

177 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Empire Offshore Wind LLC

Docket No. ER22-98-000

ORDER GRANTING WAIVER REQUEST

(Issued December 21, 2021)

1. On October 13, 2021, pursuant to section 309 of the Federal Power Act (FPA)¹ and section 207(a)(5) of the Commission's Rules of Practice and Procedure,² Empire Offshore Wind LLC (Empire Wind) filed a request for a limited one-time prospective waiver of section 30.4.4.5.1 of Attachment X of the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT). Section 30.4.4.5.1 of the NYISO OATT provides that extensions of the commercial operation date for interconnection requests will not be considered material modifications if the proposed commercial operation date is within four years of the date on which NYISO completed the Class Year Facilities Study. To ensure that its interconnection agreement accurately reflects the commercial operation date of its 816 MW offshore wind project (Project), Empire Wind requests waiver to permit it to include a commercial operation date in its draft interconnection agreement with NYISO that is beyond the timeframe in section 30.4.4.5.1. As discussed below, we grant Empire Wind's waiver request.

I. Background

2. Empire Wind's proposed 816 MW Project is the first large scale offshore project in the State of New York. The Project consists of 68 GE Haliade-X wind turbines, each rated at 12 MW, two three-phase 230 kV submarine transmission lines, and two short 345 kV cable circuits.

¹ 16 U.S.C. § 825h.

² 18 C.F.R. § 385.207(a)(5) (2021).

3. Section 30.4.4.5.1 of the NYISO OATT provides that the extension of a proposed commercial operation date for a project will not constitute a material modification if the proposed commercial operation date is within four years from the date on which NYISO completed the Class Year Facilities Study for the Project.³

4. Empire Wind states that it submitted its request for interconnection service under the NYISO OATT on June 12, 2018, and that on June 14, 2021, NYISO completed the Class Year 2019 Facilities Study, awarding Empire Wind Energy Resource Interconnection Rights and Capacity Interconnection Rights. Empire Wind states that because NYISO completed its Class Year 2019 Facilities Study on June 14, 2021, the tariff requires that Empire Wind adopt a commercial operation date of no later than June 14, 2025.⁴

5. Section 30.4.4.5.2 of the NYISO OATT provides that once an interconnection agreement has been fully executed, the developer may extend the commercial operation date by demonstrating to NYISO via an officer certification that the developer has made reasonable progress against the milestones set forth in the interconnection agreement.

II. Waiver Request

6. Empire Wind states that it is seeking a one-time, limited waiver of section 30.4.4.5.1 of the NYISO OATT to ensure that its generator interconnection agreement accurately reflects the estimated commercial operation date of the Project.⁵ Empire Wind asserts that given the expected timelines for receiving key permits and governmental approvals, as well as constructing and commissioning New York State's first large-scale offshore wind generating facility, it currently anticipates that the Project will achieve commercial operation in or before December 2026. Empire Wind contends that it should not be required to enter into an interconnection agreement representing that the Project will achieve commercial operation in June 2025, which Empire Wind asserts is impossible.⁶

7. Empire Wind requests that the Commission grant a limited, prospective waiver of the interconnection milestone requirements of section 30.4.4.5.1 of the NYISO OATT to: (1) set the milestone date in the Project's interconnection agreement on which Empire Wind's interconnection facilities are expected to be energized and placed "In Service" as

³ NYISO OATT, attach. X, § 30.4.4.5.1.

⁴ Waiver Request at 6.

⁵ *Id.*

⁶ *Id.* at 6-7.

June 14, 2025; (2) set the milestone date in the Project's interconnection agreement on which Empire Wind's Project is expected to achieve commercial operation as December 14, 2026; and (3) provide that Empire Wind may extend either or both of these dates subsequent to the execution of the Project's interconnection agreement by demonstrating to NYISO that it has made reasonable progress against the milestones in the Project's interconnection agreement, as provided in section 30.4.4.5.2.2 of the NYISO OATT.⁷

8. Empire Wind asserts that its waiver request satisfies the Commission's criteria for granting waiver.⁸ First, Empire Wind asserts that the waiver is required to remedy a concrete problem created by the fact that the last date for commercial operation the NYISO OATT allows to be included in the Project's draft interconnection agreement is inconsistent with the realities of the time required for the permitting and construction of Empire Wind's large-scale offshore wind generating facility.⁹ Empire Wind notes that it is working with other NYISO stakeholders to amend the NYISO OATT to address this problem for future projects, but the NYISO shared-governance process makes it unlikely that any such amendment could obtain the stakeholder approval required for a filing under section 205 of the FPA¹⁰ in time to become effective prior to the time when the Project's interconnection agreement must be executed.

9. Second, Empire Wind argues that it is acting in good faith because it has been working on development of the Project for over a decade, including posting \$42,554,135 in firm security for the Project's network upgrades.¹¹ Empire Wind states that it has carefully tailored the waiver request to provide assurance that the Project is continuing to make substantial progress. Empire Wind explains that although it cannot achieve commercial operation within the four years, it does plan on having the Project meet its in service milestone by the four year deadline and it will establish December 14, 2026 as the Project's anticipated commercial operation date in the interconnection agreement.¹²

10. Third, Empire Wind asserts that the requested waiver will not have undesirable consequences or harm third parties because the extensions will only affect the Project.¹³

⁷ NYISO OATT, attach. X, § 30.4.4.5.2.2.

⁸ Waiver Request at 7-8.

⁹ *Id.* at 8.

¹⁰ 16 U.S.C. § 825d.

¹¹ Waiver Request at 9.

¹² *Id.*

¹³ *Id.* at 10-11.

Empire Wind states that the waiver will not adversely impact NYISO or any market participant because granting the requested commercial operation date extension will not excuse Empire Wind from funding the network upgrades identified by NYISO or shift any of the costs of those facilities to other customers.

11. Fourth, Empire Wind states that the requested waiver is limited in scope because it is a one-time, prospective waiver of the NYISO OATT requirement specifying the commercial operation date milestone to be stated in the Project's yet-to-be-filed interconnection agreement.¹⁴ Empire Wind states that its waiver request is limited to a single tariff provision and does not involve any other offshore wind generating facility seeking interconnection service under the NYISO OATT.¹⁵

12. Lastly, Empire Wind states that the waiver request is prospective and consistent with the filed rate doctrine and the rule against retroactive ratemaking.¹⁶ Empire Wind states that neither Empire Wind nor NYISO seeks to excuse past non-compliance with the tariff. Empire Wind reiterates that it and NYISO are still in the process of negotiating the interconnection agreement, and the effect of the waiver will be to allow the parties to include the correct commercial operation date for the Project in the executed interconnection agreement.

13. Empire Wind requests that the Commission issue a ruling prior to December 23, 2021, which is the date that the six-month negotiation period for the Project's interconnection agreement ends.¹⁷

III. Notice of Filing and Responsive Pleadings

14. Notice of the waiver request was published in the *Federal Register*, 86 Fed. Reg. 58,262 (Oct. 21, 2021), with interventions and protests due on or before November 3, 2021. Shell Energy North America (US), L.P. (Shell Energy) filed a timely motion to intervene. NYISO filed a timely motion to intervene and comments.

15. NYISO states that the waiver request, if granted, will allow NYISO to accept Empire Wind's proposed in service date of June 14, 2025, and proposed commercial operation date of December 14, 2026. NYISO explains that any further extensions would be governed by section 30.4.4.5.2 of the NYISO OATT and that it understands Empire Wind to be requesting waiver of the tariff-imposed limitation on permissible extensions

¹⁴ *Id.* at 11.

¹⁵ *Id.*

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 6, 14.

so the Project may execute an interconnection agreement that reflects these milestone extensions.¹⁸ NYISO states that under the circumstances described by Empire Wind, NYISO does not oppose Empire Wind's waiver request.¹⁹ NYISO asserts that it is not aware of any adverse impact the requested waiver could have on other projects in the NYISO interconnection queue. NYISO adds that the Commission's evaluation of a waiver request is highly dependent on the specifics of a particular request and that the granting of this waiver is not precedent for granting of future waiver requests.²⁰ NYISO further adds that waiver of tariff requirements should not be construed as having any impact on the applicability of the same requirements to other projects.²¹ NYISO adds that it supports Empire Wind's request that the Commission issue an order by December 23, 2021 in order to avoid delays in finalizing the Project's interconnection agreement.²²

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), Shell Energy's and NYISO's timely, unopposed motions to intervene serve to make them parties to this proceeding.

B. Substantive Matters

17. We grant Empire Wind's request for waiver of section 30.4.4.5.1 of Attachment X of the NYISO OATT to enable Empire Wind to designate the Project's commercial operation date in the interconnection agreement as December 14, 2026, and set the in service date of its interconnection facilities as June 14, 2025. As for the third part of Empire Wind's request, we clarify that any further extensions of time that Empire Wind may request would be governed by the NYISO OATT.

18. 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.²³ We find that the circumstances of Empire Wind's waiver request satisfy these criteria.²⁴

¹⁸ NYISO Comments at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 3.

²¹ *Id.* at 4.

²² *Id.*

19. First, we find that Empire Wind has acted in good faith. Empire Wind has made reasonable efforts to meet a June 14, 2025, commercial operation date, including pursuing necessary permits and approvals over several years and posting security for network upgrades. We acknowledge the complexity of constructing and commissioning New York State's first large-scale offshore wind generating facility, including obtaining numerous State and federal government approvals.

20. Second, we find that the waiver is limited in scope because it entails a one-time waiver of section 30.4.4.5.1 of the NYISO OATT to allow a one-time modification of the commercial operation date in the draft interconnection agreement for the Project to December 14, 2026, and set the in service date as June 14, 2025. The waiver only applies to a single tariff requirement, does not relieve Empire Wind of any financial or other requirements, and does not apply to any other facility. As Empire Wind and NYISO both acknowledge, any further extensions of time that Empire Wind may request would be governed by the NYISO OATT.

21. Third, we find that the waiver addresses a concrete problem. Specifically, it will allow Empire Wind to execute the interconnection agreement with an accurate commercial operation date of December 14, 2026, avoiding withdrawal of the interconnection request and the subsequent delay of the Project.

22. Fourth, we find that the requested waiver will not have undesirable consequences, such as harming third parties, because the waiver request does not affect any other facility seeking interconnection service under the NYISO OATT. Furthermore, we note that NYISO supports the waiver request and asserts that it is not aware of any adverse impact the requested waiver could have on other projects in the NYISO interconnection queue.

The Commission orders:

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

By the Commission. Commissioner Phillips is not participating.

(S E A L)

²³ 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).

²⁴ Relevant to the finding it is making in the instant proceeding, the Commission considers requests on a case-by-case, fact-specific basis.

Kimberly D. Bose,
Secretary.