

162 FERC ¶ 61,061
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

New York Independent System Operator, Inc.

Docket No. ER17-1624-002

ORDER DENYING RECONSIDERATION, REHEARING AND CLARIFICATION

(Issued January 26, 2018)

1. On August 9, 2017, Green Power Energy LLC (Green Power) filed a petition for reconsideration or, alternatively, a request for rehearing of the Commission Secretary's notice denying Green Power's untimely motion to intervene and rejecting its request for rehearing.¹ Green Power also requests clarification that the July 10 Notice did not dismiss Green Power's request for stay. As discussed below, we deny Green Power's requests for reconsideration, rehearing, and clarification.

I. Background

2. Green Power is developing a 10 MW wind generation project called the Cody Road Wind Farm in Madison County, New York (Project), which will consist of five wind turbines, and will interconnect to the transmission system owned by Niagara Mohawk Power Corporation d/b/a National Grid (National Grid).² In 2005, NYISO initiated its Small Generator Interconnection Procedures (SGIP) for the Project and completed the Interconnection Facilities Study in May 2009. Thereafter, in August 2009, NYISO, National Grid, and Green Power executed a Small Generator Interconnection Agreement (SGIA) for the Project, which was subsequently accepted by the

¹ *Green Power Energy, LLC*, 160 FERC ¶ 62,016 (2017) (July 10 Notice).

² Green Power Petition at 2.

Commission.³ According to the SGIA's original schedule, the Project was to be in commercial operation by October 2010.

3. After numerous extensions of the Project's commercial operation date, on January 30, 2017, Green Power asked NYISO for a seventh extension of the commercial operation date until July 2018. After concluding that Green Power had not demonstrated reasonable progress using the milestones that it had agreed to satisfy by January 31, 2017,⁴ NYISO informed Green Power on February 17, 2017 that the Project would be removed from the interconnection queue. Subsequently, on May 18, 2017, NYISO filed with the Commission a notice of cancellation of the SGIA. NYISO argued that Green Power's lack of reasonable progress warranted a withdrawal of the Project from the interconnection queue, pursuant to section 30.4.4.5.2 of Attachment X,⁵ and that the SGIA terminates upon withdrawal from the interconnection queue, pursuant to section 7.6.3 of the SGIA.⁶ No interventions or comments were submitted in this proceeding. On June 15, 2017, Commission staff, under delegated authority, issued a letter order accepting NYISO's notice of cancellation of the SGIA, effective July 17, 2017, as requested.⁷

³ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER09-1693-000 (Oct. 13, 2009) (delegated letter order). The SGIA is designated in NYISO's OATT as Service Agreement No. 1483.

⁴ In July 2016, NYISO granted a sixth extension of the Project's commercial operation date until January 31, 2017, contingent upon Green Power meeting specific milestones (comprised of 36 separate subtasks) by January 31, 2017. NYISO Notice of Cancellation, transmittal, at 3.

⁵ NYISO stated that a small generating facility may extend its commercial operation date up to four years following the execution of the Interconnection Agreement, but extensions beyond the four years are only permitted if the project developer: (1) has an executed interconnection agreement (or filed an unexecuted agreement with the Commission); and (2) demonstrated through an Officer certification the project has made "reasonable progress against milestone set forth in the Interconnection Agreement." NYISO Notice of Cancellation, transmittal at 4 (citing NYISO, OATT, Attachment X, section 30.4.4.5.2).

⁶ Section 7.6.3 of the SGIA provides "in cases where the Interconnection Customer has elected to proceed under Section 32.3.5.3 of the SGIP [the provision on the scope of the facilities study], if the Interconnection Request is withdrawn or deemed withdrawn pursuant to the SGIP during the term of this Agreement, this agreement shall terminate."

4. On June 20, 2017, as clarified on June 27, 2017, Green Power filed a motion to intervene out-of-time and a request for rehearing of the June 15 Letter Order. Green Power argued that, among other things, good cause exists to grant its late intervention because it relied on bad legal guidance from counsel stating there was no deadline for preserving its interests in this proceeding and that it was unable to timely obtain another counsel before the comment period deadline. Green Power also sought rehearing, arguing that the June 15 Letter Order erred by accepting NYISO's notice of cancellation when there was no actionable basis for terminating the SGIA. It also requested a stay of the June 15 Letter Order and an order from the Commission directing NYISO to grant Green Power's requested extension of the commercial operation date of the Project.

5. Subsequently, the Commission Secretary issued the July 10 Notice denying Green Power's late-filed motion to intervene, stating that when a late intervention is "sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention is substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention."⁸ The July 10 Notice stated that Green Power's late intervention due to bad legal advice does not meet the higher burden of justifying its late intervention. The July 10 Notice also rejected Green Power's request for rehearing because Green Power is not a party to this proceeding.⁹

II. Green Power's Request for Reconsideration, Rehearing, and Clarification

A. Petition for Reconsideration of the July 10 Notice

6. Green Power asks the Commission to reconsider the July 10 Notice on equitable grounds, arguing that its motion to intervene was denied on procedural grounds, despite

⁷ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-1624-000 (June 15, 2017) (delegated letter order) (June 15 Letter Order).

⁸ July 10 Notice, 160 FERC ¶ 62,016 (citations omitted).

⁹ *Id.* at 2 (stating that, under section 313(a) of the Federal Power Act (FPA), 16 U.S.C. 825l(a) (2012), and Rule 713(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(b) (2017), a request for rehearing may be filed only by a party to the proceeding).

extenuating circumstances and factors that supported its late intervention.¹⁰ Green Power states that the Commission has broad discretion to grant an untimely motion for intervention under Rule 214 of the Commission's Rules of Practice and Procedure, and that each of the factors in Rule 214 weigh in favor of its intervention.¹¹ While Green Power concedes that there is a higher burden to intervene after a dispositive order is issued in a proceeding, it adds that the Commission routinely finds there is good cause for accepting a late intervention at the rehearing stage when, as here, a party shows that it has a particular interest in the proceeding and there is no evidence of any undue prejudice or delay to other parties.¹² Green Power further argues that "good cause" is only one factor, and the Commission can consider other, non-enumerated factors in adjudicating a motion for untimely intervention, and can abstain from considering any enumerated factors that would interfere with granting a late intervention.

7. Additionally, Green Power argues that it had no actual notice of the Commission's public notice setting a deadline for the comment period. Green Power contends that, as a small developer, it is not "eRegistered" or "eSubscribed" with the Commission's website. It does not receive "eService" and does not know how to check the Commission's "eLibrary" for filings. Green Power argues that, while knowledge of publically posted comment deadlines are commonly imputed to all interested parties, it does not preclude the use of discretion in circumstances where there was no actual notice.¹³

8. Green Power further argues that it actively sought to act on NYISO's notice of cancellation but it only resulted in its intervention being filed late due to wrong legal advice.¹⁴ While "faulty legal advice" does not, on its own, satisfy the higher burden for a

¹⁰ Green Power Petition at 4 (citing *Wahl v. Allamakee-Clayton Elec. Cooperative*, 116 FERC ¶ 61,134, at P 5 (2006) (*Wahl*); *LG&E-Westmoreland Southampton*, 76 FERC ¶ 61,116, n.1 (1996) (*LG&E-Westmoreland*); and *Winding Creek Solar LLC*, 153 FERC ¶ 61,027, at P 6 (2015) (*Winding Creek*)).

¹¹ Rule 214(d) states that, in deciding on a late intervention, "the decisional authority may consider whether: (i) The movant had good cause for failing to file the motion within the time prescribed, (ii) Any disruption of the proceeding might result from permitting intervention, (iii) The movant's interest is not adequately represented by other parties in the proceeding, (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention, and (v) The motion conforms to the requirements of paragraph (b) of this section." 18 C.F.R. § 385.214(d) (2017).

¹² Green Power Petition at 5.

¹³ *Id.* at 6.

late intervention, Green Power contends that the circumstances when considered as a whole, warrant discretion and leniency. Moreover, although its intervention was filed late, Green Power states that the intervention was submitted within the 60-day statutory deadline for changes to rate filings. Green Power argues that the July 10 Notice thus effectively reduced the notice period to 31 days without any findings of good cause for waiver because Green Power thereafter became subject to a higher burden, despite Green Power pointing to the presence of favorable factors under Rule 214.¹⁵

9. Green Power also argues that the Commission should reconsider its request for rehearing on the merits because rejecting a timely request solely on procedural grounds is “unjust and unreasonable under the unique facts in this case.”¹⁶ Green Power asserts that the Commission erred in accepting NYISO’s notice of cancellation of the SGIA because there was no basis for the withdrawal of its interconnection request or the subsequent cancellation. Specifically, Green Power argues that its request for an extension of the commercial operation date should not be deemed a “material modification” of the SGIA, as NYISO asserted in its notice of cancellation. Green Power contends that NYISO did not make a finding that its requested extension satisfies the material modification definition in NYISO’s Open Access Transmission Tariff (OATT).¹⁷

10. Moreover, Green Power adds that, under section 30.4.4.5.2 of the NYISO OATT, there will not be a finding of a “material modification” if the developer has an executed interconnection agreement and had provided an Officer certification that it has made reasonable progress against the milestones. Green Power contends that it has satisfied these conditions because it has an executed Interconnection Agreement and provided an Officer certification stating that it had made reasonable progress under the circumstances. Further, even if NYISO made a finding that the requested extension constituted a material modification, Green Power asserts that this should not constitute grounds to cancel the SGIA because there is nothing in the SGIA, SGIP or the incorporated language of section 30.4.4.5 of the Large Generating Facility Interconnection Procedures (LGIP) granting such a right, and the SGIP permits withdrawal only in limited situations.¹⁸ Moreover, Green Power argues that, as a small generating facility, the LGIP does not apply to its Project.

¹⁴ *Id.*

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 8.

¹⁷ Under NYISO OATT § 30.1 (Attachment X – Definitions) “Material Modification shall mean those modifications that have a material impact on the cost or timing of any Interconnection Request with a later queue priority date.”

¹⁸ Green Power Petition at 9.

11. Green Power further argues that there is no basis for cancellation of the SGIA because NYISO made no assertion of default of the SGIA. Even if the lack of reasonable progress constituted a breach of the SGIA, Green Power contends that, under section 7.6.1 of the SGIA,¹⁹ such a breach would be excused because it was caused by an event of force majeure and actions of the other parties.²⁰

B. Request for Rehearing of the July 10 Notice

12. On rehearing, Green Power reiterates many of the same points it raises on reconsideration and argues that the July 10 Notice erred in three respects.²¹ First, it contends the July 10 Notice is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” because Green Power demonstrated good cause for its late intervention and timely submitted a request for rehearing. It maintains that the Commission has granted late intervention in similar circumstances where there is no evidence of harm or prejudice.²² Second, it contends that the July 10 Notice is an impermissible denial of a request for rehearing that denies Green Power due process because it was issued at a time when the Commission lacked a quorum and could not conduct business. Therefore, Green Power asserts that the merits of its timely request for

¹⁹ Section 7.6.1 of the SGIA states that “[n]o Breach of this Agreement shall exist where such failure to discharge an obligation is the result of a Force Majeure event or the result of an act or omission of the other Parties.”

²⁰ Green Power states that these events include “National Grid’s delay in providing necessary information and NYISO’s [w]ithdrawal notice, necessitating dispute resolution and curtailing investment and progress on the project” and delay in pouring turbine foundation caused by local zoning and planning boards. Green Power Petition at 14, n.58.

²¹ *Id.* at 16.

²² *Id.*

rehearing of the June 15 Letter Order must be considered by the Commission once its quorum is reestablished.²³

13. Finally, Green Power contends that, by its denying intervention and rejecting Green Power's request for rehearing, the Secretary effectively waived the statutory notice period for changes in rate filings to take effect absent authority and in contravention of the Commission's stated policy against allowing tariff changes to go into effect by operation of law.²⁴ Essentially, Green Power argues that FPA section 205(d) requires a 60-day notice period, which includes "keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedule then in force and the time when the change or changes will go into effect."²⁵ Accordingly, Green Power asserts that, because the Commission accepted NYISO's notice of cancellation after 31 days of filing, the statutory 60-day notice period was still in effect when it filed its intervention as an interested party in this proceeding. Therefore, Green Power contends that it was unjust and unreasonable to subject Green Power to a higher burden standard, effectively preventing an intervention and protest.²⁶

C. **Request for Stay of the June 15 Letter Order**

14. Green Power argues that its request for a stay in the late intervention was not addressed by the July 10 Notice and should be decided now on the merits. Green Power states that there is no requirement that an entity seeking to stay an order must be a "party" to the proceeding. Green Power therefore renews its request for stay and asks that the stay be granted retroactively to the date of the initial request. In support of its request, Green Power argues denial of a stay would cause it irreparable harm because it would be difficult to finance the Project without completed interconnection studies and an interconnection agreement, even one that might be reinstated. Green Power also contends that no evidence has been presented that a stay would harm others and argues that issuance of a stay would serve the public interest by keeping the Project viable until the merits of its rehearing are considered.²⁷

²³ *Id.*

²⁴ *Id.*

²⁵ 16 U.S.C. § 824d (2012).

²⁶ Green Power Petition at 19.

²⁷ *Id.* at 21.

III. Responsive Pleadings

15. On August 24, 2017, National Grid and NYISO each filed an answer. Both answers raised objections to Green Power's petition for reconsideration, its request for rehearing, and its request for a stay.²⁸

16. NYISO and National Grid argue that Green Power's Petition for Reconsideration should not be granted because, as the July 10 Order correctly found, Green Power failed to demonstrate good cause to justify its late intervention.²⁹ They assert that Green Power's explanation of bad legal advice and inability to timely obtain counsel does not meet the higher burden of justifying a late intervention after the Commission's issuance of a dispositive order. NYISO and National Grid contend that Green Power's claim that it is not familiar with the Commission's procedures for submitting comments also does not meet the higher burden, and is not credible given Green Power's history of participation in previous proceedings before the Commission, including a timely intervention and protest of NYISO's notice of cancellation of the SGIA in 2016.³⁰ NYISO also contends that, contrary to Green Power's argument that it lacked actual notice of NYISO's notice of cancellation, it notified Green Power of its potential filing of a notice of cancellation "weeks before it submitted the notice" and served Green Power's sole representative with the notice when NYISO submitted the filing with the Commission. Moreover, NYISO notes that the Commission publicly posted NYISO's notice of cancellation and the deadline for timely interventions. Therefore, NYISO argues that Green Power cannot now claim that it did not have notice of the notice of cancellation or its responsibility to timely intervene.³¹ If the Commission were to consider the merits of the termination of the SGIA, NYISO and National Grid argue that NYISO acted in accordance with its SGIP in Attachment Z of its OATT when it withdrew Green Power's interconnection request from NYISO's interconnection queue.³²

²⁸ In reviewing these answers, we will not consider arguments directed at Green Power's request for rehearing, as those are prohibited by our regulations. 18 C.F.R. § 375.713(d)(1) (2017).

²⁹ NYISO Answer at 2-3; National Grid Answer at 3-4.

³⁰ NYISO Answer at 3; National Grid Answer at 4. On April 29, 2016, the Commission rejected NYISO's proposed notice of termination of the SGIA for Green Power's breach and default of the SGIA for failure to pay certain 2015 and 2016 invoices. The Commission found that, while the proposed notice of termination was pending before the Commission, Green Power had cured its breach and default under the SGIA by paying its 2015 invoices and, at the time of the Commission's order, Green Power still had the contractual right under SGIA to cure its failure to pay the 2016 invoices. *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,113, at PP 28-31 (2016).

³¹ NYISO Answer at 3-4.

NYISO and National Grid assert that the Project's commercial operation date has been extended six times, and Green Power requested a seventh extension in January 2017 while failing to meet the milestones agreed upon by the parties. They argue that this left NYISO with no option under its OATT but to deny a further extension and withdraw Green Power's interconnection request, and that NYISO followed proper OATT procedures in filing its notice of cancellation.³³

17. Finally, National Grid argues that all interconnection customers should be required to adhere to the same rules. National Grid argues that, in this case, Green Power has repeatedly sought to modify the rules, seeking numerous deadline extensions, contrary to the provisions of the NYISO OATT and its SGIA. Although some measure of flexibility in the interconnection process is reasonable, it argues that Green Power has already benefitted from ample flexibility through a prior waiver of the NYISO OATT and extensions granted by NYISO. National Grid argues that Green Power now seeks to be excused not only from following the NYISO interconnection process but also from complying with the rules of the Commission itself. National Grid argues that, if the Commission grants Green Power's petition, it will be creating an incentive for other interconnection customers to disregard the NYISO interconnection rules.³⁴

18. NYISO and National Grid argue that the Commission should deny Green Power's request for a stay of the June 15 Letter Order because Green Power has failed to show irreparable harm, as required under the factors that the Commission considers in granting a stay.³⁵ They state that NYISO and Green Power have already discussed the flexibility contained in NYISO's interconnection process to move the Project along in a timely manner if Green Power decides to re-enter the interconnection queue under a new interconnection request. NYISO argues that this process would allow Green Power to proceed with its Project as planned if it chooses to use it and that a stay is not needed to prevent irreparable harm to Green Power. Given this option to interconnect its project to National Grid's system in a manner that complies with the same NYISO interconnection procedures applicable to all customers, National Grid contends that Green Power has

³² *Id.* at 6; National Grid Answer at 5.

³³ NYISO Answer at 6-9; National Grid Answer at 5.

³⁴ National Grid Answer at 6.

³⁵ These factors include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. NYISO Answer at 9; National Grid Answer at 9 & n.30, 31 (citing *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009), where the Commission stated "[i]f the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, [the Commission] need not examine the other factors)."

failed to demonstrate “irreparable injury,” absent which a stay should be denied.³⁶ Finally, NYISO argues that a stay, and the resulting uncertainty as to whether the Commission could reinstate the interconnection process, would have the potential to disrupt its interconnection process and create substantial uncertainty for other developers. NYISO argues that other developers should not be harmed by Green Power’s failure to make reasonable progress against its milestones and its untimely action at the Commission.³⁷

IV. Discussion

A.

Petition for Reconsideration

19. As discussed below, we deny Green Power’s petition for reconsideration of the July 10 Notice. Green Power contends that it satisfies the five factors that the Commission may consider under Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2017), for granting a late intervention. However, as Green Power did not file its motion to intervene until after the Commission had already issued its dispositive order accepting NYISO’s notice of cancellation, Green Power must meet a “higher burden” to justify its late intervention and the factors listed in Rule 214 are not necessarily sufficient to meet this burden.³⁸ As noted in the July 10 Notice, Green Power failed to meet the higher burden to demonstrate that good cause exists for granting its late intervention after the Commission has already ruled. We continue to find that Green Power’s explanations that it relied upon bad legal advice or that it was unable to timely obtain counsel do not meet the higher burden of justifying late intervention after the Commission has issued a dispositive order.

20. Also, we are not persuaded by Green Power’s argument that it lacked actual notice of NYISO’s notice of cancellation or its responsibility to submit timely interventions. In

³⁶ National Grid Answer at 10 & n.27 (citing *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 14 (2012); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009); *Columbia Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009); and *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001)).

³⁷ NYISO Answer at 10.

³⁸ See, e.g., *PJM Interconnection, LLC*, 132 FERC ¶ 61,265, at PP 18-20 (2010); *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265, at P 4 (2006); *American Elec. Power Serv. Corp.*, 111 FERC ¶ 61,372, at P 16 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003), *Fla. Power & Light Co.*, 99 FERC ¶ 61,318, at P 9 (2002); *Midwest Indep. Transmission Sys. Operator, Inc.*, 98 FERC ¶ 61,133, at 61,383 (2002); *Pacific Gas & Elec. Co.*, 100 FERC ¶ 61,097, at P 5 (2002); *Garnet Energy LLC*, 99 FERC ¶ 61,165, at P 4 (2002); *Edison Mission Energy*, 96 FERC ¶ 61,032, at 61,083 (2001).

the notice of cancellation, NYISO provided evidence that it issued a withdrawal notice to Green Power on February 17, 2017.³⁹ NYISO's letter noted that Green Power could respond with information, action to cure the deficiency or to notify NYISO of its intent to pursue dispute resolution. Subsequently, the parties engaged in dispute resolution,⁴⁰ where Green Power provided notice to the parties that it "opposes cancellation of the SGIA."⁴¹ Moreover, NYISO's notice of cancellation noted that representatives of National Grid and Green Power are designated for receipt of service of NYISO's filing.⁴² Further, after NYISO submitted its notice of cancellation, the Commission issued a public notice, which was published in the *Federal Register*, clearly stating that motions to intervene were due on or before June 8, 2017.⁴³ Finally, despite Green Power's claimed lack of knowledge of the Commission's procedures, it has been previously before the Commission on multiple occasions with regard to this specific Project, including a 2014 request for a waiver of the OATT and a 2016 timely intervention and protest of a previous notice of cancellation.⁴⁴ Green Power, therefore, had notice of NYISO's notice of cancellation and was on notice of its responsibility to submit timely interventions.

21. Green Power's argument that it was wrongly subjected to a higher burden of good cause for late intervention when it submitted its intervention within the 60-day statutory deadline for rate changes is misplaced. We find that Green Power conflates the 60-day notice period prescribed in the FPA for the Commission to act on section 205 filings with a public notice issued by the Commission's Secretary informing the public that a rate filing has been submitted and setting a date by which protests and interventions must be submitted. If the parties have 60 days to submit interventions and comments on a section 205 filing, as Green Power asserts, the Commission would have insufficient time to consider such comments and issue an order within the same 60 days required under the FPA for Commission action on that filing.

22. Finally, we are not persuaded by Green Power's contention that the Commission

³⁹ NYISO Notice of Cancellation, transmittal at 6 and Attachment II. Attachment II provides NYISO's letter of withdrawal addressed to Green Power's representative, David M. Senehi.

⁴⁰ NYISO Answer at 8.

⁴¹ Green Power June 20, 2017 Motion at 5, 10.

⁴² NYISO Notice of Cancellation, transmittal at 7. NYISO also indicates that its filing will be posted on its website at www.nyiso.com.

⁴³ 82 Fed. Reg. 23,802 (2017).

⁴⁴ See *Green Power Energy LLC*, 147 FERC ¶ 61,084, at P 1 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,113, at PP 9, 26 (2016).

should reconsider the July 10 Notice on equitable grounds. Specifically, Green Power argues that, based on two prior cases, the Commission has broad discretion to reconsider orders issued under delegated authority irrespective of procedural barriers.⁴⁵ Green Power's support of this proposition is misplaced. In these cases, the movants had earlier filed complaints with the Commission seeking an enforcement action by the Commission on their behalf, which the Commission denied. Thus, by virtue of their complaints, the party status of both complainants had already been established.⁴⁶ In addition, in both of these cases, the timeliness of the pleading was not at issue. The third case cited by Green Power, *LG&E-Westmoreland*,⁴⁷ is also inapposite. Green Power cites this case to show that the Commission can treat a late-filed request for rehearing as timely filed. Green Power neglects to mention that LG&E Southampton was already a party to the proceeding,⁴⁸ and thus entitled to file a request for rehearing, and that the case involved a courier who arrived two minutes late due to a copier malfunction. None of these cases lend any support for the Commission granting reconsideration on equitable grounds based on the facts before us.

23. Having denied Green Power's late motion to intervene, the Commission Secretary appropriately rejected Green Power's request for rehearing. Section 313(a) of the FPA permits only a party to a proceeding to file a request for rehearing of a Commission order. Green Power is not a party to this proceeding. However, notwithstanding the July 10 Notice that denied Green Power's late motion to intervene, if Green Power were a party to this proceeding and the Commission were to consider its request for rehearing, we would deny the request for rehearing.

24. Green Power asserts that NYISO did not make a required finding that Green Power's requested extension to the commercial operation date constituted a material modification. Moreover, it argues that there will not be a finding of material modification if it has an executed interconnection agreement and submitted an officer certification, as required under section 30.4.4.5.2, and that it has satisfied these requirements. Green Power assumes that if an officer within its own company (or an associated company) certifies that a reasonable progress has been made – that certification alone is determinative and an extension of the commercial operation date should be automatic. However, Green Power's Project has been pending in the NYISO

⁴⁵ Green Power Petition at 4 (citing *Wahl*, 116 FERC ¶ 61,134 at P 5, and *Winding Creek*, 153 FERC ¶ 61,027 at P 6).

⁴⁶ The definition of "party" in Rule 102 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.102(c)(1) (2017), specifically includes a person filing a complaint.

⁴⁷ 76 FERC ¶ 61,116, n.1 (1996).

⁴⁸ See *LG&E-Westmoreland*, 68 FERC ¶ 61,034 at n.1.

interconnection queue for approximately 13 years. During that time, NYISO – and this Commission - granted multiple extensions with the latest extension of the commercial operation date to January 31, 2017 on the condition that Green Power will meet milestones it proposed and agreed upon with NYISO and National Grid. As detailed in NYISO’s notice of cancellation, Green Power failed to demonstrate that it satisfied these milestones when it requested a seventh extension to January 2018.⁴⁹ Therefore, it was appropriate for NYISO to conduct its own evaluation to determine whether the progress certified as reasonable was, in fact, reasonable progress. Having concluded that satisfying 11 of the 36 subtasks was an insufficient demonstration of progress, NYISO properly determined that a request for further extension of the commercial operation date constituted a material modification of the interconnection request.

25. We also find that NYISO complied with its OATT in the withdrawal of Green Power’s interconnection request and cancellation of the SGIA. For instance, NYISO provided notice of withdrawal on February 17, 2017 and afforded Green Power an opportunity to cure the deficiencies and/or commence the Dispute Resolution Process. After the completion of the dispute resolution process, NYISO submitted its notice of cancellation. As a result of the withdrawal, section 7.6.3 of the SGIA required termination of the SGIA. To effectuate the termination, NYISO filed with the Commission for acceptance the notice of cancellation to comply with section 3.3 of the SGIA and section 35.15 of the Commission’s rules. Under section 35.15, NYISO was mainly required to provide 60 days’ notice of the cancellation.⁵⁰ Here, NYISO satisfied that requirement by affording Green Power 60 days’ notice by requesting an effective date of July 17, 2017. Accordingly, we find that NYISO appropriately applied its OATT and complied with the necessary regulatory requirement in filing the notice of cancellation.

26. Green Power asserts that NYISO relied upon a provision in the LGIP as guidance in withdrawing the Project from the interconnection queue when, as a small generator facility, its Project is not subject to the LGIP. We find that Green Power’s argument is misplaced because NYISO’s reliance on the LGIP provision is appropriate and consistent with prior Commission direction. Within the NYISO OATT, Attachment Z contains the

⁴⁹ NYISO stated that, as of February 1, 2017, Green Power had only satisfied 11 of the 36 subtasks, noting that the “foundations have yet to be excavated or poured” on the site, Green Power has not submitted the first engineering package to National Grid for the “Connecting Transmission Owner Attachment Facilities and Stand Alone System Upgrade Facilities,” and that no turbines have been erected on the site and no agreement is in place to procure the turbine. Also, according to NYISO, six major tasks that Green Power had represented that it would complete had not been completed. NYISO Notice of Cancellation, transmittal, at 2-3.

⁵⁰ 18 C.F.R. § 35.15(a) (2017).

SGIP while Attachment X contains the LGIP. SGIP's provision on extensions to the commercial operation, section 32.1.3.2, states that extension of commercial operation date for small generating facilities is subject to section 30.4.4.5 of Attachment X (LGIP). Also, under Order No. 2006, the Commission directed transmission providers to use the provisions of the LGIP as guidance for interpretation and implementation where the *pro forma* SGIP lacks specific provisions.⁵¹ Moreover, in 2014, when Green Power sought an extension of the Project's commercial operation date for 15 months, it requested a waiver of Attachments X and Z of the NYISO OATT.⁵² If the LGIP does not apply to the Project, as Green Power asserts, there was no need at that time to seek a waiver of section 30.4.4.5 of Attachment X. Yet, Green Power did so and the Commission granted a waiver of both provisions.⁵³ Thus, Green Power cannot now assert that that such a provision in Attachment X does not apply to its Project because it is a small generating facility.

B. Request for Rehearing

27. We deny Green Power's request for rehearing of the July 10 Notice. On rehearing, Green Power advances three arguments. First, it contends that it demonstrated good cause for its late intervention and timely submitted a request for rehearing. We reject this argument. As noted above, Green Power did not file its motion to intervene until after the issuance of the dispositive order accepting NYISO's notice of cancellation; therefore, it faced the higher standard for granting late interventions and it failed to meet this burden.⁵⁴ This denial was in accordance with Commission precedent, and was not an arbitrary or capricious decision.⁵⁵ Also, while Green Power's request for rehearing of the June 15 Letter Order would otherwise be considered timely, this did not retroactively cure its failure to timely file its motion to intervene and achieve party status (and, as noted above, party status is a prerequisite to being able to file for rehearing). Put simply, Green Power's request for rehearing was denied based on Green Power not being a party to the underlying proceeding. It was not rejected as an untimely request for rehearing.

28. We also note that, pursuant to 18 C.F.R. § 385.214(d)(3)(ii) (2017), even if we did

⁵¹ See *Standardization of Small Generator Interconnection Agreement and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, PP 47-48; *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005); *order on clarification*, FERC Stats. & Regs. ¶ 31,221 (2006).

⁵² See *N.Y. Indep. Sys. Operator*, 147 FERC ¶ 61,084, at P 3 (2014).

⁵³ *Id.* PP 12-15.

⁵⁴ See *supra* discussion at P 20; July 10 Notice, 160 FERC ¶ 62,016.

⁵⁵ See *supra* note 38.

grant Green Power's late-filed motion to intervene, a late intervenor must accept the record of the proceeding as it was developed prior to the late intervention. As the Commission has stated, "even if we were to grant the late interventions, such a determination would not permit a party to seek rehearing of an order issued prior to its becoming a party."⁵⁶ We further stated "[a] Commission order is no less a part of 'the record of the proceeding'" as any other filing or evidence. Indeed, it may be the most important part of the record as it is the Commission decision that is appealable to the U.S. Court of Appeals. Thus, a late intervenor is not entitled to seek rehearing of any order issued prior to its intervention (unless the Commission specifically grants such a right, which we did not find to be appropriate here).⁵⁷

29. Second, Green Power contends that the July 10 Notice is an impermissible denial of a request for rehearing that denies Green Power due process and must be considered by the Commission once quorum is reestablished. Prior to losing its quorum, the Commission had long since delegated to its staff authority to issue delegated orders involving uncontested filings and the Commission's Secretary has long had the delegated authority to issue notices denying late-filed motions to intervene and rejecting requests for rehearing from non-parties.⁵⁸ Thus, we find the argument that the issuance of the July 10 Notice during the Commission's lack of quorum violated due process to be without merit.⁵⁹ The July 10 Notice also, consistent with the statute and regulations, afforded an opportunity for parties to file requests for rehearing within thirty days of the June 15 Letter Order. But Green Power failed to file a timely intervention and thus was not a party – and, as a consequence, was not positioned to file for rehearing in this proceeding. Due process, in short, does not dictate that the Commission reach the conclusion advocated by Green Power. Nevertheless, as discussed above, we explain why Green Power's request for rehearing of the June 15 Letter Order, even if it were properly filed, is without merit.

⁵⁶ *PJM Interconnection, LLC*, 132 FERC ¶ 61,265, at P 21 (2010).

⁵⁷ *Id.*

⁵⁸ Under 18 C.F.R. § 375.302(e) (2017), the Secretary can pass on motions to intervene. In contrast, 18 C.F.R. § 385.713(b) (2017) provides for requests for rehearing to be filed only by parties and, under 18 C.F.R. §§ 375.302(h) and 385.2001(b)(2017), the Secretary may reject a request for rehearing that does not comply with a Commission rule, such as the rule that requests for rehearing may be filed only by parties. *Accord* 16 U.S.C. § 825l(a) (2012).

⁵⁹ In fact, even if the Commission had a quorum during the relevant period, NYISO's filing could have, and likely would have, been acted on pursuant to delegated authority, and Green Power's failure to timely intervene would have barred Green Power's filing for rehearing. The absence of a quorum, in short, made no difference.

30. Third, Green Power contends that, by denying its intervention and rejecting its request for rehearing, the Secretary has effectively waived the statutory notice period for changes in rate filings to take effect absent authority and in contravention of the Commission's stated policy against letting tariff changes go into effect by operation of law. Green Power's argument here is without merit. Green Power misconstrues the statutory notice period for rate changes under FPA section 205(d). Under this notice requirement, "[u]nless the Commission otherwise orders, no change shall be made by any public utility in . . . rates . . . or service . . . except after sixty days' notice to the Commission and to the public." As discussed herein, NYISO provided the required 60 days' notice as its notice of cancellation became effective after 60 days' notice to the Commission.⁶⁰ Green Power asserts that, because Commission staff accepted NYISO's notice of cancellation after 31 days of filing, i.e., within the 60-day notice period provided in FPA section 205, it had a right, as an interested party to this proceeding, to inspect the filing and intervene without being subjected to a higher burden. Again, we reiterate that, when a rate filing is made, a public notice is issued that provides a deadline by which prospective intervenors or protesters must file. This deadline is separate from the 60-day notice period provided in FPA section 205, regardless of when the dispositive order is issued in a proceeding. There is no requirement, under FPA section 205, that the Commission must wait 60 days from a rate filing before taking action. Rather, Green Power failed to intervene in this proceeding by the deadline set for interventions in the public notice issued by the Commission; the 60-day notice period provided in FPA section 205 does not set that deadline.

C. Request for Stay and Extension

31. Consistent with our findings on Green Power's petition for reconsideration and its request for rehearing, we will also deny its request for a stay of the June 15 Letter Order and its request for an extension to the commercial operation date of Green Power's project. Moreover, given Green Power's options for pursuing its project and an interconnection with NYISO (as pointed out by both NYISO and National Grid) notwithstanding the finality of the notice of cancellation, Green Power's motion for a stay fails to demonstrate denial of the stay will result in irreparable harm, which is a sufficient basis, by itself, for denial of the stay.

32. In any event, even if a stay had been appropriate at an earlier stage of this proceeding, it would only have been in force until such time as the Commission considered the Green Power requests for reconsideration and rehearing that we are addressing (and denying) in this order. So the request is at this stage moot.

The Commission orders:

⁶⁰ NYISO submitted the notice of cancellation to the Commission on May 17, 2017, to be effective July 17, 2017.

(A) Green Power's petition for the Commission to reconsider the July 10 Notice is hereby denied, as discussed in the body of this order.

(B) Green Power's request for rehearing of the July 10 Notice is hereby denied, as discussed in the body of this order.

(C) Green Power's request for a stay of the June 15 Letter Order and its request for an extension to the commercial operation date of Green Power's project are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.