

160 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

NRG Curtailment Solutions, Inc.

Docket No. ER17-834-000

ORDER DENYING REQUEST FOR WAIVER

(Issued August 17, 2017)

1. On January 20, 2017, NRG Curtailment Solutions, Inc. (NRG) submitted a request for waiver of certain penalty provisions in the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff), regarding the deficiency charge on a Responsible Interface Party participating in NYISO's capacity market as a Special Case Resource (SCR) when there is a shortfall in delivered capacity.¹ Specifically, NRG requests waiver of sections 5.14.2.1 and 5.14.2.3.4 of the Services Tariff. In this order, we deny NRG's request for waiver.

I. Background

2. SCRs are demand-side resources that agree to reduce system load at NYISO's direction and are paid for the energy and capacity they provide. SCRs may reduce load through load curtailments, the use of Local Generators,² or through a combination of both. Individual SCRs participate in the program through an aggregator called a Responsible Interface Party, which interfaces with NYISO and is responsible for compliance with all applicable NYISO rules. NRG is a Responsible Interface Party participating in NYISO's SCR program.³

¹ NRG Waiver Request at 1.

² Local Generators are defined as resources "operated by or on behalf of a load that is either: (i) not synchronized to a local distribution system; or (ii) synchronized to a local distribution system solely in order to support a load that is equal to or in excess of the resource's capacity. Local Generators supply energy only to the load they are being operated to serve and do not supply energy to the distribution system." NYISO, Services Tariff, § 2.12 (5.0.0).

³ NYISO Protest at 2.

3. Eligibility to use a Local Generator in the SCR program is conditioned on, among other things, a Local Generator's compliance with all applicable federal, state, and local environmental regulations, including the U.S. Environmental Protection Agency's (EPA) Reciprocating Internal Combustion Engine (RICE) National Emissions Standards for Hazardous Air Pollutants (NESHAP) rules.⁴

4. NRG states that, in 2010, the EPA issued RICE NESHAP regulations applicable to Local Generators providing emergency demand response service, including those participating in NYISO's SCR program.⁵ The rule permitted emergency generators to operate without additional emissions controls for up to 15 hours per year in emergency demand response programs.⁶ In 2013, the EPA established new regulations permitting operation of emergency generators without emissions controls for up to 100 hours per year in emergency demand response programs.⁷ Subsequently, certain parties filed a petition for review of this rule. In 2015, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded the 100-hour emissions exemption for emergency generator participation in emergency demand response program.⁸ The EPA sought and was granted a stay of the D.C. Circuit's mandate implementing its decision until May 1, 2016 (motion to stay).⁹ On April 15, 2016, the EPA issued a guidance document explaining that, based on the D.C. Circuit's decision, a Local Generator may not operate in emergency demand response programs unless it meets more stringent environmental control requirements.¹⁰ On May 2, 2016, the D.C. Circuit issued a mandate implementing its *Delaware* decision.

⁴ *Id.* (citing NYISO, Services Tariff, § 5.12.11.1 (19.0.0) and NYISO Installed Capacity Manual § 4.12.2).

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.* (citing *National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines*, 78 Fed. Reg. 6674, 6679-81, 6705 (2013)).

⁸ *Delaware Dep't of Natural Resources and Env'tl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015) (*Delaware*).

⁹ NYISO Protest at 2 (citing Order Granting Respondent's Motion for Stay of Mandate, *Delaware*, 785 F.3d 1).

¹⁰ *Id.* (citing Memorandum from Peter Tsirigotis, Director, Sector Policies and Programs Division, Office of Air Quality Planning and Standards, *Guidance on Vacatur of RICE NESHAP and NSPS Provisions for Emergency Engines* (2016)).

II. NRG's Waiver Request

5. NRG seeks waiver of sections 5.14.2.1 and 5.14.2.3.4 of the Services Tariff.¹¹ NRG states that certain SCRs it enrolled for the month of May 2016 are subject to penalty under the Services Tariff because they were not permitted to operate in the SCR program pursuant to the EPA's RICE NESHAP Rules.¹² NRG states that NYISO's market rules permit offering and registering Local Generators into the SCR program as demand resources provided they can be operated in compliance with all environmental permits.¹³ NRG explains that a Responsible Interface Party is subject to shortfall evaluation, by Load Zone, for its entire SCR portfolio, as well as penalties associated with invalid registrations. In addition, a shortfall occurs when the Responsible Interface Party's resources do not perform to their capacity obligation during a single hour in a test or event called by NYISO in the Capability Period.¹⁴

6. NRG argues that the requested waiver meets the Commission's four criteria for granting a waiver. 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.¹⁵

7. First, NRG states that it acted in good faith to meet the Services Tariff requirements. NRG states that a small number of its now ineligible SCRs with Local Generators were registered in NYISO's capacity market for May 2016 prior to the issuance of the EPA's guidance document, noting that the last date of enrollment for the May 2016 delivery period was April 7, 2016.¹⁶ NRG states that it only enrolled generators in the May 2016 auction that would participate for 15 hours or less because NRG assumed, based on discussions with the EPA staff, consultations with outside counsel and review of case law, that the 15-hour rule would be reinstated with the vacatur of the 2013 100-hour rule, allowing for NRG's resources to fulfill their capacity

¹¹ NRG did not specify an effective date for its waiver request.

¹² NRG Waiver Request at 7-8.

¹³ *Id.* at 4 (citing NYISO, Services Tariff § 4.1.7 (7.0.0) and 5.1.1.1 (6.0.0); NYISO Installed Capacity Manual § 4.12.2).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 5 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 14 (2016); *Calpine Energy Serv., L.P.*, 154 FERC ¶ 61,082, at P 12 (2016); *N.Y. Power Auth.*, 152 FERC ¶ 61,058, at P 22 (2015)).

¹⁶ NRG Waiver Request at 4.

obligations.¹⁷ NRG contends that it had no ability, under the NYISO rules, to withdraw resources that no longer complied with the EPA's revised emissions rule. As a result, NRG expects to incur non-performance and invalid registration penalties for at least 13 percent of its total May 2016 Unforced Capacity (UCAP) that, given the timing of the EPA's rules clarification on April 15, 2016, could not have been avoided.¹⁸ NRG also states that it stopped selling capacity from demand response resources backed by non-compliant resources no longer exempt from the EPA's rules for the June 2016 auction.

8. NRG claims that the waiver is limited in scope since it is a one-time waiver of only the penalties in sections 5.14.2.1 and 5.14.2.3.4 for its resources committed for the May 2016 auction.¹⁹ NRG clarifies that it does not seek a waiver of penalties for any shortfall that is attributed to other demand-side resources (whether generating or load curtailing resources) if such resources were not impacted by the EPA regulations.²⁰

9. NRG further claims that the waiver resolves a concrete problem by remedying the deliverable capacity shortfall penalties that NRG, as the Responsible Interface Party, would otherwise incur, due to the implementation of an environmental law.²¹

10. Finally, NRG contends that the waiver does not have undesirable consequences because NRG returned the revenue it received and seeks a waiver of only the punitive 50 percent penalty that resulted from the unexpected change in the interpretation of law.²² NRG states that, if the waiver is granted, it will (1) clarify the rules for the participation of Local Generators subject to RICE NESHAPS rules and (2) achieve the desired result of making NRG whole from penalties, who acted in good faith and exercised careful due diligence when confronted with the EPA's change in implementation of law.²³

III. Notice and Protest

¹⁷ *Id.* at 5-7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8. NRG further clarifies that if NYISO asserts that additional tariff provisions are applicable, NRG seeks waiver of all penalties that NYISO may assess for NRG's May 2016 registrations that were impacted by the EPA regulations.

²¹ *Id.*

²² *Id.* at 9.

²³ *Id.*

11. Notice of NRG's filing was published in the *Federal Register*, 82 Fed. Reg. 8,738 (2017), with interventions and protests due on or before February 13, 2017. NYISO filed a timely motion to intervene and protest.

12. NYISO opposes NRG's request for waiver and states that the Commission should deny the request. NYISO argues that certain SCRs that NRG enrolled for May 2016 are subject to penalty under section 5.14.2.1 because they were not permitted to operate in the SCR program pursuant to the EPA's RICE NESHAP rules.²⁴ According to NYISO, the EPA's intent to apply more stringent emissions requirements was apparent beginning in July 2015, contrary to NRG's contentions.²⁵ Pointing to various parts of the EPA's motion to stay, NYISO argues that it was clear that the EPA intended not to revert back to its 2010 regulation of allowing resources to operate for up to 15 hours per year in emergency demand response programs.²⁶ Rather, according to NYISO, the EPA's statements indicated that it intends to prohibit the operation of the affected resources in emergency demand response programs.²⁷ Moreover, NYISO contends that the EPA sought a longer stay until May 1, 2016 to help preserve long-term demand response participation by providing the affected resources the opportunity to enhance their emissions controls prior to the full effect of the Court's vacatur.²⁸

13. NYISO contends that NRG, like all other participants in the SCR program, is required to determine whether each resource it enrolls meets the eligibility requirements to participate in the program before selling capacity from that resource.²⁹ NYISO states that NRG sold capacity from the affected resources even though NRG could not certify that those resources meet the applicable eligibility requirements.³⁰ NYISO asserts that NRG enrolled resources that it knew, due to the regulatory uncertainty, might not be able to participate in the program beginning in May 2016.³¹ NYISO argues that such a risk

²⁴ NYISO Protest at 5. NYISO states that it has not yet analyzed final SCR performance data for the 2016 Summer Capability Period (which includes May), but expects to review data regarding NRG's resources beginning in February 2017 and expects to determine whether potential penalties are warranted by the end of March 2017.

²⁵ *Id.* at 7.

²⁶ *Id.* at 8-10.

²⁷ *Id.* at 9.

²⁸ *Id.* at 8.

²⁹ *Id.* at 6.

³⁰ *Id.*

should be borne by NRG. NYISO notes that it is not aware of any resources other than NRG's that were improperly enrolled in May 2016 due to the regulatory uncertainty related to the RICE NESHAP rules and litigation.³²

14. NYISO points out that it has no reason to believe NRG purposefully intended to enroll ineligible resources; however, if NRG remained uncertain as to whether the affected resources could participate, it had the option to not enroll the resources until there was greater regulatory certainty.³³ NYISO clarifies that it runs monthly ICAP Spot Market Auctions and NRG had the option to not enroll the affected resources in May, but to enroll them for June (if they meet the EPA emissions requirements) once the EPA clarified its position.³⁴ NYISO believes that NRG assumed the risk of non-compliance and therefore should be subject to the penalty provisions of the Services Tariff addressing that non-compliance.³⁵ NYISO argues that granting the requested waiver would send improper signals to the market that a Responsible Interface Party may be absolved of its failure to satisfy the Services Tariff requirements so long as the misconduct was not intentional (i.e., so long as it did not enroll a SCR that it knew with certainty that it could not perform).³⁶

³¹ *Id.* at 7.

³² *Id.* at 7 n.20.

³³ *Id.* at 9, 10-11.

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ *Id.* at 7.

IV. Discussion**A. Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), NYISO's timely, unopposed motion to intervene serves to make NYISO a party to this proceeding.

B. Commission Determination

16. We find that NRG has not satisfied the criteria for granting waiver and therefore deny NRG's request to waive sections 5.14.2.1 and 5.14.2.3.4 of the Services Tariff. First, we do not believe that this waiver is necessary to resolve a concrete problem. NRG is required to determine whether each resource it enrolls in the SCR program meets the eligibility requirements before selling capacity from that resource. Notwithstanding any uncertainty surrounding its resources' eligibility to participate in the SCR program, NRG made the business decision to enroll its resources and assumed the risk associated with that decision. We do not believe that this set of facts constitutes a concrete problem that warrants a remedy. Similarly, we find that granting this waiver would have undesirable consequences, as it would effectively serve only to relieve NRG of the financial consequences of its market commitments. Here, NRG made a business decision to assume the risk of enrolling its affected resources for the month of May 2016 when there was regulatory uncertainty. NRG had the option of waiting and enrolling its affected resources later when there was regulatory certainty but chose not to do so. In addition, granting waiver under the circumstances here could encourage similarly risky bidding behavior that market participants seek to remedy after the fact through a waiver, and we are not persuaded that the relief sought here is warranted.

The Commission orders:

NRG'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.