

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

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Genbright LLC

Docket No. ER20-366-000

ORDER DENYING WAIVER

(Issued February 3, 2020)

1. On November 13, 2019, pursuant to Rule 207(a)(5) of the Commission’s regulations,¹ Genbright LLC (Genbright) submitted a request for a one-time, limited waiver of Market Rule 1 of ISO New England Inc.’s (ISO-NE) Transmission, Markets and Services Tariff (Tariff)² to allow fourteen distributed energy resource projects (Projects)³ to participate in the fourteenth Forward Capacity Auction (FCA 14)⁴ administered by ISO-NE (Waiver Request). As discussed below, we deny the Waiver Request.

I. Background

2. Market Rule 1 of the Tariff governs the operation and eligibility requirements of ISO-NE’s FCA. Under these rules, each new resource seeking to participate must undergo a qualification evaluation.⁵ To participate, project sponsors must submit both a Show of Interest form and a New Capacity Qualification Package. Furthermore, the rules specify that project sponsors must have “a valid Interconnection Request under

¹ 18 C.F.R. § 385.207(a)(5) (2019).

² ISO-NE, Transmission, Markets and Services Tariff, § III Market Rule 1 – Standard Market Design (0.0.0) (Market Rule 1), § III.13.1 Forward Capacity Auction Qualification (63.0.0).

³ Seven of the Projects are solar photovoltaic generating facilities; the other seven are energy storage facilities. *See* Genbright Answer at 5; Waiver Request at 5, 10.

⁴ Capitalized terms not defined herein are used as they are defined in the Tariff. *See* Tariff § I.2 Rules of Construction; Definitions (116.0.0).

⁵ *Id.* § III.13.1.

Schedules 22, 23, or 25 of [the Tariff] prior to submitting a Show of Interest”⁶ After the required information is submitted, ISO-NE determines whether a new resource qualifies to offer capacity in the FCA. Tariff Section III.13.1.1.2.8 requires ISO-NE, “[n]o later than one-hundred twenty-seven (127) days before the [FCA],” to send a notification to each project sponsor or market participant, stating whether the new resource is accepted for participation in the FCA.⁷ This notification is referred to as a Qualification Determination Notification. Tariff Section III.13.1.9.1 requires a project sponsor to pay a Forward Capacity Market (FCM) Deposit within the timeframe specified in the ISO-NE Financial Assurance Policy, which, for FCA 14, ends on October 28, 2019.⁸

3. Genbright states that it submitted its Show of Interest form on April 26, 2019, as required. Genbright explains that its Show of Interest form indicated that the Projects had submitted Interconnection Requests pursuant to a Massachusetts-administered interconnection process. Genbright states that, on September 27, 2019, it received fourteen Qualification Determination Notifications, stating that each of the Projects was ineligible to participate in FCA 14. According to Genbright, the Qualification Determination Notifications state that, because the point of interconnection for the Projects is under the Commission’s jurisdiction as a facility subject to the Tariff, the Projects should have filed Interconnection Requests in accordance with Schedule 23.⁹ Genbright states that ISO-NE concluded that the interconnection application did not support the Projects’ participation in the FCA 14 because Genbright sought interconnection under a state-administered interconnection process.¹⁰

4. Genbright asserts that all fourteen Projects were incorrectly disqualified from participating in FCA 14. Genbright claims that “ISO-NE’s publicly-issued, training material on FCA 14 states that a valid Interconnection Request is required as part of the Show of Interest form submittal” for the FCA qualification process, “regardless of the

⁶ *Id.* §§ III.13.1.1.2, III.13.1.1.2.1(a).

⁷ *Id.* § III.13.1.1.2.8.

⁸ *See id.* § III.13.1.9; Forward Capacity Auction 14 Schedule, Capacity Commitment Period: 2023-2024, <https://www.iso-ne.com/static-assets/documents/2017/05/fca-14-timeline-5-9-2017.pdf>; *c.f.* Waiver Request at 1 n.2.

⁹ Waiver Request at 4 (quoting Ex. B, ISO-NE, Qualification Determination Notification for the Projects (Sept. 27, 2019)).

¹⁰ *Id.*

jurisdictional status of the project's proposed interconnection.”¹¹ Genbright interprets this language to mean that a project sponsor's Show of Interest form could represent that an Interconnection Request had been made pursuant to either: (1) Schedules 22, 23, or 25 of the Tariff (for Commission jurisdictional interconnections); or (2) the local transmission owner's interconnection processes (for state jurisdictional interconnections).¹²

5. Genbright explains that the seven Projects that are solar photovoltaic generating facilities each will participate in the Solar Massachusetts Renewable Target project as a Qualifying Facility (QF) selling 100 percent of its output to Eversource Energy Service Company (Eversource), the Projects' interconnecting electric distribution company, pursuant to Eversource's Massachusetts-approved tariff. Therefore, Genbright contends that these Projects are not subject to the Commission's jurisdiction and do not need to apply for interconnection pursuant to Schedule 23.¹³

6. Genbright further claims that “at least three, and perhaps all seven,” of the remaining Projects, which consist of energy storage facilities, likewise are not subject to the Schedule 23 process.¹⁴ Genbright argues that ISO-NE's denial of each of these Projects is based on Eversource's erroneous assertion that the distribution line into which each Project is interconnecting is subject to the Commission's jurisdiction because there is a pre-existing QF on the distribution line that sells all of its output to Eversource, which Eversource had registered with ISO-NE as a settlement-only generator.¹⁵

7. Genbright claims that neither Eversource nor ISO-NE informed any of the Projects that they had filed incorrect Interconnection Requests, even though Eversource was aware of each Project's point of interconnection for many months and, in some cases years, before the Show of Interest window closed. Genbright also contends that Eversource knew that the Projects intended to participate in the ISO-NE market.

¹¹ *Id.* at 3 (citing ISO-NE, *FCM Show of Interest for New Generation and Imports For the Fourteenth Forward Capacity Auction (CCP 2023-2024)*, at 8, 10, (Feb. 27, 2019) <https://www.iso-ne.com/staticassets/documents/2019/03/20190227-fcm-soi-new-gen-imports.pdf>).

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *See id.* at 5, 10.

¹⁵ *Id.* at 5. Genbright describes a “settlement-only generator” as “a facility that generates less than 5 MW and is entitled to receive capacity credit but not be centrally dispatched by ISO-NE.” *Id.* at 10.

Genbright asserts that Eversource's failure to timely notify the Projects of its determination will lead to an inequitable disqualification of the Projects from participating in FCA 14.¹⁶

II. Waiver Request

8. Genbright requests a waiver of the deadline in Tariff Section III.13.1.1.2.8 for ISO-NE's selection of resources eligible to participate in FCA 14 (i.e., September 27, 2019). Genbright also requests waiver of Tariff Sections III.13.1.1.2 and III.13.1.1.2.1(a).¹⁷ If the Commission grants these requests, Genbright asks the Commission to waive the requirement under Tariff Section III.13.1.9.1 for Genbright to pay the FCM Deposit by October 28, 2019.¹⁸

9. Genbright states that the Commission has previously granted waivers of tariff requirements when: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) the waiver would remedy a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹⁹ Genbright also adds that the Commission has granted one-time waivers to alleviate the effects of errors by independent system operators or other entities and limited waivers to correct errors that parties discover only after a submission window has closed.²⁰

10. First, Genbright claims that Genbright and ISO-NE acted in good faith.²¹ Genbright argues that ISO-NE mischaracterized the seven solar generating Projects as not having the correct Interconnection Request because it relied on misinformation provided by Eversource. Genbright asserts that it failed to include an Interconnection Request pursuant to Schedule 23 in its Show of Interest because of uncertainty and lack of

¹⁶ *Id.* at 5, 6.

¹⁷ *Id.* at 1, 18. Tariff Section III.13.1.1.2 addresses the FCA qualification process for new resources. Tariff Section III.13.1.1.2.1(a) describes what information should be included in the Show of Interest form completed by new resources.

¹⁸ *Id.* at 1 n.2.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 14-15 (citing *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006); *Wisvest-Connecticut*, 101 FERC ¶ 61,372, at 62,551 (2002); *Great Lakes Gas Transmission Ltd. P'ship*, 102 FERC ¶ 61,331 (2003); *TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003); *N. Border Pipeline Co.*, 76 FERC ¶ 61,141 (1996)).

²¹ *Id.* at 15.

transparency between ISO-NE and Eversource. Genbright states that, after learning of the Qualification Determination Notifications, it acted diligently and as expeditiously as possible to investigate the factual and legal basis for the disqualifications.²² Genbright adds that it has complied with all other deadlines, submittals and requirements for the Projects' participation in FCA 14.

11. Second, Genbright asserts that the request is limited in scope because it concerns a discrete number of projects and would not invalidate any portion of the Tariff.²³ Genbright adds that this limited waiver is intended to "solve" a matter of interpretation of existing Commission precedent and to waive Tariff rules and deadlines in order to correctly apply that interpretation in a just manner.²⁴

12. Third, Genbright contends that granting the waivers would remedy a concrete problem because, without the waivers, the Projects' capacity will not be able to participate in FCA 14.²⁵

13. Fourth, Genbright asserts that the waivers will not have undesirable consequences, such as harming third parties. Genbright contends that granting the waivers will not delay ISO-NE's implementation of FCA 14 nor any participants that have previously been afforded eligibility under the program. Genbright adds that granting the waiver and allowing the Projects to participate in FCA 14 will not impair ISO-NE's ability to commence FCA 14 on February 3, 2020 or be a detriment to other eligible FCA 14 participants or ISO-NE customers.²⁶

III. Notices of Filings and Responsive Pleadings

14. Notice of Genbright's filing was published in the *Federal Register*, 84 Fed. Reg. 63,868 (2019), with interventions and protests due on or before November 27, 2019. Calpine Corporation, Eversource, ISO-NE, National Grid, New England Power Pool Participants Committee, and NRG Power Marketing LLC filed timely motions to intervene. RENEW Northeast, Inc. (RENEW) filed a motion to intervene out-of-time. Eversource filed a motion to reject and protest (Eversource

²² *Id.* at 16.

²³ *Id.* at 16-17.

²⁴ *Id.* at 17.

²⁵ *Id.*

²⁶ *Id.*

Protest), and ISO-NE filed a protest (ISO-NE Protest). Genbright filed an answer to the Eversource Protest (Genbright Answer).

15. On December 5, 2019, Commission staff issued a letter, notifying Genbright that its filing was deficient because it did not include a form of non-disclosure agreement, as required by section 388.112(b) of the Commission's regulations, where, as Genbright did here, an applicant requests privileged treatment.²⁷ Staff requested that Genbright submit a form of non-disclosure agreement.²⁸ On December 6, 2019, Genbright submitted its response to the December 5, 2019 deficiency letter and a form of non-disclosure agreement.²⁹ Notice of Genbright's deficiency response was published in the *Federal Register*, 84 Fed. Reg. 68,928 (2019), with interventions and protests due on or before December 13, 2019. None was filed.

A. Eversource Protest

16. Eversource asks the Commission to deny the Waiver Request.³⁰ Eversource asserts that Genbright is seeking substantive, jurisdictional rulings that are inappropriate in a waiver request.³¹ Eversource argues that Genbright's request is not about whether a tariff provision should be waived due to a one-time error, but rather an attempt to seek a substantive ruling related to disagreements over the law as to what causes a distribution-level interconnection to fall under Commission jurisdiction.³² Eversource states that such issues would be more appropriate in the context of a declaratory order or rulemaking.³³

²⁷ 18 C.F.R. § 388.112(b). Section 388.112(a) provides that, where an applicant requests privileged treatment for some or all of the information contained in a submission, it must also submit a proposed form of protective agreement.

²⁸ Commission Staff December 5, 2019 Deficiency Letter.

²⁹ Genbright December 6, 2019 Response to Deficiency Notice.

³⁰ Eversource Protest at 27.

³¹ *Id.* at 2.

³² *Id.* at 2-3.

³³ *Id.* at 4.

17. Eversource also asserts that the Waiver Request fails three prongs of the waiver test.³⁴ First, Eversource contends that it did not err in characterizing the relevant facilities as Commission-jurisdictional.³⁵ Second, Eversource argues that the Waiver Request is not limited in scope because the findings that Genbright seeks involve: (1) the impact of wholesale capacity sales to third parties on QF interconnection jurisdiction; and (2) whether utilities in Massachusetts must use their distribution systems to move electricity purchased pursuant to the Public Utility Regulatory Policies Act of 1978³⁶ to the ISO-NE market, which affects which distribution facilities are subject to wholesale use and interconnection jurisdiction.³⁷ Eversource argues that Genbright's views on jurisdiction would have far-reaching impacts on auction eligibility, jurisdiction over existing interconnection agreements, and the appropriate queue for yet-to-be-interconnected generators.³⁸ Third, Eversource claims that the Waiver Request does not resolve a concrete problem.³⁹

18. Eversource adds that Genbright's exact relationship with the Projects is unclear, other than a claim that it is an aggregator. Eversource states that, while it has had close levels of coordination with the Project developers, it has had very limited interaction with Genbright.⁴⁰ Eversource also contends that the identities of the Projects are unclear.⁴¹

B. ISO-NE Protest

19. ISO-NE asks the Commission to deny the Waiver Request, arguing that Genbright has failed to demonstrate any error in the treatment of the Projects.⁴² ISO-NE argues that Genbright's submissions to ISO-NE included interconnection applications under state-regulated tariffs of Eversource's distribution affiliates. ISO-NE asserts that it asked

³⁴ *Id.* at 3.

³⁵ *Id.* at 5, 26.

³⁶ 16 U.S.C. §§ 796(17)-(18), 824a-3 (2018).

³⁷ Eversource Protest at 3-4.

³⁸ *Id.* at 3.

³⁹ *Id.* at 26.

⁴⁰ *Id.* at 2 n.2 (citing Waiver Request at 4).

⁴¹ *Id.* at 6.

⁴² ISO-NE Protest at 1.

Eversource, as the interconnecting transmission owner, to verify the requested interconnection, and in response Eversource informed ISO-NE that the point of interconnection for each of the Projects is on a distribution facility subject to the Tariff.⁴³ Furthermore, ISO-NE contends that, because the Projects indicated the intent to participate in the ISO-NE administered wholesale markets by seeking to qualify in the FCM, none of the exceptions in Schedule 23 apply. Therefore, ISO-NE concludes that it correctly determined that the Projects did not qualify for FCA 14 because their points of interconnection are located on distribution facilities subject to its Tariff and the Projects did not submit Interconnection Requests under Schedule 23 on or before the close of the prescribed Show of Interest submission window for FCA 14.⁴⁴

C. Genbright Answer

20. Genbright disputes Eversource's claim that the Waiver Request involves complicated legal questions.⁴⁵ Genbright asserts that the Commission can grant the Waiver Request based solely on the fact that Eversource failed to comply with its obligation under ISO-NE rules to timely inform the Project developers of the jurisdictional status of the distribution feeder into which interconnection was sought. Genbright also claims that the other arguments in the Waiver Request require only that the Commission clarify existing policies.⁴⁶

21. Genbright argues that ISO-NE has made it clear that Eversource, as the sole possessor of information concerning the jurisdictional status of its distribution lines, had the obligation under ISO-NE's rules to determine and communicate in a timely manner to the Project developers the jurisdictional status of each distribution feeder into which an interconnection was sought. Genbright claims that Eversource knows, but ignores, ISO-NE's applicable rules and stated practices.⁴⁷

22. Genbright adds that Eversource's interconnection tariff and applicable Massachusetts requirements require each Project developer to provide a form to

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 2.

⁴⁵ Genbright Answer at 2 (citing Eversource Protest at 26).

⁴⁶ *Id.* at 2-3.

⁴⁷ *Id.* at 4 (quoting Eversource in ISO-NE, Response, Docket No. RM18-9-000, att. B, at 3 (Oct. 7, 2019) ("A determination of whether a distribution facility is subject to the OATT is typically made on a case-by-case basis when Eversource receives an Interconnection Request on a specific distribution facility.")).

Eversource, stating whether the Project intends to participate in the ISO-NE wholesale markets. Genbright contends that, based on the information that Eversource received for the energy storage portion of each of the Projects, Eversource must have known that each of the integrated projects intended to participate in the ISO-NE wholesale markets. Genbright asserts that, despite this knowledge, Eversource continued to process the applications and issue interconnection service agreements for each Project, while failing to notify the Project developers that they were proposing to interconnect into distribution feeders that were subject to the Commission's jurisdiction. Genbright contends that Eversource's lack of transparency and communication deprived each Project developer and Genbright of any ability to pursue a Schedule 23 Interconnection Request in time to participate in FCA 14.⁴⁸

23. Genbright notes that, with respect to its related waiver request filed in Docket No. ER20-158-000 regarding four Genbright distributed energy resource projects, Eversource acknowledged that it belatedly discovered that it had made an error regarding the jurisdictional treatment of its distribution feeder lines, which caused ISO-NE to inappropriately disqualify prior Genbright projects from FCA 14.⁴⁹ Genbright argues that granting the Waiver Request is justified on equitable grounds and would prevent harm to the Projects caused by Eversource's failure to manage its Interconnection Request process correctly.

24. Genbright disagrees that it should have sought relief by seeking a declaratory order or participating in pending rulemakings, asserting that neither of these processes would allow the Projects to participate in FCA 14.⁵⁰

25. Genbright responds that, contrary to Eversource's claims that the identity of the Projects is unclear, Eversource knows each Project's identity and Genbright's role with respect to each. Genbright states that, prior to the Waiver Request, counsel for Eversource and Genbright extensively discussed the Projects and Eversource's basis for disqualifying them from participation in FCA 14.⁵¹

⁴⁸ *Id.* at 5-6 (citing Eversource Protest at 22-23).

⁴⁹ *Id.* at 7 (citing Eversource Protest at 5 n.8). The Commission granted the waiver request in Docket No. ER20-158-000. *Genbright LLC*, 169 FERC ¶ 61,178 (2019).

⁵⁰ Genbright Answer at 7-8 (citing Eversource Protest at 4).

⁵¹ *Id.* at 3 (citing Eversource Protest at 2 n.2, 6).

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2019), we grant RENEW's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Genbright's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

29. We deny the Waiver Request. The Commission has granted waiver of tariff provisions where: (1) the underlying error was made 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.⁵² We find that Genbright has failed to demonstrate that the Waiver Request is limited in scope.

30. Although Genbright's answer narrows its argument to asserting that Eversource failed to timely alert the Project developers of the jurisdictional status of the distribution feeder into which interconnection was sought, Genbright seeks to participate in FCA 14 by having several Tariff provisions waived. Specifically, Genbright is requesting waiver of Tariff provisions that implicate Schedule 23, which contains the terms and conditions for interconnecting small generating facilities to the ISO-NE-administered transmission system. As an example, Genbright's requested waiver would allow the Projects to avoid ISO-NE's complex interconnection study process, including the system impact study, which is ISO-NE's comprehensive reliability evaluation. Genbright's Waiver Request is distinguishable from other proceedings where the Commission has granted waiver to

⁵² See, e.g., *New Brunswick Energy Mktg. Corp.*, 167 FERC ¶ 61,252, at P 12 (2019); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

allow, for example, a discrete, one-time waiver of a tariff-imposed deadline.⁵³ For these reasons, we deny the Waiver Request.⁵⁴

The Commission orders:

Genbright's Waiver Request is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵³ See, e.g., *Calpine Energy Serv., L.P.*, 154 FERC ¶ 61,082 (2016) (granting waiver to allow applicant to elect a lock-in as part of its otherwise timely new capacity qualification package, based upon finding that applicant did not seek waiver of substantive tariff requirements and neither undesirable consequences nor harm to third parties would result).

⁵⁴ The Commission granted Genbright's aforementioned waiver request filed in Docket No. ER20-158-000. In that proceeding, the parties agreed that the projects were subject to the state-administered interconnection process, and therefore, unlike here, concerns related to interconnection pursuant to Schedule 23 were not raised.