

146 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER14-1125-000

ORDER ON WAIVER REQUEST

(Issued February 21, 2014)

1. On January 21, 2014, the New York Independent System Operator, Inc. (NYISO) submitted a request for limited waivers of certain provisions of the installed capacity market mitigation measures of NYISO's Market Administration and Control Area Services Tariff (Services Tariff)¹ as related to certain mitigation determinations that NYISO expects to make in the near future. The Commission grants, in part, and denies, in part, the requested waivers for the reasons discussed below.

I. Background

2. NYISO administers buyer-side market power mitigation rules to discourage uneconomic entry for proposed new entrants in its Installed Capacity (ICAP) market in its New York City capacity zone and in any new capacity zone. All such new entrants are subject to an Offer Floor unless they show they will be economic when they are presumed to enter the ICAP market by meeting either prong of a two-part exemption test. If NYISO determines that the new entrant would not be "economic," i.e., if the net cost per kW/month of the new project would be more than the projected capacity price per kW/month, it imposes an Offer Floor on the new entrant. As discussed below, the market mitigation rules provide for an informational "Indicative" exemption

¹ Services Tariff § 23.4.5.

determination in advance of the final, binding exemption determination for new projects in a new capacity zone. The instant waiver request applies to certain buyer-side market mitigation rules that pertain to the exemption determination process for two projects located in NYISO's newly-created new capacity zone, the load zone G-J Locality.²

3. NYISO files on a triennial basis to establish Demand Curves that are used to set prices for installed capacity for NYISO's various capacity zones, including any new capacity zones, and the data underlying the Demand Curves are an important factor in the economic evaluation involved in the mitigation exemption process. The Services Tariff also provides that the triennial Demand Curve reset proceeding is where the first Demand Curves for any new capacity zone must be proposed. Recently, on November 29, 2013, NYISO filed to establish new Demand Curves for its capacity zones, including the new G-J Locality, for each of the three Capability Years beginning May 1, 2014, which the Commission conditionally accepted in an order issued January 28, 2014.³

II. NYISO's Waiver Request

4. On January 21, 2014, NYISO filed a request for limited waivers of sections 23.4.5.7.2.3.2, 23.4.5.7.2.1, and 23.4.5.7.2.2 (i) of its Services Tariff for market power mitigation determinations for the two "NCZ (New Capacity Zone) Examined Projects" located in the G-J Locality that are members of the completed 2011 Class Year.

A. Load Forecast

5. NYISO states that it has recently identified a drafting error in section 23.4.5.7.2.3.2 that pertains to the data source to be used to establish the Load forecasts used in the mitigation determinations for facilities located in a new capacity zone. Section 23.4.5.7.2.3.2 states:

The Load forecast shall be based on data used to develop the Indicative Locational Minimum Installed Capacity Requirement [LCR], and Special Case Resources based on data for the Mitigated Capacity Zone that is part

² NYISO's market mitigation measures for new capacity zones were accepted, subject to conditions, in a June 6, 2013 order. *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,217 (2013). NYISO's G-J capacity zone was accepted in an August 13, 2013 order. *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126 (2013).

³ *New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043 (2014).

of the Special Case Resource data set forth in the most-recently published Load and Capacity Data (Gold Book).

6. NYISO states that section 5.16.3 of the Services Tariff requires NYISO to determine the “Indicative NCZ LCR” on or before March 1 of the Demand Curve reset year in which it proposes a new capacity zone.⁴ NYISO asserts that the problem is that, because the mitigation exemption determination for an NCZ Examined Project in a completed Class Year is issued after the first ICAP Demand Curve for the new capacity zone is accepted, the determination would not be an Indicative determination, but rather, would be a final, binding determination. NYISO contends that basing Load forecasts on data used for the Indicative LCR could only be reasonable when NYISO is making Indicative determinations. In addition, NYISO asserts that the Load forecast used to develop the Indicative LCR is an unsuitable data source for the projects at issue here because it is only developed for one Capability Year, whereas, in accordance with section 23.4.5.7.3, final determinations under the mitigation rules are based on the three Capability Years that comprise the Mitigation Study Period.⁵ Further, NYISO notes that section 23.4.5.7.2.2 provides that Indicative determinations are “for informational purposes only.” Thus, NYISO concludes, the use of the Indicative LCR is an inappropriate and incomplete data set and it would not be reasonable to extrapolate a Load forecast from the one-year forecast used to develop the Indicative LCR for the instant purposes.

7. Instead of the data required by section 23.4.5.7.2.2, NYISO asserts that it would be reasonable to use the Load forecast data that will be in NYISO’s 2014 *Load and Capacity Data*, i.e., the 2014 “Gold Book.” NYISO states that the forecasted Load for the 2014-2015 Capability Year has already been finalized and will be included in the 2014 Gold Book, which will also include forecasted Load in the G-J Locality for future years, including the second and third years of the three-year Mitigation Study Period. NYISO adds that taking this approach would align these determinations with the market power mitigation rules in an established mitigated capacity zone.⁶ NYISO states that it

⁴ NYISO Waiver Request at note 12. Section 5.16.3 further provides: “This Indicative NCZ Locational Minimum Installed Capacity Requirement will be used solely for establishing revised ICAP demand Curves in accordance with (sic) 5.14.1.2.”

⁵ NYISO notes that the three-year mitigation study period for Class Year 2011 projects is the three-year period beginning May 1, 2014, through April 30, 2017.

⁶ NYISO references Services Tariff section 23.4.5.7.3.2 which states, in pertinent part: “The ISO shall compute the reasonably anticipated ICAP Spot Market Auction

(continued...)

anticipates the necessary final Load forecast data for the 2014 Gold Book will likely be available by March 15, 2014, and it is virtually certain that the Load forecast data will be available by March 31, 2014. Accordingly, NYISO requests a temporary waiver of section 23.4.5.7.2.3.2 so that it may conduct the market power mitigation determinations for the two subject projects using the 2014 Gold Book Load forecast data when it becomes available.

B. Requirement to “Promptly” Issue Exemption Determinations

8. NYISO also requests that, if the Commission grants the waiver discussed above, it also waive section 23.4.5.7.2.1 to the extent that it states that NYISO must make its exemption and Offer Floor determination for a new capacity zone project “promptly” after Commission acceptance of the first ICAP Demand Curve to apply to a Mitigated Capacity Zone.⁷ NYISO states that, since it will not have the 2014 Gold Book Load forecast data needed to make the determinations for the subject projects until six to eight weeks after the ICAP Demand Curves are accepted and it will then need a brief period (no more than two weeks) to finalize and issue the determinations, it is concerned that this time period may not be consistent with the tariff language requiring that it act “promptly.” Accordingly, NYISO requests waiver of this tariff requirement to the extent necessary to permit it to complete the determinations for the projects “promptly” after both: (i) the Commission’s acceptance of the Demand Curve for the G-J Locality, and (ii) the availability of the Load forecast data to be included in the 2014 Gold Book.

C. Requirement to Issue Indicative Determinations

9. Finally, NYISO states that section 23.4.5.7.2.2 (i) incorrectly requires it to issue an Indicative mitigation exemption determination for a project in a completed Class Year after the Commission accepts the applicable ICAP Demand Curve in direct contrast to the explicit requirement in section 23.4.5.7.2.1 to issue final determinations after the

forecast price based on ... [t]he load forecast and Special Case Resources as set forth in the most recently published Load and Capacity Data (Gold Book).”

⁷ Section 23.4.5.7.2.1 of NYISO’s Services Tariff states: “Promptly after Commission acceptance of the first ICAP Demand Curve to apply to a Mitigated Capacity Zone, the ISO shall make an exemption and Offer Floor determination for any NCZ Examined Project that is in a completed Class Year and has received CRIS [Capacity Resource Interconnection Service].” CRIS is the authority to offer capacity into NYISO’s capacity market.

approval of the applicable Demand Curve.⁸ NYISO asserts that the requirement to issue an Indicative determination in that circumstance would, at a minimum, provide useless information, and would likely also create confusion for developers and unnecessary work for NYISO. Accordingly, NYISO requests waiver of this subsection so that it need not comply with the requirement to simultaneously make Indicative and final determinations.

D. Waiver Standard

10. NYISO asserts that its requested waivers meet the Commission's criteria for granting tariff waiver requests in that (1) they address unforeseen and unintended drafting issues in Services Tariff provisions that were prepared in good faith and that it was brought to the attention of the Commission and its stakeholders; (2) they are limited in scope because it is working with its stakeholders to revise the tariff language; (3) there is a "concrete problem" since, absent a waiver, NYISO would be required to conduct two upcoming market mitigation exemption determinations using rules that are practically unworkable and sub-optimal; and (4) there will be no undesirable consequences, such as harming third parties, since the waivers will only ensure that the relevant tariff provisions function efficiently and as intended.

III. Notice of Filings and Responsive Pleadings

11. Notice of NYISO's waiver request was published in the *Federal Register*, 79 Fed. Reg. 4682 (2014), with interventions and protests due on or before January 31, 2014. Exelon Corporation and TC Ravenswood, LLC, filed motions to intervene. The New York Transmission Owners (NYTOs)⁹ filed a motion to intervene and comments in support of NYISO's filing. CPV Valley LLC (CPV Valley) filed a motion to intervene and protest.

⁸ Section 23.4.5.7.2.2(i) of NYISO's Services Tariff states that NYISO "shall make an Indicative Buyer-Side Mitigation Exemption Determination for any NCZ Examined Project if (i) the Commission has accepted a Demand Curve for the Mitigated Capacity Zone that will become effective when the Mitigated capacity Zone is first effective."

⁹ For purposes of this proceeding, the NYTOs consist of Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Corporation, Orange & Rockland Utilities, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, and Niagara Mohawk.

12. The NYTOs support NYISO's request for temporary waivers of the specified tariff provisions. They contend that NYISO's requested waivers are reasonable, consistent with past Commission precedent, and are necessary to address the unintended consequences of certain drafting issues in the Services Tariff. The NYTOs state that the waiver will ensure that the relevant tariff provisions function efficiently and as intended.¹⁰

13. CPV Valley states that it is one of the two generators directly affected by the NYISO waiver request as a Class Year 2011 member. It argues that it is harmed by the request for waiver of NYISO's obligation to promptly render a market mitigation determination after the Commission accepts the ICAP Demand Curve. CPV Valley asserts that a delay in compiling Load data until the end of March 2014, two months after acceptance of the ICAP Demand Curve, is an unjustified and unreasonable delay in the mitigation determination for the CPV Valley project.¹¹

14. CPV Valley contends that as a member of Class Year 2011, it must meet certain milestones to remain in the queue. One of those obligations is to execute an Interconnection Agreement. CPV Valley states that pursuant to Attachments X and S of the NYISO Open Access Transmission Tariff, its Interconnection Agreement must be completed and executed within six (6) months of its tender. CPV Valley contends that it was tendered its draft Interconnection Agreement in early January 2014, requiring completion and execution of the Interconnection Agreement by June 2014, as well as negotiating and executing a number of other related agreements, including affected System Agreements with New York State Electric & Gas Corporation and Central Hudson Gas & Electric Corporation. CPV Valley states that it also has been allocated System Deliverability Upgrades (SDUs),¹² and as a result, it must negotiate SDU-related

¹⁰ NYTOs January 31, 2014 Comments at 3-4.

¹¹ CPV Valley January 31, 2014 Protest at 5.

¹² Attachment S of NYISO's Services Tariff defines SDUs as "The least costly configuration of commercially available components of electrical equipment that can be used, consistent with Good Utility Practice and Applicable Reliability Requirements, to make the modifications or additions to Byways and Highways and Other Interfaces on the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Deliverability Interconnection Standard at the requested level of Capacity Resource Interconnection Service."

agreements with Central Hudson and National Grid. CPV Valley argues that a critical component of the development process is the market mitigation determination in the G-J new capacity zone. CPV Valley argues that it has relied on the Services Tariff provisions in its project planning process, and a six to eight week delay in the market mitigation determination is not justified. CPV Valley asserts that NYISO has not shown that there is a problem that requires a remedy and CPV Valley is harmed by the delay proposed in this waiver request.¹³

15. CPV Valley states that NYISO has not shown that it cannot comply with the Services Tariff requirement to make its mitigation determination promptly. CPV Valley asserts that NYISO has not said that it cannot comply with the Tariff and complete and compile whatever Load data is needed to perform the analysis, only that it does not want to do it until late March 2014, and NYISO has simply not shown that there is a concrete problem that requires remedy. CPV Valley contends that a market power mitigation determination is necessary to provide certainty to the project so that it knows whether it will be mitigated or not, and it should be able to receive such a determination promptly after acceptance of the ICAP Demand Curve.¹⁴

IV. Discussion

A. Procedural Issues

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

17. At issue is NYISO's market power mitigation exemption process for two Class Year 2011 projects in the new G-J Locality capacity zone. NYISO requests: (1) a waiver with respect to the source of its Load forecast data so that it may use the data underlying its 2014 Gold Book; (2) a waiver of the requirement to make a final mitigation exemption determination promptly after acceptance of the new 2014-2017 Demand Curves; and (3) a waiver of its obligation to perform an Indicative mitigation exemption determination. For the reasons given below, we grant, in part, and deny, in part,

¹³ CPV Valley January 31, 2014 Protest at 5-6.

¹⁴ CPV Valley January 31, 2014 Protest at 7.

NYISO's requests to waive the requirement regarding the source of the Load forecast data; deny waiver of the requirement for prompt action; and grant waiver of the requirement that it issue an Indicative mitigation exemption determination for the subject projects.

18. Although not the only basis for a grant of waivers, the Commission has previously granted one-time 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.¹⁵ NYISO argues that all of its requested waivers meet these criteria. We disagree.

19. First, we grant NYISO's request to waive the requirement of section 23.4.5.7.2.3.2 to the extent that it requires NYISO to base the Load forecast used in mitigation exemption determinations on data used to develop the Indicative Locational Minimum Installed Capacity Requirement for a new capacity zone. We agree with NYISO that this section more properly should be limited to LCRs for Indicative mitigation exemption determinations which are intended to be made for informational purposes only in periods prior to the effectiveness of the Demand Curves for the new capacity zone. However, we deny waiver of the requirement of that section to use the data set forth in the "most-recently published Load and Capacity Data (Gold Book)" which, in this case, is NYISO's 2013 Gold Book. It contains a 10-year projection of Load and capacity, which includes the three-year Mitigation Study Period applicable to the two subject projects. Although the use of the projections in its 2014 Gold Book may be based on somewhat more updated data, NYISO has not explained why it cannot use its 2013 Gold Book data to make the three Capability Year projections needed for the mitigation exemption determinations for the two subject projects. Accordingly, we find that NYISO has not shown that, with respect to the request to use the 2014 Gold Book, it has a concrete problem that requires the requested remedy. In addition, we disagree with NYISO's claim that such a waiver would have no undesirable consequences, as CPV Valley

¹⁵ *New York Independent System Operator, Inc.*, 139 FERC ¶ 61,108, at P 14 (2012). See also, e.g., *PJM Interconnection, LLC*, 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); *ISO New England Inc. - EnerNOC*, 122 FERC ¶ 61,297 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

maintains that it has relied on the Services Tariff provisions in its project planning process and it would be harmed by the delay that permitting NYISO to wait for the 2014 Gold Book data would cause. Thus, we reject NYISO's proposed use of the 2014 Gold Book data and require it to use the 2013 Gold Book data instead.

20. Next, for the same reasons as above, we deny NYISO's request for temporary waiver of the requirement of section 23.4.5.7.2.1 to make an exemption and Offer Floor determination "promptly" after Commission acceptance of the first ICAP Demand Curve for a Mitigated Capacity Zone. Since we have denied the above waiver request to the extent we are directing NYISO to use the data from the already-published 2013 Gold Book to make the final determinations for the subject two projects, consistent with NYISO's assertion that it would need no more than two weeks to finalize the determinations if it has the required data, NYISO should be able to make final determinations for the subject two projects within two weeks. Accordingly, we hereby direct NYISO to make the mitigation exemption determinations for the subject two projects and post the results on its website by no later than 14 days from the date of this order.

21. Finally, we grant NYISO's request to waive the requirement of section 23.4.5.7.2.2(i) that NYISO must issue an Indicative mitigation exemption determination for the subject projects despite the separate requirement of section 23.4.5.7.2.1 to promptly issue final determinations for the projects. The tariff makes clear that the Indicative determination is "for informational purposes only" and is not the actual, final, binding determination that must be promptly made after acceptance of the applicable ICAP Demand Curve.¹⁶ CPV Valley states that it does not oppose waiver of the Services Tariff requirement that NYISO provide an Indicative mitigation determination as long as it provides a timely final determination, which we have ordered above. We therefore agree with NYISO that issuance of an Indicative mitigation determination for each of the two subject projects is unnecessary and would not provide useful information in light of the fact that NYISO must promptly issue final determinations for the Projects. Accordingly, we grant NYISO's requested waiver of section 23.4.5.7.2.2(i) of its Services Tariff so that, in the case of the two subject projects, it is not required to make Indicative mitigation exemption determinations.

¹⁶ NYISO January 24, 2014 Filing at 7.

The Commission orders:

(A) NYISO's request for waivers is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) NYISO is directed to complete and issue the final mitigation exemption determinations for the two subject projects within 14 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.