

176 FERC ¶ 61,118
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Long Island Power Authority
Long Island Solar Farm

Docket No. ER21-2400-000

ORDER GRANTING WAIVER

(Issued August 24, 2021)

1. On July 12, 2021, pursuant to Rules 207 and 212 of the Commission's Rules of Practice and Procedure,¹ and section 309 of the Federal Power Act,² Long Island Power Authority (LIPA) and Long Island Solar Farm (LISF) (collectively, Movants) submitted a request for a limited duration one-time waiver of section 17.1.2.1.2 of the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Tariff) until December 1, 2022. As discussed below, we grant Movants' request for waiver.

I. Background

2. Movants state that section 17.1.2.1.2 of the Tariff was part of a larger package of Tariff provisions that went into effect on June 8, 2021,³ the purpose of which was to enhance NYISO's operational control of solar resources to increase NYISO's ability to reliably and efficiently operate the New York Transmission System in the face of significant expected growth of grid-scale solar resources.⁴ The Tariff provisions allow NYISO's real-time dispatch market software to include solar resources among the flexible resources that are economically evaluated for automatic re-dispatch to resolve a

¹ 18 C.F.R. §§ 385.207, 385.212 (2020).

² 16 U.S.C. § 825h.

³ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER21-892-001 (June 17, 2021) (delegated order).

⁴ Waiver Request at 2.

constraint on the transmission system.⁵ Movants assert that, prior to the Tariff changes, solar resources were not considered flexible resources; if a reduction in solar resources' output was needed to relieve a constraint, NYISO would manually identify the solar resources needed to relieve the constraint and notify the local transmission owner, who would then instruct the solar resources to reduce their output.⁶

3. Movants state that LISF owns an existing 30 MW grid-scale solar resource whose output is sold to LIPA under a long-term contract and bid into NYISO's market by LIPA, the designated market participant for the resource.⁷ Movants assert that the LISF facility has been operating for 10 years and was not designed to meet the new NYISO operating requirements. Movants state that the LISF facility is the only existing grid-scale solar resource in NYISO, and the only facility that is currently subject to the new requirements in Tariff section 17.1.2.1.2.

II. Waiver Request

4. Movants request a limited, one-time waiver of section 17.1.2.1.2 of NYISO's Tariff.⁸ Movants state that section 17.1.2.1.2 provides that solar facilities set their lower dispatch limit to zero in the real-time dispatch process. Movants state that they are requesting waiver of section 17.1.2.1.2 because current technological limitations on the control equipment prevent the LISF facility from providing the dispatch down signal response that is called for by the Tariff; Movants explain that only five of the facilities' inverters have been successfully updated to accept automatic curtailment commands.⁹ Movants request waiver of this Tariff provision until December 1, 2022, a period they deem sufficient to bring the units affected by the current Tariff provisions into compliance with the requirements of section 17.1.2.1.2.¹⁰

5. Movants assert that their waiver request satisfies the Commission's criteria for granting waivers.¹¹ First, Movants argue that their request for waiver is made in good

⁵ New York Independent System Operator, Inc., FERC FPA Electric Tariff, NYISO Tariffs, [NYISO MST, 17.1 MST Att B LBMP Calculation, 30.0.0.](#)

⁶ Waiver Request at 2-3.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

¹⁰ *Id.* at 3.

¹¹ *Id.*

faith because LISF had been working unsuccessfully with the inverter manufacturer for months before the Tariff went into effect to find a software and hardware solution that would allow the facility to come into compliance.¹² Movants state that, despite continued efforts, including opening an inverter warranty claim on April 22, 2021 and multiple subsequent site visits, the problem has not yet been resolved.

6. Second, Movants state that the waiver request is limited in scope because it would only apply to the LISF facility, which is the only generating facility in all the New York Control Area that is currently subject to the Tariff provisions.¹³ Movants state that the waiver has been tailored in duration to give Movants sufficient time to address the software interoperability issues; the waiver period will end when the software and related hardware problems are solved.

7. Third, Movants state that the waiver will remedy a concrete problem because, absent the requested waiver, the Tariff section would require the LISF facility to set its lower dispatch limit to zero in the real-time dispatch process.¹⁴ Movants state that the facility cannot respond to the automated signal based on current technological limitations on the control equipment. They further state that, in the absence of the requested waiver, not only will LIPA be unable to sell power from the LISF facility into the NYISO market, but the output of its solar units would also likely be displaced in part by fossil-fueled generation, making it harder to meet the state's renewable energy targets.¹⁵

8. Fourth, Movants state that the requested waiver will not have any undesirable consequences or harm third parties because NYISO can dispatch the facility's output reliably without undue burden.¹⁶ Movants state that, as it has historically, NYISO would manually identify the need for the facility to reduce its output to relieve a constraint as it arises and would notify the local transmission owner, who would then instruct LISF to reduce its output.

III. Notice of Filing and Responsive Pleading

9. Notice of Movants' filing was published in the *Federal Register*, 86 Fed. Reg. 38,473 (July 21, 2021), with interventions and protests due on or before July 26, 2021. NYISO filed a timely motion to intervene and comments.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 5.

10. NYISO states that, because the LISF facility cannot currently comply with the new Tariff requirement due to technical issues, and because the facility operated for approximately 10 years prior to the new requirements, NYISO supports Movants' waiver request to provide additional time for Movants to bring the LISF facility into compliance with the new Tariff obligations.¹⁷

IV. Discussion

A. Procedural Matters

11. 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.

B. Substantive Matters

12. We grant Movants' request for waiver of section 17.1.2.1.2 of NYISO's 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.¹⁸ We find that the circumstances of Movants' waiver request satisfy these criteria.

13. First, we find that Movants acted in good faith because Movants began working on a solution before section 17.1.2.1.2 of the Tariff went into effect. As Movants explain, they continue to work diligently with the manufacturer of the affected inverters to find a software and hardware solution that will allow the facility to come into compliance. Second, we find that the waiver is of limited scope because it only applies to one facility and is of limited duration. Third, we find that the waiver addresses a concrete problem because, absent the requested waiver, the LISF facility would be required to set its lower dispatch limit to zero in the real-time dispatch process, which will effectively displace it from the market. Finally, we find that the waiver does not have undesirable consequences because NYISO can dispatch the facility's output reliably without undue burden.

The Commission orders:

Movants' waiver request is hereby granted, as discussed in the body of this order.

¹⁷ NYISO Comments at 4-5.

¹⁸ 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).

By the Commission. Commissioner Danly is dissenting in part and concurring in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Long Island Power Authority
Long Island Solar Farm

Docket No. ER21-2400-000

(Issued August 24, 2021)

DANLY, Commissioner, *dissenting in part and concurring in part*:

1. I dissent in part from today's order to the extent that it grants Long Island Power Authority and Long Island Solar Farm (collectively, Movants) a retroactive waiver (from June 8, 2021 to the date of the Movants' filing) of section 17.1.2.1.2 of the New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff). The Commission has no statutory authority to grant retroactive waivers, as I have repeatedly explained.¹ Although the provision at issue is a non-rate tariff term or condition, we are obligated under the filed rate doctrine and rule against retroactive ratemaking to deny such relief.²

2. Movants explain that technological limitations on the control equipment prevent them from complying with the terms of the tariff and they made a good faith effort to comply with the tariff well in advance of the effective date.³ I have no doubt that this is true and in cases such as this, the denial of a waiver request, even in part, appears harsh. But it is what the law requires. The Commission cannot grant unlawful—but seemingly equitable—retroactive waivers on a case-by-case basis, which—as I have also said before—ultimately depend upon how sympathetic the Commission believes the applicant's situation to be.

3. Movants also are not entitled to relief under Federal Power Act section 309. Section 309 grants the Commission authority “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.”⁴ However,

[i]t bears repeating . . . that the Commission does not have the
authority *to ignore the law to achieve an equitable result*.

¹ See, e.g., *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm'r, dissenting at P 5).

² See *id.* (Danly, Comm'r, dissenting at P 6).

³ See Movants July 12, 2021 Waiver Request at 3-4.

⁴ 16 U.S.C. § 825h; accord 15 U.S.C. § 717o.

Had we found that . . . actions violated the filed rate doctrine or the rule against retroactive ratemaking, we would not then invoke the Commission's assessment of the equities to overcome those violations.⁵

4. There are two possible solutions to the problem presented in this case. The best would be for the tariff to include a provision that allows for waiver of these requirements under specified circumstances.⁶ In the absence of such a tariff provision, the Commission should have denied the waiver request (or at least that part of the waiver request that would have had retroactive effect) and then relied upon its authority under Federal Power Act section 309 to find that no action should be taken against Movants for their failure to comply with the Services Tariff.⁷

5. With respect to the Movants' request for prospective relief, I concur, in part, in today's order to the extent it grants waiver of the Services Tariff provision at issue from the date Movants submitted their filing until the earlier of December 1, 2022 or such other date as Movants are able to resolve their technical problems such that the waiver is no longer needed.⁸

For these reasons, I respectfully dissent in part and concur in part.

⁵ *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993) (citation omitted) (emphasis added); *see also AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (explaining that the filed rate doctrine applies regardless of any motive "to benefit or harm a particular customer"); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132 (1990) ("[S]trict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act.").

⁶ *See, e.g., Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (Danly, Comm'r, dissenting at P 17 & nn.38-39).

⁷ *See Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) ("The principle fairly drawn from prior cases is that the Commission has broad authority to fashion remedies so as to do equity consistent with the public interest.").

⁸ *See* Movants July 12, 2021 Waiver Request at 3 & n.3 ("Should the technical issues be resolved before the end of the waiver period, Movants would notify the Commission and NYISO that the waiver is no longer needed and Movants would bring the facility into compliance with the tariff.").

James P. Danly
Commissioner