

162 FERC ¶ 61,062
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.

Green Power Energy, LLC

Docket No. ER17-2275-000

ORDER DENYING WAIVER REQUEST

(Issued January 26, 2018)

1. On August 9, 2017, Green Power Energy LLC (Green Power) filed a request for a waiver of the commercial operation date requirements of section 32.1.3.2 of Attachment Z of the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT).¹ Green Power requests that this waiver extend the commercial operation date in its Interconnection Agreement to November 30, 2018. As discussed below, we deny Green Power's waiver request.

¹ Section 32.1.3.2. of Attachment Z states:

The expected Commercial Operation Date of the new Small Generating Facility or proposed increase in capacity of the existing Small Generating Facility provided in the Interconnection Request shall be no more than ten (10) years from the date the Interconnection Request is received by the NYISO. Extensions of Commercial Operation Dates for Small Generating Facilities are subject to the provisions of [s]ection 30.4.4.5 of Attachment X to the OATT.

Section 30.4.4.5 of Attachment X states a developer may request an extension of its commercial operation date and such a request will not be a material modification only if the following conditions have been met, if a 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."

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 Commission.³

3. According to the SGIA's original schedule, the Project was to be in commercial operation by October 2010; but, by mutual agreement, the commercial operation date was extended three times, with the third extension being to December 2013. After Green Power failed to meet the December 2013 deadline, Green Power submitted a request to NYISO for further extension of the commercial operation date to December 2014, and NYISO denied this request and removed the Project from the interconnection queue. Subsequently, in April 2014, the Commission granted Green Power a limited waiver of the commercial operation date requirements of Attachments X and Z of the NYISO OATT, extending the commercial operation of the Project to July 30, 2015, and directing NYISO to restore Green Power's position in the interconnection queue.⁴ NYISO subsequently granted Green Power an additional extension of the commercial operation date from July 2015 to July 2016.

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.⁵ 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 the SGIA to cure its failure to pay the 2016 invoices.⁶ NYISO subsequently granted a further extension of

² Green Power Waiver Request at 3.

³ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER09-1693-000 (Oct. 13, 2009) (delegated letter order).

⁴ *Green Power Energy LLC*, 147 FERC ¶ 61,084, at P 12 (2014) (noting that the three prior extension granted by NYISO did not require Green Power to demonstrate progress in meeting milestones and that "Green Power could not have known that the failure to amend the milestones in its SGIA would, because of future NYISO tariff revisions, later preclude it from receiving further extensions").

⁵ *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,113 (2016).

the Project's commercial operation date until January 31, 2017, contingent upon Green Power meeting specific milestones (comprised of 36 separate sub tasks) proposed by Green Power and that Green Power represented it would satisfy by January 31, 2017.⁷

5. 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 of the milestones that it had agreed to satisfy by January 31, 2017,⁸ NYISO informed Green Power on February 17, 2017 that the Project will be removed from the interconnection queue. Subsequently, on May 18, 2017, NYISO filed a notice of cancellation of the SGIA. 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.⁹

6. 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 Commission staff's letter order. On July 10, 2017, the Secretary issued a notice denying Green Power's late-filed motion to intervene and rejecting its request for rehearing.¹⁰ On August 9, 2017, Green Power filed a petition for reconsideration or, alternatively, a request for rehearing of the Secretary's notice, and, in an order being issued concurrently with this one, the Commission denies Green Power's petition.¹¹

⁶ *Id.* PP 28-31. The Commission also noted that its "finding here is without prejudice to a new request to terminate the [SGIA] and remove the Project from the interconnection queue based on additional information or changed circumstances." *Id.* P 31.

⁷ NYISO Notice of Cancellation, Transmittal at 3.

⁸ 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. *Id.* at 2-3.

⁹ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-1624-000 (June 15, 2017) (delegated letter order) (June 15 Letter Order).

¹⁰ *N.Y. Indep. Sys. Operator, Inc.*, 160 FERC ¶ 62,016 (July 10, 2017).

¹¹ *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,061 (2018).

II. Green Power's Waiver Request

7. Having failed to meet the January 31, 2017 commercial operation date, Green Power in this proceeding again seeks waiver of the commercial operation date requirements of section 32.1.3.2 of Attachment Z. Green Power argues that it meets the Commission's criteria to establish good cause to grant a waiver¹² because (1) its underlying error of failing to meet the milestones for project development and comply with applicable tariff provisions was made in good faith; (2) the request waiver is of limited scope and duration; (3) it would solve a concrete problem; and (4) will not have undesirable consequences, such as harming third parties.¹³ Green Power also requests expedited action by August 31, 2017.¹⁴

8. In support of these arguments, Green Power states that it made a good faith effort to make progress on the development of its Project but it was unable to move the Project forward due to circumstances largely beyond its control (i.e., local town zoning requirements and interfacing with local connecting transmission owners).¹⁵ Green Power asserts that it made regular updates to NYISO of its progress on the proposed milestones, and was working on three significant milestones when NYISO withdrew the Project from the interconnection queue. Green Power next argues that the requested waiver is of limited scope, as it only applies to a single provision of the SGIP (i.e., SGIP's section 32.1.3.2 governing the expected commercial operation date) and duration (until November 30, 2018).¹⁶ Green Power also asserts that it meets the criteria for resolving a concrete problem because the waiver would restore the Project to its position in the queue, allowing Green Power to finalize the SGIA and preserve its Renewable Energy Credit arrangement with the New York State Energy Research and Development Authority. Finally, Green Power contends that granting the requested waiver would not harm or have undesirable consequences to others because the majority of the Project's network upgrades are stand-alone facilities that it is obligated to construct and that are not required for any other customer's interconnection service. In contrast, however, Green Power states that it will be harmed if the waiver is not granted because it would not be able to continue with the Project.¹⁷

¹² Green Power Waiver Request at n.4 (citing *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 38 (2014); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184, at P 13 (2011); *Green Power Energy, LLC*, 147 FERC ¶ 61,084, at P 11 & n.17 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,147, at P 8 (2013)).

¹³ *Id.* at 11-12.

¹⁴ *Id.* at 12-13.

¹⁵ *Id.* at 8-10.

¹⁶ *Id.* at 10.

Notice and Responsive Pleadings

9. Notice of Green Power's waiver request was published in the *Federal Register*, 82 Fed. Reg. 39,116, with interventions and protests due on or before August 31, 2017. On August 31, 2017, NYISO and National Grid filed motions to intervene and protests. On September 5, 2017, Green Power filed an answer to NYISO's and National Grid's protests.

10. NYISO and National Grid argue that Green Power has not and cannot satisfy the good faith criterion when Green Power has consistently failed to meet commercial operation dates and satisfy the Project's preliminary milestones.¹⁸ NYISO argues that when Green Power requested its seventh extension of the commercial operation date until January 2018, it provided minimal additional evidence of progress against the milestones set forth in the SGIA and the milestones that Green Power agreed to satisfy as a condition of its latest extension. In the absence of reasonable progress against its milestones, NYISO states that Green Power's Project was withdrawn from NYISO's interconnection queue and its SGIA was terminated, as required under the NYISO OATT. NYISO contends that Green Power had the opportunity to challenge this determination at the Commission, but failed to timely intervene in the relevant proceeding. NYISO contends that, in the instant waiver request, Green Power asserts that it is nearing completion of a number of significant project milestones. However, NYISO notes that there are still at least 54 outstanding tasks that Green Power must complete before the Project goes into service.¹⁹ NYISO and National Grid further argue that, in the approximately 13 years since the Project has been pending in the interconnection process, no portion of the Project has been built and Green Power has not demonstrated reasonable progress against many preliminary project milestones.²⁰

11. Also, NYISO argues that the requested waiver is not limited in scope. NYISO states that, in 2014, the Commission granted Green Power a "one-time" waiver that was limited in scope because Green Power had requested a waiver until a date no later than 15 months following the Commission's order granting the waiver. NYISO argues that Green Power is again seeking a waiver, a seventh extension of its commercial operation date, arguing that this is a "one-time waiver" and not for an "open-ended period." NYISO asserts that, if granted, the waiver would require NYISO to reinstate Green Power in its interconnection queue with a commercial operation date that NYISO does not believe is feasible based on its review of Green Power's progress against its

¹⁷ *Id.* at 11-12.

¹⁸ NYISO Protest at 6-8; Niagara Mohawk Protest at 5-6.

¹⁹ NYISO Protest at 7.

²⁰ *Id.* at 7-8; National Grid Protest at 5.

milestones. Therefore, NYISO argues that there is no reasonable basis to conclude that Green Power will be able to meet its requested extended commercial operation date of November 30, 2018, and there “are no guarantees that the Green Power will not be back before the Commission at a future date requesting” another waiver.²¹

12. Contrary to Green Power’s assertions, NYISO and National Grid argue that granting the requested waiver will have undesirable consequences. They state that reinstating the Project into NYISO’s interconnection queue more than six months after it was withdrawn could create considerable uncertainty for other projects that are proposing to interconnect near the proposed point of interconnection for the Project.²² Should the Commission grant the requested waiver, NYISO states that it would be required to re-insert the Project into the base case with its associated System Upgrade Facilities, and other project developers would be relying on those System Upgrade Facilities, despite Green Power’s lack of progress in developing those facilities. NYISO contends that the absence of security to ensure that the facilities will be constructed if Green Power does not proceed to construction would create substantial uncertainty for these other developers, the scope of their projects, and their cost responsibility.²³

13. NYISO also argues that granting the requested waiver would create an “uneven playing field” among project developers because it would allow one project developer to obtain an extension of its commercial operation date without satisfying NYISO’s tariff requirements, while other similarly situated project developers have not received such extensions.²⁴ Therefore, NYISO and National Grid assert that granting the waiver would encourage other project developers to seek a waiver of the extension requirements, rendering the tariff requirements largely meaningless going forward.²⁵ NYISO also states

²¹ NYISO Protest at 9.

²² For instance, NYISO notes that five proposed projects (two wind, a solar, a cogeneration, and an energy storage projects) are currently in its interconnection queue with proposed points of interconnection located electrically close to or within one bus away from the point of interconnection for the Project. *Id.* at 10; National Grid Protest at 7.

²³ NYISO Protest at 10.

²⁴ NYISO notes that, in 2014, the Commission previously granted a limited one-time waiver to Green Power of the commercial operation date requirements because NYISO’s rules on extending the commercial operation date had only recently changed to require developers to demonstrate reasonable progress against milestones in the SGIA; however, the Commission noted that “if Green Power requires any further extensions, it would have to qualify pursuant to NYISO’s currently effective tariff.” *Id.* at 5-6 (citing *Green Power Energy LLC*, 147 FERC ¶ 61,084 n.19).

that the withdrawal of the Project from its interconnection queue need not be an end to the Project, but Green Power has failed to take any action that could have mitigated the impact of the withdrawal of its Project.²⁶

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene made the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest unless otherwise ordered by the decisional authority.²⁷ We are not persuaded to accept Green Power's answer and will, therefore, reject it.

B. Commission Determination

16. As an initial matter, as previously noted herein, NYISO's notice of cancellation of the SGIA was accepted via delegated authority in the June 15 Letter Order, and the SGIA was terminated, effective July 17, 2017. Green Power did not timely intervene in the notice of cancellation proceeding and its request for rehearing was rejected.²⁸ As such, there is no SGIA on file involving Green Power's Project upon which to grant or deny waiver of the commercial operation date.

17. Even if the SGIA had not been canceled, we would deny Green Power's requested waiver. 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.²⁹ Measured against these criteria, Green Power's request for waiver falls ~~short in several ways, but our chief concern is that granting waiver will have undesirable~~

²⁵ *Id.* at 11; National Grid Protest at 7.

²⁶ NYISO notes that it encouraged Green Power to submit a new interconnection request shortly after the Project's withdrawal from the interconnection queue, agreeing to waive the feasibility study, but Green Power failed to do so. NYISO Protest at 11.

²⁷ 18 C.F.R. § 385.213(a)(2) (2017).

²⁸ *N.Y. Indep. Sys. Operator, Inc.*, 160 FERC ¶ 62,016 (July 10, 2017).

²⁹ See, e.g., *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,069, at P 8 (2011); *Hudson Transmission Partners, LLC*, 131 FERC ¶ 61,157, at P 10 (2010).

consequences. Namely, granting waiver to allow the Project to be reinstated into NYISO's interconnection queue would create uncertainty for other project developers and disrupt NYISO's interconnection process, particularly since there is currently no relevant SGIA on file. Our concern that granting waiver could have undesirable consequences, such as causing uncertainty or disruption, is exacerbated by the fact that Green Power has already failed to meet multiple extensions of the commercial operation date and has failed to make reasonable progress against its agreed-upon preliminary milestones, as it has yet to complete a substantial number of milestones.³⁰

18. For all of the foregoing reasons, we deny Green Power's request for waiver.

³⁰ NYISO Protest at 6-8; Niagara Mohawk Protest at 5-6.

The Commission orders:

Green Power's request for a waiver is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.