

186 FERC ¶ 61,204  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;  
Allison Clements and Mark C. Christie.

New York State Electric & Gas Corporation

Docket No. ER22-1199-000

ORDER DISMISSING IN PART AND GRANTING IN PART WAIVER REQUEST

(Issued March 21, 2024)

1. On March 3, 2022, as supplemented on April 18, 2022 and October 13, 2023, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure<sup>1</sup> and section 309 of the Federal Power Act (FPA),<sup>2</sup> New York State Electric & Gas Corporation (NYSEG) submitted a request for waiver of or, in the alternative, remedial relief from sections 5.12.11.1 and 5.14.2.3 of the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Areas Services Tariff (Services Tariff). Sections 5.12.11.1 and 5.14.2.3 of the NYISO Services Tariff require submission of performance data to demonstrate load reductions within 75 days of a demand response event or test, and specify consequences, including financial penalty, for non-performance, respectively.<sup>3</sup> As discussed below, we dismiss as moot NYSEG's request for waiver and alternative request for remedial relief of Services Tariff section 5.12.11.1 and grant NYSEG's request for waiver of Services Tariff section 5.14.2.3.

**I. Background**

2. NYISO's Installed Capacity market design includes a provision for Special Case Resources (SCR),<sup>4</sup> defined as demand response resources and certain behind-the-meter

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<sup>1</sup> 18 C.F.R. §§ 385.207(a)(5), 385.212 (2023).

<sup>2</sup> 16 U.S.C. § 825h.

<sup>3</sup> Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the NYISO Services Tariff.

generators, to sell capacity in NYISO's capacity auctions. SCRs are represented in the market by Responsible Interface Parties, which are authorized by NYISO to be the Installed Capacity Suppliers for one or more SCRs to facilitate the SCR's participation.<sup>5</sup> Responsible Interface Parties that enroll qualified SCRs receive capacity payments in return for the commitment to reduce load when called upon by NYISO.

3. NYISO conducts periodic performance tests, during which each SCR must demonstrate its ability to meet its capacity obligation. Section 5.12.11.1 of the NYISO Services Tariff provides, in relevant part:

Responsible Interface Parties that were requested to reduce Load in any month shall submit performance data to the NYISO, within 75 days of each called event or test, in accordance with ISO 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.<sup>6</sup>

4. Section 5.14.2.3 of the NYISO Services Tariff provides, in relevant part:

In addition to the general provisions set forth in Section 5.14.2.1 above that are applicable to [Responsible Interface Parties] as Installed Capacity Suppliers, this Section 5.14.2.3 establishing the following four specific shortfalls applicable to [Responsible Interface Parties]: 1. shortfall for Provisional ACL; 2. shortfall for Incremental ACL; 3. Shortfall for SCR Change in Status; and 4. Shortfall for [Responsible Interface Party] portfolio performance. The deficiency charge for any such shortfall shall be equal to the Unforced Capacity

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<sup>4</sup> SCRs are "Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the ISO, and/or Demand Side Resources that have a Local Generator, which is not visible to the ISO's Market Information System and is rated 100 kW or higher, that can be operated to reduce Load from the NYS Transmission System or the distribution system at the direction of the ISO." NYISO, NYISO Tariffs, NYISO MST, § 2.19 (Definitions – A) (25.0.0).

<sup>5</sup> See NYISO, NYISO Tariffs, NYISO MST, § 2.18 (Definitions – R) (31.0.0).

<sup>6</sup> NYISO, NYISO Tariffs, NYISO MST, § 5.12 (Requirements Applicable to Installed Capacity Suppliers) (41.0.0), § 5.12.11.1.

equivalent of the shortfall multiplied by one and one-half times the applicable market clearing price of Unforced Capacity determined using the applicable ICAP Demand Curve for the ICAP Spot Market Auction for each month the [Responsible Interface Party] is deemed to have a shortfall.<sup>7</sup>

5. NYSEG states that it is a Responsible Interface Party for two commercial customers that participate in NYISO's SCR program.<sup>8</sup> NYSEG explains that, in this role, it aggregates demand response performance data for submission and verification by NYISO for participation in the NYISO Installed Capacity market.

6. NYSEG states that NYISO called a test event on September 1, 2021, requiring NYSEG to submit related performance data to NYISO by November 15, 2021 at 5:00 p.m. (September 1, 2021 Test).<sup>9</sup> However, due to a technical issue, NYSEG states that it was unable to access NYISO's Demand Response Information System before the deadline expired. NYSEG explains that it then attempted to upload the performance data on November 16, 2021, and, after being blocked from doing so, confirmed with NYISO that NYISO did not have authority to accept the performance data after the 75-day submission deadline had passed.

## **II. Waiver Request**

7. NYSEG requests waiver of or, in the alternative, remedial relief from NYISO Services Tariff sections 5.12.11.1 and 5.14.2.3 to permit NYISO to use NYSEG's performance data associated with the September 1, 2021 Test, thereby also avoiding the assessment of a deficiency charge against NYSEG.<sup>10</sup> NYSEG argues that its waiver request satisfies the Commission's criteria for granting waiver.

8. First, NYSEG argues that it demonstrated good faith by attempting to submit its performance data before the November 15, 2021 deadline, and, after a technical issue prevented it from doing so, by attempting to submit the performance data early the next day, notifying NYISO of the technical difficulty, and ultimately providing NYISO the performance data by email.<sup>11</sup> NYSEG further notes that this is the first time in more

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<sup>7</sup> NYISO, NYISO Tariffs, NYISO MST, § 5.14 (Installed Capacity Spot Market Auction and Installed Capacity Supplier Deficiencies) (37.0.0), § 5.14.2.3.

<sup>8</sup> Waiver Request at 4.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 2, 7-13.

<sup>11</sup> *Id.* at 7-9.

than twenty years as a Responsible Interface Party that it has been untimely in submitting its SCR performance data, and that it has instituted new processes and safeguards to further ensure timely submission of performance data in the future.

9. Second, NYSEG argues that its requested relief is limited in scope because it would only apply to the NYSEG performance data for its two SCRs in connection with the September 1, 2021 Test. In addition, NYSEG emphasizes that the request for waiver or remedial relief concerns only two related provisions of the NYISO Services Tariff, and would ensure accurate rates and pricing in the NYISO market.

10. Third, NYSEG argues that its requested relief addresses a concrete problem.<sup>12</sup> NYSEG states that, absent waiver, NYISO could be required to take actions that would be inconsistent with the actual performance of NYSEG's two SCR customers for the Summer 2021 Capability Period, despite the fact that these SCRs did, in fact, reduce load at 100% in response to NYISO's directives. In addition, NYSEG notes that, absent the requested relief, its failure to timely report the relevant performance data will result in NYISO levying a deficiency charge in excess of \$1.8 million. Further, NYSEG states that granting its petition will also avoid the attribution of a zero performance factor for the two SCRs served by NYSEG that curtailed load in response to NYISO's September 1, 2021 Test. NYSEG states that, absent the requested relief, NYISO would be prohibited from including the performance data in the Summer 2022 Capability Period, which would limit the two SCR customers from participating in the Summer and Winter Installed Capacity markets and would result in Installed Capacity market prices that do not accurately reflect the actual overall capacity available in NYISO.

11. Fourth, NYSEG states that it does not foresee any adverse impact resulting from granting its requested relief.<sup>13</sup> Rather, NYSEG argues that denial of the requested relief could adversely impact New York consumers, who could shoulder inflated capacity costs if the actual available capacity of NYSEG's two SCRs is not accurately reflected in the market, as well as the two SCRs and NYSEG itself, who will suffer adverse financial impact.

### **III. Supplemental Filings**

12. NYSEG explains that it enrolled its SCR customers for the May 2022 auction month of the Summer 2022 Capability Period.<sup>14</sup> NYSEG further states that, due to the passage of time, Commission action on NYSEG's request for waiver would no longer have any impact on NYSEG's ability to fully participate in the Summer 2022 and

<sup>12</sup> *Id.* at 9-11.

<sup>13</sup> *Id.* at 11-12.

<sup>14</sup> April 18, 2022 Supplemental Filing at 2.

Winter 2022-2023 Capability Periods.<sup>15</sup> NYSEG also states that NYISO informed NYSEG that, absent a Commission order granting waiver, NYISO intends to assess the applicable deficiency charge in a penalty assessment process expected to begin in November 2023.

#### **IV. Notice and Responsive Pleading**

13. Notice of NYSEG's filing was published in the *Federal Register*, 87 Fed. Reg. 14,000 (Mar. 11, 2022), with interventions and protests due on or before March 24, 2022. NYISO and Nucor Steel Auburn, Inc. (Nucor) filed timely motions to intervene and comments. Weitsman Shredding LLC (Weitsman) submitted timely comments. On April 19, 2022, and December 13, 2023, NYISO submitted supplemental comments.

14. Nucor and Weitsman support NYSEG's waiver request.<sup>16</sup> Nucor and Weitsman state that they participate in NYISO's Installed Capacity market as SCRs represented by NYSEG. Nucor notes that granting NYSEG's request will serve to reflect the actual performance of NYSEG's SCRs during the September 1, 2021 Test and avoid reliability risks and unnecessarily high-capacity costs for New York consumers by retaining NYSEG's SCRs for capacity during NYISO emergencies.

15. NYISO states that it does not oppose NYSEG's waiver request, and corroborates the facts presented by NYSEG in its waiver request.<sup>17</sup> NYISO, however, expresses concern that a waiver in this proceeding may raise questions about the applicability of data reporting requirements to other Responsible Interface Parties given the importance of timely receipt of performance data to facilitate processing and review of the over 2,500 resources participating in the SCR program. Nonetheless, NYISO states that it also recognizes that its desire for strict adherence to the submission deadline is offset by potential harmful impacts on NYISO's capacity market if NYSEG's SCRs were to stop participating in SCR program.

16. In its December 13, 2023 supplemental comments, NYISO states that, based on the specific facts and circumstances at issue, it has determined not to move forward with any penalty assessment until the Commission issues an order in this proceeding.<sup>18</sup> NYISO requests Commission action "as soon as practicable," stating that the Commission's determination on the pending penalty will provide needed certainty to NYSEG, NYISO, and other market participants.<sup>19</sup> NYISO agrees with NYSEG's statements in its October 13,

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<sup>15</sup> October 13, 2023 Supplemental Filing at 1-2.

<sup>16</sup> Nucor Comments at 2-3; Weitsman Comments at 1.

<sup>17</sup> NYISO Comments at 5-7.

<sup>18</sup> NYISO December 13, 2023 Supplemental Comments at 3.

2023 Supplemental Filing that the timing of a Commission Order in this proceeding will no longer have an impact on the amount of Unforced Capacity NYSEG's resources are able to provide.<sup>20</sup>

V. **Discussion**

A. **Procedural Matters**

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2023), the timely, unopposed motions to intervene serve to make NYISO and Nucor parties to this proceeding.

B. **Substantive Matters**

18. We dismiss as moot NYSEG's request for waiver of or, in the alternative, remedial relief from section 5.12.11.1 of the NYISO Services Tariff. Section 5.12.11.1 provides that failure to submit SCR performance data within 75 days of a test will result in zero performance attributed to those SCRs for purposes of satisfying the SCR's capacity obligation,<sup>21</sup> which NYSEG explains would also prevent it from fully participating in the Summer 2022 and Winter 2023 capacity auctions.<sup>22</sup> However, the Summer 2022 and Winter 2022-2023 capacity auctions and associated Capability Periods have passed. We find that these circumstances render NYSEG's requested waiver of or alternative request for remedial relief from section 5.12.11.1 of the NYISO Services Tariff moot, and therefore we dismiss the request.

19. We grant NYSEG's request for waiver of NYISO Services Tariff section 5.14.2.3. 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.<sup>23</sup> We find that the circumstances of NYSEG's waiver request satisfy these criteria.

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<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> NYISO, NYISO Tariffs, NYISO MST, § 5.12 (Requirements Applicable to Installed Capacity Suppliers) (41.0.0), § 5.12.11.1.

<sup>22</sup> Waiver Request at 10-11.

<sup>23</sup> See, e.g., *Citizens Sunrise Transmission LLC*, 171 FERC ¶ 61,106, at P 10 (2020); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

20. First, we find that NYSEG has acted in good faith by attempting to submit its performance data before the November 15, 2021 deadline, before encountering a technical issue that prevented that submission. We also recognize NYSEG's uncontested statement that this was the first instance in more than 20 years as a Responsible Interface Party that it was untimely in submitting its SCR performance data.<sup>24</sup> Second, we find that NYSEG's request is limited in scope because it involves waiver of only one provision of the Services Tariff and applies only to performance data for two SCRs in connection with the September 1, 2021 Test.<sup>25</sup> Third, we find that NYSEG's requested waiver addresses a concrete problem in that, absent waiver, NYSEG will be subject to a deficiency charge in excess of \$1.8 million despite its test performance data showing that the two SCRs in question provided a 100% load reduction in response to NYISO's directives during the September 1, 2021 Test.<sup>26</sup> Lastly, we find that NYSEG's requested waiver does not have undesirable consequences, such as harming third parties, because the record indicates that application of the deficiency charge would affect only NYSEG and its two SCRs.<sup>27</sup>

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<sup>24</sup> Waiver Request at 8.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.* at 11-12; NYISO December 13, 2023 Supplemental Comments at 3 (“Based on data NYSEG provided to the NYISO in 2022 . . . the financial penalty would be reduced to zero dollars if the Commission grants the Waiver Request.”).

<sup>27</sup> Waiver Request at 11-12.

The Commission orders:

(A) NYSEG's request for waiver of or, in the alternative, remedial relief from section 5.12.11.1 of the NYISO Services Tariff is hereby dismissed, as discussed in the body of this order.

(B) NYSEG's request for waiver of section 5.14.2.3 of the NYISO Services Tariff is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Debbie-Anne A. Reese,  
Acting Secretary.