

176 FERC ¶ 61,079  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

Viridity Energy Solutions, Inc.

Docket No. ER21-2395-000

ORDER GRANTING WAIVER

(Issued August 6, 2021)

1. On July 9, 2021, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,<sup>1</sup> Viridity Energy Solutions, Inc. (Viridity) filed a petition for a limited, one-time waiver of a procedural deadline in section 5.12.11.1 of the New York Independent System Operator, Inc. (NYISO) Market Administration and Control Areas Services Tariff (NYISO Services Tariff) that requires submission of performance data to demonstrate load reductions within 75 days of each called demand response event or test. Viridity also requests expedited Commission action on its waiver request by August 9, 2021. As discussed below, we grant Viridity's waiver request.

**I. Background**

2. Viridity states that it provides battery storage, distributed generation, demand response, and demand management solutions as a NYISO market participant.<sup>2</sup> Viridity asserts that it is a Responsible Interface Party<sup>3</sup> for purposes of serving as the Installed Capacity Supplier for several customers of NYISO member utilities.<sup>4</sup> Viridity explains

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<sup>1</sup> 18 C.F.R. § 385.207(a)(5) (2020).

<sup>2</sup> Waiver Request at 3.

<sup>3</sup> Viridity states that a Responsible Interface Party is "[a] Customer that is authorized by the [NYISO] to be the Installed Capacity Supplier for one or more Special Case Resources and that agrees to certain notification and other requirements as set forth in [the] Services Tariff and in the [NYISO] Procedures." *Id.* at 3 n.1 (citing NYISO Services Tariff, § 2.18).

<sup>4</sup> Unless otherwise noted, capitalized terms not defined herein have the meanings set forth in the NYISO Services Tariff.



that, as the Responsible Interface Party, it aggregates demand response performance data from demand side resources for submission and verification by NYISO in order to facilitate each resource's participation in the NYISO Installed Capacity (ICAP) market.

3. Viridity states that the NYISO Services Tariff includes provisions allowing certain demand side resources that meet the definition of a Special Case Resource (SCR) to participate in the NYISO ICAP market.<sup>5</sup> Viridity explains that section 5.12.11.1 of the NYISO Services Tariff requires a Responsible Interface Party to submit performance data for any SCRs required to respond to a demand response event or performance test within 75 days of each event or test. Viridity explains that failure to timely submit the performance data will prevent SCRs from satisfying their capacity obligations and affect energy payments during the event/test period. Specifically, Viridity states that section 5.12.11.1 provides:

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 [NYISO] 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 . . . If the [NYISO] determines that it has made an erroneous payment to a Responsible Interface Party, the [NYISO] shall have the right to recover it either by reducing other payments to that

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<sup>5</sup> *Id.* at 4 (citing NYISO Services Tariff, § 2.19). Viridity states that section 2.19 of the NYISO Services Tariff defines SCRs as:

Demand Side Resources whose Load is capable of being interrupted upon demand at the direction of the [NYISO], and/or Demand Side Resources that have a Local Generator, which is not visible to the [NYISO's] Market Information System and is rated 100 kW or higher, that can be operated to reduce Load from the [New York State] Transmission System or the distribution system at the direction of the [NYISO]. Special Case Resources are subject to special rules, set forth in Section 5.12.11.1 of this [NYISO] Services Tariff and related [NYISO] Procedures, in order to facilitate their participation in the Installed Capacity market as Installed Capacity Suppliers.



Responsible Interface Parties or by resolving the issue pursuant to other provisions of this Services Tariff or other lawful means.<sup>6</sup>

4. Viridity explains that the deadline to import the performance data into the NYISO's Demand Response Information System (DRIS) after NYISO's first test confirming the ability of SCRs to meet their obligations for the upcoming NYISO Winter Season ICAP Market (Winter 2021-2022) was 5:00 p.m. on May 11, 2021.<sup>7</sup> Viridity states that it submitted the performance data at 5:09 p.m. on May 11, 2021.<sup>8</sup>

## II. Waiver Request

5. Viridity requests a limited, one-time waiver of the 75-day performance data submission deadline in section 5.12.11.1 of the NYISO Services Tariff. Viridity asserts that its waiver request satisfies the Commission's criteria for granting waiver.

6. First, Viridity argues that its error or inability to comply with the tariff provision was made in good faith.<sup>9</sup> Viridity contends that it made numerous attempts to submit the required test performance data before the 5:00 p.m. deadline and ultimately provided the performance data only nine minutes late. Viridity explains that the delay was caused by technical difficulties that Viridity has not previously experienced in its 10-year history as a Responsible Interface Party. Specifically, Viridity explains that it must obtain individual customer meter performance data and then submit the data into NYISO's DRIS for 52 customers, of which 50 are customers of Consolidated Edison Company of New York, Inc. (ConEd). Viridity states that, for the past 10 years and leading up until the event at issue, it always had direct access to ConEd customer data. Viridity states that, in the interim period between its prior submission and the submission due by 5:00 p.m. on May 11, 2021, ConEd installed Advanced Metering Infrastructure (AMI) meters, which for the first time prevented Viridity direct access to the required customer data.<sup>10</sup> Viridity asserts that, as a result of this change in metering, it must receive the information or access to the information directly from each of the affected customers.<sup>11</sup>

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<sup>6</sup> *Id.* at 4 (citing NYISO Services Tariff, § 5.12.11.1).

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* at 6-7.

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



Viridity states that it was unaware that ConEd had implemented this change in metering until it attempted to obtain the customer data for the NYISO performance data submission.<sup>12</sup>

7. Viridity states that, on May 7, 2021, Viridity operators explained to NYISO that they were working on the submission and voiced concerns about Viridity's inability to directly access data as a result of the newly-instituted ConEd AMI meters.<sup>13</sup> Viridity notes that, on May 10, 2021, it requested an extension of the May 11, 2021 data submission deadline but was informed by NYISO that an extension could not be granted. Viridity contends that it continued to work to obtain customer data from the new AMI meters, but when it was unable to do so, it attempted to submit into NYISO's DRIS the customer data that Viridity had available from its own Supervisory Control and Data Acquisition data and from data that was provided directly by ConEd. Viridity asserts that its data upload attempts prior to the deadline were not accepted by NYISO's system due to problems with the format of the data.<sup>14</sup> Viridity states that, when it realized that a submission into NYISO's DRIS portal was not possible, it provided the data to NYISO via email at 5:09 p.m., nine minutes after the 5:00 p.m. deadline on May 11, 2021.<sup>15</sup>

8. Viridity states that, to ensure that the problem does not occur again, it has instituted a more formalized procedure for gathering and submitting the required data into NYISO's DRIS.<sup>16</sup> Viridity further plans to improve its coordination and communication

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<sup>12</sup> Viridity states that ConEd was not at fault or responsible for Viridity's problem with accessing the customer data; rather, ConEd worked with Viridity to help resolve the problem and has since cooperated with Viridity to discuss remedial measures. *Id.* at 8.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> Viridity also does not maintain that NYISO was at fault or responsible for the repeated rejection of its attempted data submissions into NYISO's DRIS. *Id.* at 8.

<sup>15</sup> *Id.* at 7-8. Viridity states that its past practice has been to submit all of the performance data for the 52 customers in a single submission; therefore, the late submission was for all 52 customers. *Id.* at 8.

<sup>16</sup> *Id.* at 8-9. In particular, Viridity states that it will: (1) obtain direct access to customer data as a third party through the ConEd Green Button Connect portal and notify customers that such direct access to data is required in order for Viridity to fulfill its obligations as their demand response aggregator; (2) verify access to customer data no less than 14 business days prior to the NYISO DRIS submission due date; (3) initiate the data collection and submission process no less than seven business days prior to the NYISO DRIS submission due date; and (4) confirm successful submission into the NYISO DRIS no less than three business days prior to the NYISO DRIS submission due date. *Id.* at 9.



with NYISO, affected customers, and utilities. Viridity argues that, with these remedial measures in place, it does not expect that the problems that caused its late submission will occur in the future.

9. Second, Viridity argues that its request for waiver is limited in scope because the waiver would apply to only: (1) the Viridity performance data that was submitted at 5:09 p.m. on May 11, 2021; and (2) one provision of the NYISO Services Tariff.<sup>17</sup>

10. Third, Viridity argues that the requested waiver would address a concrete problem.<sup>18</sup> Viridity states that granting the waiver would allow NYISO to accept performance data for the demand response resources who reduced their load in response to NYISO directives during the performance test and, therefore, were eligible to receive energy payments as SCRs commensurate with their performance. Viridity states that, if the waiver is not granted, its provision of performance data will be deemed untimely, which would result in zero performance being attributed to the demand response resources and potentially result in NYISO taking action to recoup payments made to those resources, in addition to imposing penalties. Moreover, Viridity argues, the performance factors for its SCRs will not reflect their actual performance during the test but will affect the amount of capacity that its SCRs are eligible to provide in the upcoming ICAP markets, including the NYISO Winter Season ICAP Market (Winter 2021-2022).<sup>19</sup>

11. Fourth, Viridity argues that granting the waiver will not have undesirable consequences because Viridity is not aware of any party, NYISO Services Tariff provision, or NYISO practice that will be adversely impacted if the waiver is granted.<sup>20</sup> On the other hand, Viridity argues that failure to obtain a waiver will adversely impact Viridity, the 52 demand response participants on whose behalf Viridity submits performance data to NYISO, and perhaps NYISO in its ability to validate performance and the resulting payments for such SCRs. Viridity also contends that, because the waiver is limited in scope, there should be no concerns that the waiver will impact other demand response participants or the NYISO markets for which the performance data has already been submitted.

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<sup>17</sup> *Id.* at 9-10.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 11.

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



12. Viridity requests expedited Commission action on its waiver request, i.e., by August 9, 2021, as resolution by that date will avoid adverse impacts on the amount of capacity its SCRs will be able to provide in that market and other upcoming ICAP markets.

### III. Notice of Filing and Responsive Pleadings

#### A. Notice of Filing

13. Notice of Viridity's filing was published in the *Federal Register*, 86 Fed. Reg. 37,749 (July 16, 2021), with interventions and protests due on or before July 16, 2021. ConEd and NYISO filed timely motions to intervene and comments.

#### B. Responsive Pleadings

##### 1. ConEd Comments

14. ConEd filed comments in support of Viridity's waiver request. ConEd asserts that Viridity's error was unintentional and that both ConEd and Viridity acted in good faith.<sup>21</sup> ConEd confirms that the error was caused by an unintentional misunderstanding of recent changes to ConEd's third-party customer data access portals. In particular, ConEd states that Viridity was unaware that the changes that ConEd had made to its data access portals and AMI meters would impact the ability of third parties such as Viridity to view customers' account data without additional permission from their existing customers. ConEd confirms that, upon discovering the error, Viridity acted in good faith by making numerous attempts to obtain and submit the data by the NYISO deadline.<sup>22</sup>

15. ConEd argues that denying the waiver request could impact both the payments due for past demand response and the ability for demand response resources to participate in the next NYISO Winter Season ICAP Market (Winter 2021-2022).<sup>23</sup> ConEd asserts that granting waiver would solve a concrete problem - the potential for inaccurate compensation and future inability to provide demand response due to a technology related issue.<sup>24</sup> ConEd also contends that granting the waiver request would allow NYISO to compensate those demand response providers that reduced load in response to

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<sup>21</sup> ConEd Comments at 2.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 4-5 (citing *N.Y. Indep. Sys. Operator, Inc.*, 118 FERC ¶ 61,015, at P 1 (2007)).



NYISO's directives and therefore should receive compensation under the NYISO Services Tariff.<sup>25</sup> Finally, ConEd supports Viridity's request for expedited Commission action on its waiver request by August 9, 2021 to ensure that the affected demand response providers can participate in the NYISO Winter Season ICAP market (Winter 2021-2022).

## 2. NYISO Comments

16. NYISO states that it does not oppose Viridity's waiver request based on the facts known to NYISO at this time, consideration of the potential for undesirable market impacts absent remedial action, and the promptness of Viridity's discovery and notification of its error.<sup>26</sup> NYISO defers to the Commission on whether Viridity has met its burden to obtain waiver, but confirms that the facts known to NYISO at this time corroborate the facts presented in Viridity's waiver request.

17. NYISO also states that, although Viridity seeks only a limited waiver of a performance data submission deadline, NYISO is concerned that a waiver in this proceeding may raise questions regarding the applicability of the data reporting requirements to other Responsible Interface Parties.<sup>27</sup> NYISO states that the 75-day deadline is necessary for NYISO to receive timely performance data from Responsible Interface Parties in order to process and review data from the over 2,500 resources participating in the SCR program. NYISO concedes, however, that its desire for strict adherence to the performance data submission deadline in the instant waiver request is offset by the potential for an undesirable impact to NYISO's capacity market.<sup>28</sup> NYISO explains that, if the SCRs that Viridity brings to market were to stop participating in the SCR program, NYISO would expect increased capacity costs, which would be borne by New York State consumers.

18. NYISO notes that its ability to implement the waiver, if granted by the Commission, depends on the timing of the Commission's action.<sup>29</sup> NYISO states that, if the Commission grants Viridity's requested waiver by August 9, 2021, NYISO will have sufficient time to: (1) process and review the data; (2) complete all required calculations prior to the finalization of the performance factors for the NYISO Winter Season ICAP

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<sup>25</sup> *Id.* at 2.

<sup>26</sup> NYISO Comments at 5-6.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 6.

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



Market (Winter 2021-2022); and (3) reflect actual performance of the SCRs on Viridity's invoice.<sup>30</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), ConEd's and NYISO's timely, unopposed motions to intervene serve to make them parties to this proceeding.

##### **B. Substantive Matters**

20. As discussed below, we grant Viridity's waiver request. Specifically, we grant Viridity's request for waiver of the procedural deadline in section 5.12.11.1 of the NYISO Services Tariff that requires submission of performance data to demonstrate load reductions within 75 days of each called demand response event or test. 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>31</sup> We find that the circumstances of Viridity's waiver request satisfy these criteria.

21. First, we find that Viridity acted in good faith. Viridity represents that it was unaware that the recent changes that ConEd had made to its data access portals and AMI meters would impact the ability of third parties such as Viridity to view customers' account data without additional permission from their existing customers. Upon discovering the error, Viridity acted in good faith by making numerous attempts to obtain and submit the performance data by the procedural deadline in section 5.12.11.1 of the NYISO Services Tariff. We note that ConEd and NYISO corroborate Viridity's account of its attempts to meet the procedural deadline and its ultimate submission of the data nine minutes after the 5:00 p.m. deadline on May 11, 2021.

22. Second, we find that Viridity's waiver request is limited in scope because it is a one-time request for waiver of the procedural deadline in section 5.12.11.1 of the NYISO Services Tariff that applies to a specific set of performance data for 52 customers. We

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<sup>30</sup> *Id.* at 6-7. NYISO also states that Viridity is eligible to receive energy payments for the actual load reduction provided by its resources during the performance test. *Id.* at 7 & n.15.

<sup>31</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).



also note that Viridity states that it has instituted remedial procedures to ensure that in the future it will gather and submit the required performance data into NYISO's DRIS by the procedural deadline.<sup>32</sup>

23. Third, we find that granting the waiver request addresses a concrete problem. Absent the waiver, Viridity's provision of performance data for 52 SCRs would be deemed untimely, which would result in Viridity receiving zero performance attributed to the 52 SCRs and in turn potentially result in NYISO recouping payments made to those resources and/or assessing penalties. Also, without the submission of Viridity's new performance data for its SCRs, the performance factors for its SCRs will not reflect their actual performance and will affect the amount of capacity that its SCRs are eligible to provide in upcoming ICAP markets, including the NYISO Winter Season ICAP Market (Winter 2021-2022).

24. Finally, we find that granting the waiver request will not have any undesirable consequences, such as harming third parties. We recognize that the 75-day deadline is necessary for NYISO to receive timely performance data from Responsible Interface Parties in order to process and review data from the over 2,500 resources participating in the SCR program. However, there is no evidence in the record that granting Viridity's waiver will adversely impact any party or NYISO practice. By contrast, NYISO acknowledges that denying the waiver could result in increased capacity costs for New York State consumers if the 52 SCRs that Viridity brings to market were to stop participating in the SCR program.<sup>33</sup>

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<sup>32</sup> See *supra* P 8 & n.16.

<sup>33</sup> See NYISO Comments at 6.



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The Commission orders:

Viridity's waiver request is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.



UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Viridity Energy Solutions, Inc.

Docket No. ER21-2395-000

(Issued August 6, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order granting Viridity Energy Solutions, Inc. (Viridity), a Responsible Interface Party, as defined in the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff), a waiver of a tariff-imposed deadline to submit Special Case Resource performance data to NYISO. While this case presents particularly sympathetic facts, especially in light of Viridity's multiple attempts to provide data in advance of the deadline, Viridity's requested waiver of the applicable deadline is a request for retroactive relief that the Commission has no statutory authority to grant, as I have explained on numerous occasions.<sup>1</sup>

2. This result seems to be harsh in this case, but it is what the law requires. To prevent harsh results, the solution is to amend the Services Tariff to allow for waiver requests like this one that are submitted after the applicable deadline, which would provide actual notice of potential retroactive changes to the filed rate. The solution is not to grant unlawful—but seemingly equitable—retroactive waivers on a case-by-case basis, which ultimately depend upon how sympathetic the Commission believes the applicant's situation to be.

For these reasons, I respectfully dissent.

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James P. Danly  
Commissioner

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<sup>1</sup> See, e.g., *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm'r, dissenting at P 5).



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