

175 FERC ¶ 61,154  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

TBE Montgomery, LLC

Docket No. ER21-1674-000

ORDER DENYING WAIVER

(Issued May 21, 2021)

1. On April 9, 2021, TBE Montgomery, LLC (TBE) submitted a request for a one-time waiver of Attachment X, section 30.4.4.5 of the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (Tariff) in order to extend its Commercial Operation Date from April 15, 2021 to June 15, 2023. As discussed below, we deny TBE's waiver request.

**I. Background**

2. TBE explains that it is developing a nominally rated 20 megawatt (MW) combined cycle biomass-fueled generation facility located in Orange County, New York (Project).<sup>1</sup> TBE states that it has a power purchase agreement with the New York Power Authority and requested an interconnection of the Project with NYISO on December 30, 2009. TBE asserts that the Project was included in NYISO's 2011 class year for interconnection studies. TBE states that it, Central Hudson Gas & Electric Corporation (Central Hudson), and NYISO executed a Large Generator Interconnection Agreement (LGIA), effective July 17, 2015.

3. TBE states that on December 15, 2015, it filed a milestone schedule revision request to change the Project's Commercial Operation Date from May 15, 2017 to April 15, 2018.<sup>2</sup> TBE states that on December 8, 2017, it filed a second milestone schedule revision request to change the Commercial Operation Date from April 15, 2018 to April 15, 2021.<sup>3</sup> TBE asserts that NYISO granted both requests. According to TBE, both requests were

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<sup>1</sup> Waiver Request at 3.

<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> *Id.* at 4.

necessary to accommodate TBE's efforts to ensure that TBE's Project would be certified as Tier 1 renewable by the New York State Energy Research and Development Authority (NYSERDA). TBE states that the Project received conditional Tier 1 renewable certification under the New York State Clean Energy Standards on December 6, 2018.

4. TBE states that the subsequent enactment of the 2019 New York State Climate Leadership and Community Protection Act (CLCPA) eliminated biomass generation from being considered a renewable energy technology.<sup>4</sup> TBE avers that on June 12, 2020, in light of the enactment of the CLCPA, TBE requested from NYISO a third milestone schedule revision to extend the Commercial Operation Date from April 15, 2021 to June 15, 2023. TBE explains that NYISO rejected this third milestone schedule revision on September 21, 2020.<sup>5</sup> According to TBE, NYISO's rejection letter explained that Attachment X, section 30.4.4.5 of the NYISO Tariff<sup>6</sup> required TBE to demonstrate that the Project has made "reasonable progress" against the milestones in the LGIA in order to receive the requested extension of its Commercial Operation Date beyond four years from the completion of the class year study and that TBE did not make such progress. Therefore, TBE states that NYISO concluded that the request to extend the Project's Commercial Operation Date would be a material modification pursuant to the NYISO Tariff.

5. TBE notes that it submitted comments to the New York Public Service Commission (New York Commission) and NYSERDA in August 2020 requesting that biomass energy systems currently conditionally certified as Tier 1 renewable be grandfathered in perpetuity, but the request was denied.<sup>7</sup> TBE adds that it continues to pursue grandfathering of its biomass technology as a renewable resource through the Climate Action Council of the CLCPA, the New York Commission, the New York State Legislature, the New York State Governor's Office, the New York State Department of Environmental Conservation (NYSDEC), and NYSERDA.

## **II. Waiver Request**

6. TBE requests waiver of Attachment X, section 30.4.4.5 of the NYISO Tariff.<sup>8</sup> TBE states that NYISO's September 21, 2020 rejection of TBE's third request to extend the Project's Commercial Operation Date requires TBE to meet the current Commercial

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

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

<sup>6</sup> NYISO OATT, 30.4 OATT Att X Queue Position, 7.0.0.

<sup>7</sup> Waiver Request at 5.

<sup>8</sup> *Id.* at 6.

Operation Date of April 15, 2021 or it will be found in default of the LGIA and the Project will be withdrawn from the interconnection queue. TBE states that it makes the instant filing to demonstrate that it will be unable to meet the April 15, 2021 Commercial Operation Date due to governmental action outside of TBE's reasonable control.

7. TBE contends that it faces "significant, potentially insurmountable difficulties" obtaining financing to meet project milestones due to the elimination of biomass as a renewable energy source in New York State.<sup>9</sup> TBE notes that, as of 2019, 29% of New York's in-state generation came from renewables; pursuant to the CLCPA, New York must more than double that amount in 10 years while also eliminating all non-renewable resources from the energy sector by 2040.<sup>10</sup> TBE argues that this policy requirement, combined with the determination under the CLCPA that biomass is not a renewable technology – and TBE's subsequent inability to have its project grandfathered thereunder – are the reason why TBE has been unable to secure project financing sufficient to meet the current LGIA milestones. TBE argues that a developer should not be penalized for actions of an administrative or regulatory agency, which are not reasonably in a developer's control.<sup>11</sup> Therefore, TBE contends, it would be consistent with Commission policy to permit a limited waiver of the Attachment X, section 30.4.4.5 of the NYISO Tariff to allow TBE to address this issue with the relevant New York authorities.

8. TBE asserts that its waiver request satisfies the Commission's criteria for granting waivers.<sup>12</sup> First, TBE argues that its request for waiver is made in a good faith.<sup>13</sup> TBE states that it has invested tens of millions of dollars into its Project and worked to ensure that its technology would be treated as Tier 1 renewable. TBE states that it had no control over the governmental regulations and claims that the requested waiver will allow TBE the additional time it needs to continue its efforts to save its Project. Second, TBE states that its waiver request is limited in scope because it is a one-time waiver of the NYISO Tariff provision to allow TBE to change its Commercial Operation Date without triggering a material modification that would threaten its queue position. Third, TBE states that its waiver will remedy a concrete problem because, absent the waiver, TBE will lose its queue position and would have to resubmit an interconnection request and endure additional expenses and time, all resulting from the regulatory burdens and uncertainty imposed on TBE by the passage of the CLCPA.<sup>14</sup> Fourth, TBE states that

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

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

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 9.

granting the waiver will not have any undesirable consequences or harm third parties because there are no participants in the NYISO interconnection queue that will be impacted by extending TBE's Commercial Operation Date.<sup>15</sup>

9. Finally, TBE requests that the Commission establish a shortened comment period not to exceed 14 days and issue an order on TBE's request by no later than May 21, 2021 granting the requested waiver, effective April 15, 2021.<sup>16</sup>

### **III. Notice of Filing and Responsive Pleadings**

10. Notice of TBE's filing was published in the *Federal Register*, 86 Fed. Reg. 20,488 (Apr. 20, 2021), with interventions and protests due on or before April 23, 2021. NYISO filed a timely motion to intervene and comments.<sup>17</sup> On May 3, 2021, Central Hudson filed a motion to intervene out of time and comments.<sup>18</sup> On May 4, 2021, TBE filed a motion for leave to answer and answer to NYISO's comments.

11. Central Hudson, as a party to the LGIA and the interconnecting Transmission Owner, states that it supports TBE's waiver request.<sup>19</sup> Central Hudson further states that it has remained apprised of the status of the project and encouraged TBE to defer the progression of unnecessary milestones until the uncertainty related to the project status and financing are resolved.<sup>20</sup>

12. Central Hudson explains that TBE was part of NYISO Class Year 2011 and was assigned System Deliverability Upgrades (SDU) and System Upgrade Facilities (SUF).<sup>21</sup>

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<sup>14</sup> *Id.* at 9-10.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.*

<sup>17</sup> On April 23, 2021, NYISO filed an errata, explaining that its initial filing was inadvertently captioned and described as a protest and requesting that the Commission substitute its initial filing with a revised copy, captioned as a motion to intervene and comments.

<sup>18</sup> Although Central Hudson styled its filing as an answer, it is in effect a filing of comments in support of the waiver request. On May 4, 2021, Central Hudson resubmitted the same filing under a different accession number.

<sup>19</sup> Central Hudson Comments at 1.

<sup>20</sup> *Id.* at 1-2.

Central Hudson states that TBE has provided and continues to hold security for both the SDU and SUF associated with the Project. Central Hudson states that TBE continues to make timely progress payments for the SDU as invoices are presented. Central Hudson argues that TBE's participation in this SDU no longer impacts future class studies. Central Hudson explains that the SUF is specific to the interconnection of TBE's Project and communication with adjacent substations. Central Hudson argues that an extension of TBE's Commercial Operation Date has no impact on other projects looking to connect to Central Hudson's system or any other Transmission Owner's system.

13. Central Hudson argues that the milestones set forth in the LGIA are not a true indication of the progress and efforts TBE has made.<sup>22</sup> Central Hudson contends that TBE has completed preparatory work and expended money on the Project. Central Hudson explains that many of the milestones in the LGIA are specific to the SUF and, given the uncertainty due to the passage of the CLCPA, it is premature for TBE to force investments into these milestones. Central Hudson states that it agrees with and supports TBE's decision not to proceed with SUF milestones at this time, as such an investment would put an unnecessary burden on TBE and Central Hudson.

14. NYISO states that it takes no position on whether TBE's waiver request should be granted but provides comments with additional information for the Commission to consider.<sup>23</sup> NYISO explains that Attachment X, section 30.4.4.5.2 of the NYISO Tariff provides a four-year period, from the completion of the class year study, within which a developer may extend its Commercial Operation Date.<sup>24</sup> NYISO states that Attachment X, section 30.4.4.5.2 allows an extension beyond that four-year deadline if the developer demonstrates that it has made reasonable progress against the milestones set forth in the LGIA.<sup>25</sup> NYISO explains that it granted TBE's first two Commercial Operation Date extension requests because TBE showed reasonable progress towards the LGIA milestones.<sup>26</sup> However, NYISO states, for TBE's third Commercial Operation Date extension request, which is the subject of the waiver request, TBE did not fully complete any additional milestones, even though TBE had completed some work and expended money.<sup>27</sup> Therefore, NYISO contends that TBE did not demonstrate reasonable progress

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<sup>21</sup> *Id.* at 2.

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

<sup>23</sup> NYISO Comments at 1.

<sup>24</sup> *Id.* at 1-2.

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

<sup>26</sup> *Id.* at 2-3.

against the milestones and its requested extension was a material modification of its interconnection request. NYISO explains that the Project's currently approved Commercial Operation Date has now expired, as of April 15, 2021; thus, the Project is subject to withdrawal from the NYISO interconnection queue and its LGIA is subject to termination, absent an order from the Commission granting the waiver request.

15. NYISO states that it takes no position on TBE's interpretation of the CLCPA but notes that it is unclear how TBE's situation is unique and distinguishable from any other project that cannot obtain financing.<sup>28</sup> Furthermore, NYISO states that it does not dispute that TBE submits this waiver request in good faith but believes that it is important that the Commission continue to reinforce the importance of tariff and manual deadlines that enhance certainty and transparency in NYISO's administration of the interconnection process.<sup>29</sup> NYISO states that it is not currently aware of a proposed project in the NYISO interconnection process that would be impacted by the requested extension. However, NYISO also states that it is unable to assess whether any distribution-level resources subject to state jurisdictional interconnection processes may be impacted from the extension, as requests for Capacity Resource Interconnection Service come from facilities not in the NYISO queue.

16. NYISO asserts that, if the Commission rejects the waiver request, TBE has many options to move forward with the Project.<sup>30</sup> NYISO explains that TBE could re-enter the NYISO queue by submitting a new interconnection request. Even though the Project has a maximum net capability of 21.9 MW, NYISO contends that TBE could propose control technologies to limit the Project output to 20 MW to proceed through the Small Generator Interconnection Procedures (SGIP), under which TBE can skip the feasibility study. Additionally, NYISO explains, with agreement of NYISO and Central Hudson, TBE could skip the system impact study and facilities study. However, NYISO notes that a new interconnection request would likely require at least the facilities study, but such study could be completed and immediately followed by a Small Generator Interconnection Agreement.

17. NYISO requests that, if the Commission grants TBE's waiver request, the Commission include certain conditions.<sup>31</sup> Specifically, NYISO requests that the Commission order TBE to: (1) cooperate with amendment of its existing LGIA with

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<sup>27</sup> *Id.* at 3.

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

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.*

execution within 90 days of the Commission's order; (2) develop a revised, detailed milestone schedule to be incorporated into the amended LGIA that would support the requested Commercial Operation Date of June 2023; and (3) provide quarterly status reports to NYISO after execution of the amended LGIA to report progress against the revised milestone schedule. NYISO further requests that the Commission allow for the withdrawal of the Project and the termination of the LGIA or amended LGIA upon failure to comply with any of the above requirements.<sup>32</sup>

18. In its answer, TBE argues that its Project is unique and distinguishable from all current projects in the NYISO queue because it is the only project that both: (1) uses a pyrolytic gasification process to convert biomass that has been fraction-sorted and separated from municipal solid waste, construction and demolition debris, and unadulterated wastewood, into electricity, and (2) received provisional certification as a Tier 1 renewable that was later revoked due to the CLCPA.<sup>33</sup> TBE also contends that it has undertaken substantial efforts to demonstrate reasonable progress against Project milestones, including taking delivery of major equipment and conducting outreach to the New York state legislature, the New York Commission, NYSDEC, NYSERDA, and other organizations.<sup>34</sup> TBE states that it has expended over \$50 million and incurred a further \$20 million in additional costs and expenses to develop its Project.

19. TBE also argues that the alternative options proposed by NYISO – namely, submission of a new interconnection request or interconnection through the SGIP – are not viable.<sup>35</sup> TBE explains that it is currently negotiating financing for the Project, and a condition precedent of that financing is an executed interconnection agreement. TBE states that it will not be able to satisfy that requirement if it is required to restudy the Project and execute a new interconnection agreement.

20. Lastly, TBE argues that the requested waiver will have no adverse impacts and that the conditions requested by NYISO are unnecessary and unsupported.<sup>36</sup> TBE states that it has complied with the LGIA and the NYISO Tariff and that the waiver request reflects TBE's efforts to secure relief consistent with the NYISO Tariff. TBE also states that it has engaged in meaningful, good faith discussions with NYISO to address the issues TBE faces. TBE submits that if the waiver is granted, it will continue to comply with the requirements of the LGIA and the NYISO Tariff to negotiate revised milestones.<sup>37</sup>

<sup>32</sup> *Id.* at 6-7.

<sup>33</sup> TBE Answer at 3.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *Id.* at 6.

#### IV. Discussion

##### A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), NYISO's timely, unopposed motion to intervene serves to make it a party to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2020), we grant Central Hudson'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.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept TBE's answer because it has provided information that assisted us in our decision-making process.

##### B. Substantive Matters

23. We deny TBE's request for waiver of Attachment X, section 30.4.4.5 of the NYISO Tariff. 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; (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>38</sup> We find that the circumstances of TBE's waiver request do not satisfy these criteria.

24. Specifically, we find that TBE has not shown that the proposed waiver is limited in scope. While TBE states that the requested waiver would allow it to seek an extension of the Commercial Operation Date to June 15, 2023, TBE does not provide any explanation of how it chose that date or why it believes that it will be able to meet Project milestones by that date.<sup>39</sup> Lacking from TBE's request for waiver is a connection between the timing of its efforts to be grandfathered and TBE's request to extend its Commercial Operation Date to June 15, 2023.

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<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> See, e.g., *Citizens Sunrise Transmission LLC*, 171 FERC ¶ 61,106, at P 10 (2020); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

<sup>39</sup> See *Green Mountain Power Corp.*, 172 FERC ¶ 61,250, at P 12 (2020) ("The Commission has previously stated that requested waivers are limited in scope when they span a specific and limited period of time. Here, while Green Mountain [Power Corp.] states that it expects to decommission individual turbines 'within the coming years,' it does not provide the expected date of decommissioning.").



25. Additionally, we find that TBE did not demonstrate that granting the waiver would address a concrete problem because it does not appear that the requested waiver would alleviate the burden imposed upon TBE by the passage of the CLCPA and the New York Commission's denial of TBE's request to be grandfathered. The record reflects considerable uncertainty about whether, even with the extension, TBE will be able to meet Project milestones because TBE does not provide any information about how it can appeal the New York Commission's rejection of its request to grandfather previously certified biomass projects under the CLCPA.<sup>40</sup> Moreover, as NYISO stated, absent waiver, TBE has options in NYISO's interconnection process to move forward with the Project under the SGIP, under which TBE can skip the feasibility study.<sup>41</sup> Although TBE argues that this option is not viable because it will require TBE to submit a new interconnection request and impede its ability to obtain financing,<sup>42</sup> we find this argument unpersuasive given that TBE has also stated that it has been unable to obtain financing due to the uncertainty caused by the New York Commission's denial of TBE's request to be grandfathered under the CLCPA.<sup>43</sup> For these reasons, we deny TBE's waiver request.

The Commission orders:

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

By the Commission.

( S E A L )

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<sup>40</sup> See *Thunderhead Wind Energy LLC*, 173 FERC ¶ 61,179, at P 22 (2020) (*Thunderhead Wind*) (“[Thunderhead Wind Energy LLC (Thunderhead)] has not demonstrated that its request for waiver will address a concrete problem . . . [because] it is not clear that granting Thunderhead's request for waiver will resolve the problem it identifies[.]”); *Calpine Corp.*, 167 FERC ¶ 61,115, at P 8 (2019) (“Calpine [Corp.] does not demonstrate that the uncertainty caused by the ongoing regulatory proceedings . . . is a concrete problem justifying waiver.”); see also *Cassadaga Wind LLC*, 150 FERC ¶ 61,182, at P 19 (2015) (“Cassadaga [Wind]'s waiver request reflects considerable uncertainty as to whether, even with the Commission's grant of a waiver, it would be eligible to participate in the 2015 Class Year and, therefore, does not appear to be limited in scope.”).

<sup>41</sup> See *Thunderhead Wind*, 173 FERC ¶ 61,179 at P 22 (finding that Thunderhead failed to identify a concrete problem because Thunderhead could proceed with its project without waiver).

<sup>42</sup> TBE Answer at 5.

<sup>43</sup> Waiver Request at 2.

Debbie-Anne A. Reese,  
Deputy Secretary.