

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

NRG Curtailment Solutions, Inc.

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Docket No. ER17-834-000

**MOTION TO INTERVENE AND PROTEST OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

On January 20, 2017, NRG Curtailment Solutions, Inc. (“NRGCS”) sought waiver of two provisions of the New York Independent System Operator, Inc.’s (“NYISO”) Market Administration and Control Area Services Tariff (“Services Tariff”) that impose penalties on Responsible Interface Parties¹ (“RIP”) who (i) enroll ineligible Special Case Resources (“SCR”) in the NYISO’s SCR program, and (ii) fail to deliver the full amount of Unforced Capacity sold in the NYISO’s Installed Capacity (“ICAP”) auctions.²

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,³ the NYISO moves to intervene and submits a protest in the above-captioned proceeding. For the reasons explained herein, the NYISO opposes NRGCS’ Request for Limited Tariff Waiver (“Waiver Request”), and submits that the Commission should deny that request.

¹ Capitalized terms not otherwise defined herein have the meaning set forth in the NYISO’s Market Administration and Control Area Services Tariff.

² NRG Curtailment Solutions January 20, 2017 Request for Limited Tariff Waiver, Docket No. ER17-834-000 [hereinafter *Waiver Request*].

³ 18 C.F.R. §§ 385.211, 385.212, and 385.214 (2016).

I. Background

A. The Special Case Resource Program

The SCR program is a reliability-based demand response program that is activated in response to: (i) a forecasted reserves shortage, (ii) an ISO-declared Major Emergency State, and (iii) a request for assistance for load relief purposes or as the result of a local reliability rule.

SCRs are Demand Side Resources that agree to reduce their Load at the NYISO's direction and are paid for the Energy and Capacity they provide. Individual SCRs participate in the program through an aggregator called a RIP, which is the entity that interfaces with the NYISO and is responsible for compliance with all applicable NYISO rules. NRGCS is a RIP participating in the NYISO's SCR program.

SCRs may reduce the load they draw from the grid through load curtailments, the use of certain behind-the-meter generators (called Local Generators⁴), or through a combination of load curtailment and use of a Local Generator. Eligibility to use Local Generators in the SCR program is conditioned on, among other things, the Local Generator's compliance with all applicable federal, state, and local environmental regulations, including the Environmental Protection Agency's ("EPA") Reciprocating Internal Combustion Engine ("RICE") National Emissions Standards for Hazardous Air Pollutants ("NESHAP") rules.⁵

⁴ 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." Market Administration and Control Area Services Tariff § 2.12 [hereinafter *Services Tariff*].

⁵ *Services Tariff* § 5.12.11.1 ("Local Generators . . . will be required to comply with the verification and validation procedures set forth in the ISO Procedures."); *See also* New York Indep. Sys. Operator, Inc. Installed Capacity Manual § 4.12.2 ("By enrolling a SCR that participates with a Local Generator, the RIP is certifying to the NYISO, on behalf of itself and the SCR, that the SCR has obtained all necessary regulatory approvals for the Local

If a RIP sells Capacity from a SCR using a Local Generator that does not comply with such environmental regulations, the Services Tariff requires the NYISO to assess a deficiency charge due to the invalid enrollment of that SCR.⁶ Although the NYISO has not yet determined whether penalties are appropriate for NRGCS capacity sales for May 2016, sales by invalidly enrolled SCRs would be subject to a penalty.

NRGCS also seeks waiver of Services Tariff Section 5.14.2.3.4. RIPs are subject to penalty under this section when the total of the amount of UCAP sold by the RIP for a month in the NYISO's Capability Period Auction, Monthly Auction, or Spot Auction, or sold in a Bilateral Transaction, is greater than the greatest quantity MW reduction achieved during a single hour in a performance test or event called by the NYISO.⁷ Performance is calculated on an individual SCR basis, and is rolled up to determine the total performance for a RIP's entire portfolio in a Load Zone. If an individual SCR is subject to another penalty, such as a penalty assessed under Section 5.14.2.1, the NYISO removes the already-penalized SCR from the calculation of the RIP's portfolio performance shortfall so as not to double-penalize the RIP.⁸

Generator to operate for the purposes of reducing the Load being supplied from the NYS Transmission System and/or distribution system during all NYISO initiated performance tests and events.”).

⁶ *Services Tariff* § 5.14.2.1 (“If an Installed Capacity Supplier is found, at any point during a Capability Period, to have had a shortfall for that Capability Period, *e.g.*, when the amount of Unforced Capacity that it supplies is found to be less than the amount it was committed to supply, the Installed Capacity Supplier shall be retrospectively liable to pay the ISO” a monthly deficiency charge, and “[i]f the Installed Capacity Supplier is a RIP, it may experience a shortfall when, among other reasons, it sells ineligible or unavailable capacity MW associated with a properly or improperly enrolled SCR.”).

⁷ *Services Tariff* § 5.14.2.3.4.

⁸ *See* New York Indep. Sys. Operator, Inc. Installed Capacity Manual, § 4.12.4.6 (“When a SCR has previously been assessed a deficiency charge for an ineligible enrollment, ... the SCR shall be removed from both the UCAP equivalent of the greatest performance during a single hour and the UCAP sales during the determination of the RIP portfolio performance for the applicable months within the Capability Period.”).

B. The RICE NESHAP Regulations

In 2010 the EPA promulgated RICE NESHAP regulations applicable to Local Generators providing emergency demand response service, including participation in the NYISO's SCR program (the "2010 Rule").⁹ The rule permitted "emergency" generators to operate for up to 15 hours per year in emergency demand response programs. EPA received requests to reconsider the 15-hour limit shortly after the rule was finalized, and in 2013 promulgated a new set of regulations that would permit operation of emergency generators for up to 100 hours in emergency demand response programs (the "2013 Rule").¹⁰ The State of Delaware petitioned the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit") for judicial review of the 2013 Rule in April 2013.¹¹

The DC Circuit vacated and remanded the 100-hour emissions exemption for emergency generator participation in emergency demand response programs in 2015.¹² The EPA then sought to stay the DC Circuit's Mandate implementing its decision ("Motion to Stay") until May 1, 2016,¹³ which was granted on August 14, 2015.¹⁴ On April 15, 2016, the EPA issued "Guidance on Vacatur of RICE NESHAP and NSPS Provisions for Emergency Engines,"

⁹ See 75 Fed. Reg. 9,648, 9,654, 9,677 (Mar. 3, 2010).

¹⁰ *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 (Jan. 30, 2013).

¹¹ Petition for Review, Delaware Dep't of Natural Resources & Env'tl. Control v. EPA, 785 F.3d 1 (D.C. Cir. 2015) (No. 13-1093).

¹² *Delaware Dep't of Natural Resources & Env'tl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015) ("Delaware").

¹³ Respondent's Motion for Stay of Mandate, Delaware Dep't of Natural Resources & Env'tl. Control v. EPA, 785 F.3d 1 (D.C. Cir. 2015) (No. 13-1093) [hereinafter *Motion to Stay*].

¹⁴ Order Granting Respondent's Motion for Stay of Mandate, Delaware Dep't of Natural Resources & Env'tl. Control v. EPA, 785 F.3d 1 (D.C. Cir. 2015) (No. 13-1093).

advising the regulated community of the EPA's intended application of the RICE NESHAP rules once the stay expired.¹⁵

II. Motion to Intervene

The NYISO is the independent body responsible for providing open access transmission service, maintaining reliability, and administering competitive wholesale markets for Energy, Capacity, and Ancillary Services in New York State. The NYISO further administers various demand response programs in each of those wholesale markets pursuant to Commission-approved tariffs. In this proceeding, NRGCS is requesting a waiver of penalty provisions established by the NYISO's Services Tariff. The NYISO has a unique interest in this proceeding that cannot be adequately represented by any other entity and, therefore, should be permitted to intervene with all rights of a party.

III. Protest

A. The "Affected Resources"

Based on the information provided by NRGCS, certain SCRs it enrolled for the month of May 2016 are subject to penalty under Services Tariff Section 5.14.2.1 because they were not permitted to operate in the SCR program pursuant to EPA's RICE NESHAP Rules (the "Affected Resources"). The NYISO has not yet analyzed final SCR performance data for the 2016 Summer Capability Period (which includes May), but expects to review data from the Affected Resources beginning in February 2017.¹⁶

¹⁵ 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* (Apr. 15, 2016) [hereinafter *Guidance Document*].

¹⁶ The NYISO is currently processing data from the Summer 2016 Capability Period, and expects to determine whether potential penalties are warranted by the end of March 2017.

B. A penalty pursuant to Services Tariff Section 5.14.2.1 is warranted because NRGCS sold capacity from an ineligible resource

Assuming, *arguendo*, that enrollment of the Affected Resources is a violation of the NYISO's Services Tariff, the question becomes whether NRGCS should be relieved of its penalty because of regulatory uncertainty. The NYISO believes it should not. NRGCS, like all other RIPS participating in the NYISO's SCR program, is required to determine whether each SCR it enrolls meets the eligibility requirements to participate in the NYISO's ICAP market before selling capacity for that SCR. This includes the obligation to certify that a Local Generator meets applicable EPA regulations. In this matter, NRGCS sold capacity from the Affected Resources when it could not certify that those resources met the applicable eligibility requirements.¹⁷

1. The NYISO's Services Tariff addresses NRGCS' conduct and should be enforced

NRGCS argues that it was subject to regulatory and NYISO processes outside of its control that led to its failure to comply with the NYISO's tariffs.¹⁸ NRGCS reveals that the underlying uncertainty existed ("[w]hile all market participants were on notice that the operative environmental rules would be changing, NRGCS believed in good faith that the changes would not affect its ability to participate in the NYISO capacity market"¹⁹), and decided to enroll the

¹⁷ NRGCS removed the Affected Resources from the Capacity market for the June delivery month in compliance with the NYISO's Services Tariff.

¹⁸ *Waiver Request* at 1-2.

¹⁹ *Id.* at 1.

Affected Resources anyway. The NYISO's Services Tariff sanctions RIPS for this conduct specifically to deter them from enrolling resources they are not certain can perform.²⁰

The SCR program is a reliability-based demand response program. As such, the NYISO's grid operators rely on the capacity sold by RIPS to actually perform when called upon to support the bulk power system. The NYISO has many processes in place to ensure that the SCRs enrolled and selling capacity actually comply with the market rules (*e.g.*, audits, performance testing, etc.), and assesses penalties to RIPS who do not comply with those market rules to deter inappropriate conduct. In this matter, NRGCS enrolled resources that it knew – due to the regulatory uncertainty – might not be able to participate in the SCR program beginning in May 2016. The risk of that decision should properly be borne by NRGCS. Removing the compliance incentive (*i.e.*, the penalty) via waiver would send the improper signal to the market that a RIP may be absolved of its failure to satisfy 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 could not perform).

2. The EPA's intent to apply more stringent emissions controls was apparent beginning in July 2015

Contrary to NRGCS' assertion,²¹ the NYISO believes that the EPA signaled its intent to subject the Affected Resources to the more stringent emissions standards in its July 15, 2015 Motion to Stay. In fact, the very first sentence of its argument in favor of staying the mandate provides: “[v]acatur of the 100-hour per year allowances (*i.e.*, the provisions allowing up to 100 hours per year of emergency demand response operation during a grid operator-declared Energy

²⁰ The NYISO is not aware of any SCRs, other than the Affected Generators enrolled by NRGCS, that were improperly enrolled in May 2016 due to the regulatory uncertainty related to the RICE NESHAP rules and litigation.

²¹ See *Waiver Request* at 6.

Emergency Alert Level 2 ...), means that engines operating for purposes of emergency demand response ... no longer qualify as ‘emergency engines’ under EPA’s regulations, absent further action by EPA on remand.”²² EPA followed that declaration with an explanatory footnote that states, in part, that “EPA does not interpret this Court’s vacatur of the 100-hour provisions within the 2013 Rule to reinstate provisions within EPA’s prior 2010 regulation ... that had previously allowed up to 15 hours per year of emergency demand response.”²³ These two passages are directly at odds with NRGCS’ decision to enroll the Affected Resources in the NYISO’s SCR program in May 2016.

EPA’s instruction that the Affected Resources would not be permitted to operate under the 2010 Rule is a theme repeated throughout its Motion to Stay. For example, EPA sought a minimum stay until at least August 31, 2015, to protect near-term grid reliability, arguing that the stay would allow continued operation of emergency generators *that would otherwise be prohibited from operating* because they did not meet the more stringent non-emergency generator emissions controls that would be applicable immediately upon vacatur of the 2013 Rule.²⁴

Similarly, EPA sought a longer stay until May 1, 2016, in order 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. The EPA argued

²² *Motion to Stay* at 4-5.

²³ *Id.* at 5 n.2.

²⁴ *Id.* at 6 (“Issuance of the mandate this summer could threaten electric grid reliability. Specifically it would result in the likely unavailability of many reciprocating internal combustion engines that have already committed to operate if called upon for purposes of emergency demand response. Such engines would be unavailable because they presently lack the emissions controls required for non-emergency engines.”).

that “[i]n light of the Court’s May 1, 2015 decision, *operators of engines that are used for purposes of emergency demand response will need to determine whether to install the controls required of non-emergency engines so as to be able to continue such operation*” (emphasis added).²⁵ EPA, contemplating both near-term reliability and long-term demand response participation, advised the Court that Affected Resources would be required to comply with the more stringent emissions standards for non-emergency generators upon vacatur.

The EPA did introduce the possibility that it would promulgate a new rule while the mandate was stayed (addressing “operation of emergency engines to address voltage or frequency deviations”²⁶), but such a rule, if promulgated, would not have permitted the Affected Resources to participate in the NYISO’s SCR program. Although the NYISO does call on SCRs to provide voltage and frequency support, it also calls SCRs to provide other grid support services (such as to provide support during operating reserves shortages) and therefore the Affected Resources would need to meet the more stringent emissions controls to continue participation. The EPA did not initiate such rulemaking at any time during the one-year stay.

Even though the EPA’s statements in its Motion, taken as a whole, indicate the Agency’s intent to prohibit the operation of the Affected Resources in emergency demand response programs, NRGCS enrolled and sold capacity from the Affected Resources for the month the DC Circuit’s vacatur was set to take effect. NRGCS states that it acted in good faith, and the NYISO has no reason to believe the company purposefully intended to enroll ineligible resources. Rather, and as stated in the Waiver Request, NRGCS decided to enroll and sell capacity from the

²⁵ *Id.* at 9-10.

²⁶ *Motion to Stay* at 13.

Affected Resources after reviewing applicable case law, consulting with outside counsel, and engaging in discussions with EPA staff.²⁷

NRGCS downplays the legal authority that should be given to statements made by EPA counsel in its Motion to Stay, and states that “[t]he only suggestion NRGCS [had] to the contrary was an EPA pleading on March 28, which suggested, in a footnote, that the entire rule would be nullified. However, that footnote was hardly binding EPA guidance, and therefore, NRGCS had every reason to believe that EPA would revert back to the 15-hour rule.”²⁸ While the NYISO offers no opinion on whether the text of the Motion to Stay was binding guidance, the mere fact that the EPA expressed its intent to prohibit emergency generators from any participation in emergency demand response programs should have put the regulated community on notice that such resources were likely to be barred starting in May 2016.

3. The “surprise” guidance document should not have been a surprise

EPA asked for and was granted a stay until May 1, 2016. At the time SCR enrollments for the May 2016 ICAP Spot Market Auction opened, EPA had yet to issue any sort of formal guidance (other than its Motion to Stay). It should have been clear to NRGCS, however, that enrolling the Affected Generators in the NYISO’s SCR program for the month of May 2016 exposed the company to risk of penalty because of that regulatory uncertainty.

If NRGCS remained uncertain as to whether the Affected Resources could participate in the SCR program, it had the option to not enroll the Affected Resources until there was greater

²⁷ *Waiver Request* at 5-6.

²⁸ *Id.* at 6. The NYISO is unaware of which pleading NRGCS is referring to in its Waiver Request. The NYISO reviewed the docket for DC Circuit Case No. 13-1093, the *Delaware* docket, and could not find a pleading by EPA on such date. However, as explained throughout, once the EPA’s 100-hour rule was vacated and remanded, the EPA advised the Court and the public that it would not be reinstating the 15-hour rule in its July 15, 2015 Motion to Stay.

regulatory certainty. The NYISO runs monthly ICAP Spot Market Auctions and NRGCS had the option to not enroll the Affected Resources in May, but to enroll them for June (if they met EPA emissions requirements) once the EPA clarified its position. While it is true that the company would have lost revenue by holding the Affected Resources out of the market, it is also true that enrolling the Affected Resources without regulatory certainty subjects the company to the risk of not being able to supply the Capacity it sold and, therefore, to the risk of penalty.

Though issued only shortly before the stay was set to expire, the information provided in the April 14, 2016 Guidance Document is consistent with the Motion to Stay. Just as stated in the Motion to Stay, the Guidance Document asserts that the Affected Resources would be, upon issuance of the mandate, subject to the same emissions regulation as non-emergency generators: “[i]t is the EPA’s view that [the vacatur] will mean that an engine may not operate in circumstances described in the vacated provisions for any number of hours per year unless it is in compliance with the emissions standards and other applicable requirements for non-emergency generators.”²⁹

In asking the Commission to grant waiver in this matter, NRGCS is asking the Commission to absolve NRGCS of the risk it took by enrolling the Affected Resources for the ICAP auction month of May 2016. The NYISO believes that NRGCS assumed the risk of non-compliance and therefore the company should be subject to the penalty provisions of the Services Tariff addressing that non-compliance.

²⁹ *Guidance Document* at 2.

**C. The Commission should deny NRGCS' request for waiver of Services
Tariff Section 5.14.2.3.4 as moot**

As explained above, the NYISO does not, as a matter of equity, double-penalize RIPs that have an ICAP shortfall for their portfolio. Prior to determining if a RIP has a penalty under Services Tariff Section 5.14.2.3.4, the NYISO will calculate all other potential penalties, and, if an individual SCR has an ICAP shortfall and is penalized for specific conduct (such as the Affected Resources discussed herein), the NYISO will remove those specific SCRs when determining if the RIP has a portfolio-based shortfall.

If the Commission denies NRGCS' Waiver Request, the Affected Resources will be removed from the calculation of any penalties NRGCS may receive for the performance of its portfolio. In the alternative, if the Commission grants NRGCS's Waiver Request, the Commission will exonerate NRGCS' sanctionable conduct, and, for the purposes of penalty calculations, the NYISO intends to treat the Affected Resources as if they were never enrolled and therefore do not count toward a portfolio performance shortfall. Based on these reasons, the Commission should deny NRGCS' request for waiver of Services Tariff Section 5.14.2.3.4 as moot.

IV. Communications and Correspondence

All communications and service with regard to this filing should be directed to:

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V. Conclusion

WHEREFORE, for the foregoing reasons, the NYISO respectfully requests that the Commission (i) grant this motion to intervene, (ii) deny NRGCS waiver of Services Tariff Section 5.14.2.1, and (iii) deny NRGCS waiver of Services Tariff Section 5.14.2.3.4 as moot.

Respectfully submitted,

/s/ Gregory J. Campbell

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February 13, 2017

cc:	Michael Bardee	Larry Parkinson
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 13th day of February 2017.

/s/ Joy A. Zimmerlin

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