

178 FERC ¶ 61,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Brookfield Renewable Energy Trading and
Marketing, LP

Docket No. ER22-359-000

ORDER DENYING WAIVER

(Issued January 31, 2022)

1. On November 5, 2021, Brookfield Renewable Energy Trading and Marketing, LP (Brookfield) filed a request for waiver of the regulatory requirements in New York Independent System Operator, Inc.’s (NYISO) Open Access Transmission Tariff (OATT) and Market Administration and Control Area Services Tariff (Services Tariff) (collectively, Tariff), which impose ongoing commitments or obligations on Brookfield in connection with certain External Capacity Resource Interconnection Service rights (External CRIS Rights) that Brookfield holds. As discussed below, we deny Brookfield’s waiver request.

I. Background

2. External CRIS Rights provide the holder with the long-term right to import capacity into the New York Control Area¹ without being subject to all of the requirements in NYISO’s Tariff that would otherwise apply to import capacity.² NYISO’s Tariff distinguishes between Contract and Non-Contract External CRIS Rights.³

¹ Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in NYISO’s Tariff.

² See NYISO OATT, attach. S, § 25.7.11 (“While the External CRIS Rights are in effect, External Installed Capacity associated with External CRIS Rights is not subject to: (1) the deliverability determination described above in Section 25.7.10 of this Attachment S, (2) the annual deliverability determination applied in the import limit setting process described in Section 5.12.2.2 of the Services Tariff, or (3) to the allocation of import rights described in ISO Procedures.”).

³ Brookfield holds Non-Contract External CRIS Rights. Waiver Request at 2.

Specifically, NYISO's Tariff requires Non-Contract External CRIS Rights holders to offer the committed number of megawatts (MWs) of External Installed Capacity for every month of the commitment for an Award Period of at least five years.⁴ NYISO's Tariff further distinguishes obligations for External CRIS Rights in the summer and winter.⁵ Summer External CRIS Rights obligate the holder to offer the same number of MWs of external capacity for all summer months, whereas winter External CRIS Rights allow the holder to specify which winter months it wishes to supply a certain number of MWs of external capacity.⁶

3. Under NYISO's Tariff, External CRIS Rights must be held for at least five years before they expire. A holder of External CRIS Rights can relinquish these External CRIS Rights prior to expiration by either transferring them to another entity (i.e., selling them to another entity) or by forfeiting them involuntarily for failure to deliver upon its obligations.⁷ In the latter case, the holder would be penalized 1.5 times the Installed Capacity Spot Auction Market Clearing Price for any months in which the capacity under Non-Contract Commitment was not offered for each MW committed.⁸ After four months of failing to deliver on an External CRIS Rights capacity commitment (and receiving the above noted penalty), NYISO's Tariff states that the associated External CRIS Rights will be terminated in their entirety with no ability to renew.⁹ Aside from expiration or transfer, there are no provisions in NYISO's Tariff that allow for a holder of External CRIS Rights to relinquish those rights voluntarily without facing a penalty.

4. Brookfield held Non-Contract External CRIS Rights for both the Winter and Summer Capability Periods that are committed for an Award Period set to expire in October 2030. Brookfield uses power from four affiliate-owned hydropower facilities to satisfy its External CRIS Rights obligations. Brookfield recently executed a transaction to sell the capacity from the hydropower facilities to a third party under a long-term power purchase agreement (Transaction).¹⁰ The Transaction is scheduled to be effective

⁴ See NYISO OATT, attach. S, § 25.7.11.1.2.

⁵ The Summer Capability Period runs from May 1 through October 31 of each year, and the Winter Capability Period runs from November 1 through April 30 of the following year. See *id.* § 1.3 Definitions – C.

⁶ See *id.*, attach. S, § 25.7.11.1.1.

⁷ See *id.* § 25.9.6.

⁸ See *id.* § 25.7.11.1.3.

⁹ See *id.* § 25.7.11.1.3.1. Entities who have had External CRIS Rights terminated involuntarily may reapply for External CRIS. See *id.*

January 1, 2022. Brookfield sought to relinquish its External CRIS Rights given that the capacity used to satisfy Brookfield's External CRIS Rights obligations is being sold to a third party. Brookfield successfully transferred (i.e., sold) its External CRIS Rights for the Summer Capability Period but was unable to transfer its External CRIS Rights for the Winter Capability Period. Brookfield will be unable to meet its obligation to offer in the Winter Capability Period auctions beginning January 1, 2022, and will be subject to penalties.¹¹

II. Waiver Request

5. Brookfield states that it requests a prospective, one-time, limited waiver in order to voluntarily and permanently relinquish its winter External CRIS Rights to NYISO. Specifically, Brookfield seeks waiver of all the “regulatory requirements that would impose ongoing commitments or obligations on [Brookfield] in connection with [its winter External CRIS Rights] . . . including those requirements found in the [OATT], [Services Tariff], or NYISO Installed Capacity Manual.”¹² Brookfield states that, subject to the Commission granting its waiver request, Brookfield intends to provide NYISO with a written notice that it is relinquishing its winter External CRIS Rights.

6. Brookfield asserts that its waiver request meets the standards that the Commission has set forth to evaluate requests for waivers.¹³ First, Brookfield argues that its waiver request addresses a concrete problem because it will no longer be able to meet the offer requirements associated with its winter External CRIS Rights. Brookfield states that, because it cannot meet the offer requirements, the penalties that are triggered when an External CRIS Rights holder registers a Supply Failure could be applied to Brookfield, even though it plans to relinquish its winter External CRIS Rights.¹⁴ Second, Brookfield states that it believes that its voluntary relinquishment of the winter External CRIS Rights will not have negative consequences but will instead provide deliverability headroom for other generators and help NYISO in its initiatives to address under-utilized CRIS.¹⁵

¹⁰ Waiver Request at 2.

¹¹ Brookfield states that “absent the requested waiver, as of the Effective Date of the Transaction, [Brookfield] will no longer be able to . . . satisfy the capacity commitment requirements associated with its External Winter CRIS Rights, which will result in [Brookfield] failing to meet NYISO External Winter CRIS Rights Requirements.” *Id.* at 4.

¹² *Id.* at 1, 10.

¹³ *Id.* at 10.

¹⁴ *Id.* at 10–11.

Third, Brookfield asserts that it has and continues to act in good faith because it has not failed to meet its obligations or violated any rule or requirement and instead submitted the waiver request prospectively, in an abundance of caution.¹⁶ Finally, Brookfield states that the requested waiver is limited in scope because Brookfield is only seeking relief from the NYISO External CRIS Rights requirements.¹⁷

7. Brookfield requests expedited Commission action by December 13, 2021 in order to allow NYISO to post import rights prior to the January spot auction, which was scheduled to open on December 27, 2021.¹⁸

III. Notice and Responsive Pleadings

8. Notice of Brookfield's filing was published in the *Federal Register*, 86 Fed. Reg. 63,372 (Nov. 16, 2021), with interventions and protests due on or before November 26, 2021. New York Transmission Owners¹⁹ filed a timely motion to intervene. NYISO filed a timely motion to intervene and comments.

9. NYISO states that it understands Brookfield to be requesting waiver of its obligations as set forth in OATT section 25.7.11 and the applicable subsections. NYISO also states that it does not oppose Brookfield's waiver request and supports expedited review of the waiver request. Additionally, NYISO requests that, if the Commission grants the waiver, the Commission also confirm that NYISO may proceed with a process not explicit in its Tariff "to avoid any ambiguity in implementation of the Commission's order."²⁰ Specifically, NYISO requests that the Commission confirm that, after NYISO receives notice from Brookfield that Brookfield is relinquishing its External CRIS Rights, NYISO may treat Brookfield's winter External CRIS Rights consistent with how NYISO would treat winter External CRIS Rights that were terminated due to a holder's failure to

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ *Id.* at 13–14.

¹⁹ New York Transmission Owners include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

²⁰ NYISO Comments at 5.

meet its obligations (i.e., Brookfield's relinquishment would trigger a recalculation of monthly import rights).

IV. Discussion

A. Procedural Matters

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

B. Substantive Matters

11. We deny Brookfield's request for waiver. Brookfield does not identify a specific Tariff provision for which it seeks waiver and instead requests waiver of all the regulatory requirements applicable to its External CRIS Rights that may be found in NYISO's Tariff and manuals. NYISO's Tariff limits Brookfield to two avenues for relinquishing its External CRIS Rights prior to expiration: transfer and involuntary termination. We find that, in essence, Brookfield seeks to create a new, third avenue to avoid the penalties associated with involuntary termination—voluntary relinquishment, a process that NYISO's Tariff currently does not permit.

12. We find that Brookfield's waiver request is an inappropriate vehicle for allowing Brookfield to relinquish its External CRIS Rights.²¹ A typical waiver seeks to suspend a tariff provision. By contrast, Brookfield's request would not only suspend numerous Tariff provisions but also alter the existing conditions under which a market participant may relinquish its External CRIS Rights (for example, through a transfer) and allow for an entirely new basis for forfeiting External CRIS Rights without penalty. Such new processes may not be effectuated by a waiver of NYISO's Tariff; they must be proposed pursuant to Federal Power Act (FPA) section 205²² by NYISO or through an FPA section 206 proceeding.²³

13. Moreover, even if we applied the Commission's waiver criteria here,²⁴ we would deny Brookfield's proposed waiver request because it is not sufficiently limited in scope

²¹ *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (*ISO-NE*).

²² 16 U.S.C. § 824d.

²³ *Id.* § 824e.

²⁴ 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

nor does it address a concrete problem. The Commission has previously denied waiver where the applicant's request was not limited to identified tariff provisions.²⁵ Brookfield seeks waiver of all the regulatory requirements applicable to its External CRIS Rights that may be found in NYISO's Tariff and manuals. Also, while NYISO states that it does not oppose Brookfield's waiver request, the breadth of that request is evidenced by NYISO's comments, which seek clarification on how to implement Brookfield's waiver request, as well as authorization to treat Brookfield's External CRIS Rights as if they were involuntarily terminated.²⁶ Additionally, there is no concrete problem that requires Commission action. The Commission has previously denied waiver where the waiver applicant merely sought to avoid following its tariff requirements.²⁷ Brookfield finds itself unable to transfer its winter External CRIS Rights and faces penalties associated with involuntary termination because of a series of voluntary business decisions. We are not persuaded that these circumstances represent a concrete problem given that Brookfield was aware of the requirements related to its External CRIS Rights.

harming third parties. *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).

²⁵ *See, e.g., ISO-NE*, 164 FERC ¶ 61,003 at P 48; *Bayonne Energy Ctr., LLC*, 163 FERC ¶ 61,095, at P 30 & n.49 (2018) (finding that waiver request was not limited in scope where applicant requested waiver of "any provisions of the Tariffs necessary to give effect to the waivers requested in the Petition.").

²⁶ NYISO Comments at 10.

²⁷ *See, e.g., Erie Power, LLC*, 148 FERC ¶ 61,038, at P 20 (2014) ("Simply having to follow NYISO's Tariff requirements . . . is not a concrete problem that warrants waiver of the Tariff's requirements.").

The Commission orders:

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

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.