outage that caused the direct link with ISO-NE to disconnect. The system was restored that same day and "ISO-NE was notified of the outage and restoration."<sup>5</sup> Nevertheless, some system functions were not automatically initialized. Consequently, SmartCloud incorrectly processed the July 19 Audit dispatch signal and did not notify CPower to dispatch the relevant RTDR Resources for the audit event. CPower became aware of this issue at the end of the July 19 Audit test hour when ISO-NE sent an "end" signal for a dispatch of RTDR Resources. CPower contacted ISO-NE that day, stating that it had not received an earlier dispatch signal, an email, or verbal communication from ISO-NE about an audit or dispatch.<sup>6</sup>

4. During the July 19 Audit, nearly all of CPower's RTDR Resources failed to perform.<sup>7</sup> Therefore, CPower received a Demand Reduction Value of nearly zero for the month of July 2017. ISO-NE averaged the July 2017 Demand Reduction Value of zero

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<sup>2</sup> *Id.*

<sup>3</sup> ISO-NE Tariff at section III.13.6.1.5.4.7(a). Market participants may request additional audits, but those results shall not replace the initial audit conducted in the same month. ISO-NE Tariff at section III.13.6.1.5.4.1(c). *See infra* n.12.

<sup>4</sup> SmartCloud provides internet communications services, including fast demand response, to customers and partners that include, in addition to CPower, ISO-NE, various utilities, and other demand response providers. <http://www.smartcloudinc.com/about>.

<sup>5</sup> Waiver Request at 3.

<sup>6</sup> ISO-NE's November 20, 2017 Intervention and Opposition to the Waiver Request (ISO-NE Protest) at 2-3; Waiver Request at 3-4. CPower states that it has implemented remedial measures to ensure that non-communication of a dispatch signal will not reoccur. Waiver Request at 3 n.6.

<sup>7</sup> Waiver Request at 3.

with the values for the months of June and August for application to the summer shoulder months of September, October, and November 2017, and to April and May 2018.<sup>8</sup>

5. On July 20, 2017, CPower and ISO-NE staff discussed the circumstances of the July 19 Audit and its negative impact on CPower. According to CPower, ISO-NE suggested that CPower request a second audit to “mitigate partially” the negative impacts of the July 19 Audit.<sup>9</sup> CPower requested a second audit for its RTDR Resources on July 20, 2017,<sup>10</sup> that took place on July 26, 2017. CPower states that the July 26 Audit demonstrated 94 percent of the claimed capacity that CPower had registered in the RTDR program.<sup>11</sup> CPower asked ISO-NE to replace the July 19 Audit results with the July 26 Audit results. ISO-NE denied the request, asserting that, under Tariff section II.13.6.1.5.4.1(c), a second audit may not replace an initial audit conducted in that same month.<sup>12</sup>

### **Waiver Request**

6. CPower asks the Commission to grant it a one-time waiver of Tariff section III.13.6.1.5.4.1(c),<sup>13</sup> to allow the results of the July 26 Audit to replace the

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<sup>8</sup> ISO-NE Protest at 3 (citing ISO-NE Tariff section III.13.7.1.5.7.1).

<sup>9</sup> Waiver Request at 5.

<sup>10</sup> ISO-NE Protest at 3.

<sup>11</sup> Waiver Request at 5.

<sup>12</sup> Tariff section III.13.6.1.5.4.1(c) states, in pertinent part:

An audit is valid beginning with the month in which the audit is performed, and remains valid until the next audit is performed for a like season, which shall be no later than the end of the next like seasonal DR Auditing Period. Additional audits performed in a month shall not replace the results of the initial audit conducted in a month and are valid on the first of the subsequent months following the audit.”

<sup>13</sup> *Supra* n.12.

July 19 Audit, and of Tariff section III.13.6.1.5.4.5,<sup>14</sup> so that ISO-NE will adopt the complete July 26 Audit results as the July 2017 Demand Reduction Value.<sup>15</sup>

7. CPower states that the July 19 Audit results, which will be averaged with the Demand Reduction Values of June and August 2017, will reduce CPower's credited performance by one third not only for the summer months but also for the additional five shoulder months,<sup>16</sup> thus amplifying the negative impact of the July 19 Audit. As a result, CPower claims that it will suffer a sizeable loss of revenue.<sup>17</sup> CPower states that it has partially mitigated the revenue loss by reducing its RTDR Capacity Supply Obligations (CSOs) for the September through November 2017 shoulder months via ISO-NE's Annual Reconfiguration Auctions. CPower states that if it is not granted a Tariff waiver to substitute the results of the July 26 Audit, then it will also need to reduce its CSOs for the months of April and May 2018. Despite this mitigation, CPower states that it still faces a very large revenue loss.<sup>18</sup>

8. CPower asserts that the purpose of an audit is to verify Demand Reduction Values, not simply to test a single line of communication or communication outages.<sup>19</sup> To this end, CPower asserts that, for an audit to be complete under Tariff section III.13.6.1.5.4.5,

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<sup>14</sup> Tariff section III.13.6.1.5.4.5 states:

The ISO may initiate an audit to verify the Demand Reduction Value or Audited Demand Reduction of a Demand Resource when an evaluation based on objective criteria indicates a Market Participant is claiming demand reductions in excess of the Demand Resource's actual capability. . . . The results of an additional audit shall replace the results of the last like Seasonal DR Audit or Demand Resource Commercial Operation Audit.

<sup>15</sup> Waiver Request at 10.

<sup>16</sup> September, October, and November 2017; April and May 2018.

<sup>17</sup> Waiver Request at 6-7.

<sup>18</sup> *Id.* at 7-8.

<sup>19</sup> *Id.* at 10-11 (citing Tariff section III.13.6.1.5.4(a). This section states, "Demand Resources shall be subject to ISO conducted audits for the purposes of (a) Auditing Demand Reduction Values or determining the audited Demand Reductions for a Demand Response)."

the audit should actually test the Demand Reduction Values, not merely a dispatch signal. CPower further states that the July 19 Audit did not replicate actual emergency event conditions for which, in addition to an electronic dispatch signal, a backup communication, such as email, text message or voice call, would have been used.<sup>20</sup> CPower states that ISO-NE is the only Independent System Operator (ISO) or Regional Transmission Organization (RTO) to use only an electronic signal for its audits, without also sending an email or verbal dispatch instruction along with an electronic signal.<sup>21</sup>

9. CPower argues that its requested waiver satisfies the Commission's four criteria for granting waiver: (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.<sup>22</sup>

10. As to acting in good faith, CPower states that it addressed the underlying communication software anomaly immediately upon discovery and has implemented corrective procedures.<sup>23</sup> CPower states that it meets or exceeds ISO-NE's communication standards and promptly notified ISO-NE of the data center outage on July 12, 2017, the day of the power outage. CPower further represents that it has reduced its CSO and is holding its RTDR customers harmless, planning to compensate them for the full performance demonstrated in the July 26 Audit even if ISO-NE does not compensate CPower.<sup>24</sup>

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<sup>20</sup> *Id.* at 10-11.

<sup>21</sup> *Id.* at 15. In Waiver Request, Attachment A, CPower lists the demand response programs of the various RTOs, ISOs, and utilities where CPower participates and where at least two methods of communications are used. Among the listed entities are the New York Independent System Operator, Inc., PJM Interconnection, L.L.C., the Electric Reliability Council of Texas, Inc., and three California utilities.

<sup>22</sup> *Id.* at 12 (citing, *inter alia*, *Calpine Energy Serv., L.P.*, 154 FERC ¶ 61,082 (2016), *ISO New England Inc.*, 142 FERC ¶ 61, 051 (2013), *East Ky. Power Coop, Inc.*, 142 FERC ¶ 61,028 (2013)).

<sup>23</sup> As corrective procedures, CPower has implemented a service to monitor the log file on the SmartCloud remote terminal unit and a procedure where, after a data center outage, the vendor will be required to log in to the system and certify functionality. Waiver Request at 4 n.6.

<sup>24</sup> Waiver Request at 12-13.

11. CPower also states that the requested waiver is of limited scope. CPower states that this is a one-time request and applies to the unique facts of a communication software glitch that will not happen again because CPower has added redundancy measures and remedied the cause of the July 19 Audit results. Moreover, CPower states, granting the waiver will not alter how ISO-NE conducts audits or administers the capacity market under its Tariff.<sup>25</sup>

12. CPower further states that the requested waiver is necessary to address the unique, concrete problem of a technical software issue outside CPower's and ISO-NE's control. CPower asserts that the July 19 Audit process merely signaled a single line of communication and did not actually audit or test the amount of demand reduction available to CPower and ISO-NE. CPower asserts that, despite the successful completion of the July 26 Audit, the July 19 Audit results of zero remain as the July 2017 Demand Reduction Value, significantly harming CPower and inaccurately reflecting its RTDR capabilities. CPower states that the July 19 Audit verified only that one part of the primary dispatch communications system did not work as expected, a result that is contrary to the audit's purpose, which, according to CPower, is to determine Demand Reduction Values.<sup>26</sup>

13. CPower asserts that the ISO-NE Tariff does not appropriately address the unique circumstances of a communication anomaly that interrupts the initiation or completion of an audit of RTDR Resources. CPower states that the Tariff allows for a second audit, but does not allow a complete audit to replace the incomplete audit.<sup>27</sup> CPower further asserts that ISO-NE's audit process holds RTDR Resources to a higher standard than generators, citing Tariff section II.1.5.1.2(f), which audits the established claimed capability of a generator and includes a separate notification to the generator prior to issuing a dispatch audit instruction.<sup>28</sup>

14. Finally, CPower argues that the requested waiver will not result in adverse consequences or harm third parties. CPower states that the waiver will not result in market delays or redistribution of costs onto other market participants. CPower acknowledges that the penalties assessed to it and applicable for July 2017 have already been distributed to over-performing resources, but it characterizes such payments as

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<sup>25</sup> *Id.* at 13-14.

<sup>26</sup> *Id.* at 14 (citing Tariff section III.13.6.1.5.4).

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 15-16.

“windfall awards” to over-performing resources.<sup>29</sup> Thus, although granting waiver would require billing adjustments by ISO-NE with respect to affected participants, CPower states that they would suffer no added costs. CPower further states that, because it shed its CSOs for September, October, and November, those months will not need settlement adjustment; the billing settlement adjustments would apply only to July 2017, and April and May 2018. CPower urges that granting the waiver will not impair the market, but will instead cause the market to reflect more accurately the amount of RTDR capacity available in New England.<sup>30</sup>

### **Notice of Filing and Responsive Pleadings**

15. Notice of CPower’s Waiver Request filing was published in the *Federal Register*, 82 Fed. Reg. 51,626 (Nov. 1, 2017), with interventions and protests due on November 20, 2017. ISO-NE filed a motion to intervene and protest. New England Power Pool Participants Committee filed a motion to intervene. On January 16, 2018, CPower submitted a letter asking that the Commission grant its waiver request by January 31, 2018.

### **ISO-NE’s Protest**

16. ISO-NE argues that the Waiver Request does not meet all of the Commission’s criteria for granting waiver. Taking no position as to whether CPower acted in good faith,<sup>31</sup> ISO-NE contends that the Waiver Request is not limited in scope. ISO-NE distinguishes this case from other waiver requests, involving, for example, requests to waive a tariff-imposed deadline. ISO-NE asserts that, if granted, this waiver would have broad implications on the effectiveness of the auditing rules. ISO-NE explains that the purpose of the auditing rules is to establish the capability of Demand Resources to perform when called upon during a capacity deficiency event in New England, when these resources must be able to perform. ISO-NE states that allowing RTDR Resources “another bite at the apple” to replace a poor performance during an audit could undermine the significance of such audits or impact future performance.<sup>32</sup> ISO-NE points out that other similarly-situated RTDR Resources have performed poorly during

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<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.* at 16.

<sup>31</sup> ISO-NE Protest at 5.

<sup>32</sup> *Id.* at 6.

audits because of communication issues. Thus, ISO-NE argues, granting waiver to CPower would result in unduly favorable treatment as compared to similarly-situated participants, a result that ISO-NE says the Commission disfavors.<sup>33</sup>

17. ISO-NE further states that there is no concrete problem to be remedied. ISO-NE notes that CPower acknowledges that ISO-NE sent the dispatch instruction to CPower's remote terminal unit, initiating the July 19 Audit. ISO-NE also notes that CPower has taken steps to remedy the communications issue that caused its RTDR Resources not to perform.<sup>34</sup>

18. Finally, ISO-NE states that the Waiver Request harms third parties. ISO-NE explains that the capacity payments lost as a result of the July 19 Audit have been distributed through the settlement process to other resources that performed during their audits. ISO-NE states that granting the Waiver Request would require the re-settlement of these payments away from resources that followed dispatch instructions and performed well during their audits.<sup>35</sup>

## **Discussion**

### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

### **B. Substantive Matters**

20. 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

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<sup>33</sup> *Id.* at 5-6 (citing *GDF Suez Energy Marketing NA, Inc.*, 149 FERC ¶ 61,165, at P 13 (2014) (*GDF Suez*); *Seneca Energy II, LLC*, 138 FERC ¶ 61,226, at P 10 (2012); *Mass. Elec.*, 148 FERC ¶ 61,227 at P 14) (*Mass. Elec.*).

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*

problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>36</sup> Applying these criteria here, we deny CPower's waiver request.

21. Specifically, we find that CPower's waiver request is not of limited scope and that granting it would have undesirable consequences, including harm to third parties. As ISO-NE observes, CPower's waiver request is distinguishable from other proceedings where the Commission has granted waiver to allow, for example, a short, one-time waiver of a tariff-imposed deadline.<sup>37</sup> CPower seeks to wholly replace the results of one audit with the results of another, which would in turn require re-settlement of payments away from RTDR Resources that followed dispatch instructions and performed well during their audits. Re-settlement of market outcomes is a significant form of relief that the Commission previously refused to authorize through a waiver request,<sup>38</sup> and we decline to do so here.

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<sup>36</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Serv., Inc.*, 154 FERC ¶ 61,082, at P 12 (2016); *New York Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015).

<sup>37</sup> See, e.g., *Calpine Energy Serv., L.P.*, 154 FERC ¶ 61,082 (2016) (granting waiver to allow applicant to elect a lock-in as part of its otherwise timely new capacity qualification package, based upon finding that applicant did not seek waiver of substantive tariff requirements and neither undesirable consequences nor harm to third parties would result).

<sup>38</sup> See, e.g., *Northeast Util. Serv. Co.*, 135 FERC ¶ 61,123, at P 12 & n.3, *reh'g denied*, 136 FERC ¶ 61,123 (2011) (*NUSCO*). The applicant in *NUSCO* requested a tariff waiver that would have allowed it to untimely submit corrected interval meter data for its demand response resources and receive corresponding billing adjustments (i.e., additional payments), where erroneous data for those resources had already been submitted and used in an Annual Reconfiguration Auction. The applicant alleged that its first attempt to timely transmit the corrected data failed for reasons beyond its knowledge or control, such as, for example, a temporary internet failure. The Commission denied the requested waiver, finding that it was not of limited scope because it would require re-running market settlements, and that to change the results of the already-conducted auction would adversely affect the other market participants. Similar logic guides us here.

22. Further, granting waiver would have broad implications on the effectiveness of auditing rules. It could undermine the integrity of audits – which by their nature test performance during unpredictable conditions – and impact future performance of RTDR Resources. Additionally, granting waiver to require a re-settlement of payments would result in preferential treatment toward CPower, compared to other similarly-situated RTDR Resources that performed poorly in audits.

The Commission orders:

CPower's Waiver Request is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.