

178 FERC ¶ 61,174
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.

Flint Mine Solar LLC

Docket No. EL22-3-000

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued March 11, 2022)

1. On October 14, 2021, as amended on October 27, 2021,¹ pursuant to section 309 of the Federal Power Act (FPA),² section 35.1(e) of the Commission's regulations,³ and Rules 215 and 218 of the Commission's Rules of Practice and Procedure,⁴ Flint Mine Solar LLC (Flint Mine) filed a complaint against the New York Independent System Operator, Inc. (NYISO), seeking a Commission order requiring NYISO to refund \$99,999 of a \$100,000 in-lieu-of deposit Flint Mine paid to participate in NYISO's 2019 Class Year Interconnection Facilities Study (Class Year Study).⁵ Flint Mine alleges that, because it successfully completed NYISO's 2019 Class Year Study and posted firm security for the full cost of its network upgrades, NYISO violated its Open Access Transmission Tariff (OATT) by retaining Flint Mine's \$100,000 portion of the in-lieu-of deposit. As discussed below, we deny the complaint.

¹ Flint Mine amended its complaint to include four exhibits referenced in its complaint but not included as attachments when initially filed.

² 16 U.S.C. § 825h.

³ 18 CFR § 35.1(e) (2021).

⁴ 18 C.F.R. §§ 385.215, 385.218 (2021).

⁵ Flint Mine states that it reduced the requested refund by one dollar in order to make the amount in controversy less than \$100,000 so that it could file under Rule 218(a) of the Commission's Rules of Practice and Procedure. Complaint at 2.

I. NYISO's OATT and Interconnection Process

2. NYISO's generator interconnection process features three interconnection studies: (1) an interconnection feasibility study; (2) an interconnection system reliability impact study; and (3) a combined Class Year Study, in which all projects that have fulfilled the requirements to be included in a given Class Year are studied together.⁶ The Class Year Study is a detailed study that identifies all electrical components and network upgrade facilities needed to enable interconnection for the Class Year projects. Based on the Class Year Study, which commences on the date that the Class Year begins (and one month after the prior Class Year Study is complete), NYISO allocates costs for network upgrades among the Class Year projects.⁷

3. Section 25.6.2.3.1 of NYISO's OATT establishes the main requirements for a Large Facility⁸ project to be eligible to be included in a given Class Year Study. No later than the Class Year Start Date, the project must have: (1) an Operating Committee-approved Interconnection System Reliability Impact Study or System Impact Study; and (2) a determination from the relevant local, state, or federal body for the project's permitting application to site and construct the Large Facility (the regulatory milestone in this proceeding).⁹ In lieu of satisfying the regulatory milestone by the Class Year Start Date, a Large Facility can either: (1) submit a two-part deposit consisting of \$100,000 and \$3,000 per MW for the requested Energy Resource Interconnection Service; or (2) have a New York State Energy Research and Development Authority agreement or a power purchase agreement.¹⁰ NYISO proposed the "in-lieu-of" deposit in early 2017 "[to provide] [d]evelopers with additional flexibility in addressing the regulatory milestone requirement that must be met for a project to enter into a Class Year Interconnection Facilities Study."¹¹ Under section 25.6.2.3.1 of

⁶ NYISO OATT §§ 30.6 – 30.8.

⁷ *Id.* § 30.8.

⁸ Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the NYISO OATT.

⁹ NYISO OATT § 25.6.2.3.1.

¹⁰ *Id.*

¹¹ NYISO Transmittal, Docket No. ER17-830-000, at 1 (filed Jan. 23, 2017). NYISO noted that "the proposed revisions will enable Developers of projects that are prepared to proceed, but have not completed the Article 10 application process, to enter into a Class Year Study," and that it "set the two-part deposit at a level that is sufficient to indicate that the Developer making the deposit is likely to proceed with its project, which is consistent with the purpose of the regulatory milestone for entering into a

NYISO's OATT, the \$3,000 per MW portion of the deposit is always refundable, including if the project withdraws from NYISO's interconnection queue. However, the \$100,000 portion of the in-lieu-of deposit is only refundable if the developer satisfies the regulatory milestone within 12 months after the Class Year Start Date or the Operating Committee's approval of the Class Year Study, whichever occurs first.¹²

II. Background

4. Flint Mine applied to NYISO for interconnection service for its 100 MW solar generation facility under development in Greene County, New York.¹³ Flint Mine chose to enter the 2019 Class Year, which commenced on August 9, 2019, despite not having received the required regulatory approval from the New York State Board on Electric Generation Siting and the Environment (Siting Board). Flint Mine states that, in lieu of satisfying the regulatory milestone, it paid the two-part deposit of \$100,000 and \$3,000 per MW as allowed under section 25.6.2.3.1 of NYISO's OATT.¹⁴ Flint Mine states that it paid this deposit while awaiting a determination from the Siting Board that its application for siting approval was complete.

5. On August 12, 2020, Flint Mine received a determination from the Siting Board that its application was complete.¹⁵ Shortly after this determination, Flint Mine states that NYISO refunded the \$3,000 per MW portion of the in-lieu-of deposit but did not return the \$100,000 portion of the deposit.¹⁶ Flint Mine states that NYISO has refused to refund the \$100,000 in-lieu-of deposit because the regulatory milestone was not satisfied within twelve months of the August 9, 2019 Start Date of the NYISO's 2019 Class Year Study.¹⁷ Flint Mine received its approval three days after the expiration of this 12-month period.

Class Year." *Id.* at 5.

¹² NYISO OATT § 25.6.2.3.1 (The \$100,000 portion of the in-lieu-of deposit "will be fully refundable if, within twelve months after the Class Year Start Date *or the Operating Committee's approval of the Class Year Study, whichever occurs first*, the Developer satisfies an applicable regulatory milestone and provides the [NYISO] with adequate documentation that the Large Facility has satisfied an applicable regulatory milestone." (emphasis added)).

¹³ Complaint at 2; NYISO Answer at 6.

¹⁴ Complaint at 3.

¹⁵ *Id.*

¹⁶ *Id.* at Ex. 1.

III. Complaint

6. Flint Mine argues that nothing in NYISO's OATT, filing containing the milestone deposit language at issue here, or the Commission order approving that filing expressly states that the \$100,000 in-lieu-of deposit becomes non-refundable after the 12-month cure period has expired.¹⁸ Flint Mine points to several other NYISO OATT provisions that provide for refund of the unused portion of interconnection study costs and study deposit payments¹⁹ and contends that because these OATT provisions require NYISO to refund to developers all unspent deposit amounts at the conclusion of any Class Year Study, such treatment applies to the in-lieu-of deposit in section 25.6.2.3.1 of NYISO's OATT.

7. Flint Mine states that it asked NYISO what it does with the forfeited deposits and was told via e-mail that NYISO credits forfeited in-lieu-of deposits against its Rate Schedule 1 Charge, which recovers NYISO's costs of operation from withdrawals to serve load.²⁰ Flint Mine argues that, had NYISO more clearly disclosed to the Commission in the original tariff filing proposing the in-lieu-of deposit that: (1) it intended to forfeit in-lieu-of deposits paid by projects that did not meet regulatory milestones within 12 months and that (2) those forfeited deposits would be credited to the benefit of load-serving entities generally, the Commission would have rejected that proposal as a clear violation of the Commission's established cost causation principles requiring that costs be allocated to the parties who cause the incurrence of such costs.²¹

8. Flint Mine states that, in *Midwest Independent Transmission System Operator, Inc.*, 138 FERC ¶ 61,233 (2012) (*MISO*), the Commission required the Midwest Independent Transmission System Operator, Inc. (*MISO*) to refund certain similar milestone payments

¹⁷ *Id.* at Ex. 2.

¹⁸ *Id.* at 4-6 (citing *N. Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-830-000 (Feb. 21, 2017) (delegated order)).

¹⁹ *Id.* at 4 (citing NYISO OATT § 30.13.3.1 ("Any difference between the study deposit and the actual cost of the applicable Interconnection Study shall be paid by or refunded, except as otherwise provided herein, to the Class Year Project or offset against the cost of any future Interconnection Studies..."); § 30.14 ("Any difference between the deposit for and the actual cost of any study performed under these Terms and Conditions shall be paid by or refunded to Developer, as appropriate."); and § 30.13.3 ("The ISO shall charge and the Developer shall pay the actual costs of the Interconnection Studies incurred by the ISO and Transmission Owner."))

²⁰ *Id.* at 5-6, Ex 4.

²¹ *Id.* at 6, Ex. 3.

in excess of a particular customer's costs, in line with the Commission's cost causation policy.²² Flint Mine argues that the Commission found that MISO can only use such milestone payment amounts to offset actual costs imposed on other interconnection customers that are affected by the posting customer's withdrawal from the interconnection queue and that any portion of such milestone payments in excess of such costs must be refunded to the withdrawing customer.²³ Flint Mine thus argues that established Commission policy requires that its refund claim should be granted. Flint Mine argues that, because it has successfully completed NYISO's 2019 Class Year Study and posted firm security for the full cost of its network upgrades, there is no need for NYISO to retain any part of the in-lieu-of deposit to address any harm that may have been suffered by other projects in the NYISO interconnection process if Flint Mine withdrew its project. Flint Mine asks the Commission to direct NYISO to refund \$99,999 of its \$100,000 portion of the in-lieu-of deposit.²⁴

IV. Notice and Responsive Pleadings

9. Notice of the complaint was published in the *Federal Register*, 86 Fed. Reg. 58,648 (Oct. 22, 2021), with the answer, interventions and protests due on or before October 25, 2021. On October 22, 2021, the Commission granted an extension of time to November 3, 2021 for NYISO to file an answer. Notice of the amended complaint was published in the *Federal Register*, 86 Fed. Reg. 60,622 (Nov. 3, 2021), with the answer, interventions and protests due on or before November 3, 2021. On November 3, 2021, NYISO filed an answer. On October 22, 2021, a timely motion to intervene was filed by New York Transmission Owners.²⁵

A. NYISO's Answer

10. NYISO argues that the Commission should deny Flint Mine's complaint. NYISO asserts that Flint Mine is asking the Commission to reinterpret the terms of NYISO's OATT to authorize the return of an in-lieu-of deposit that is expressly not refundable under its terms.²⁶ NYISO explains that Flint Mine is effectively asking the Commission

²² *Id.* at 7.

²³ *Id.* at 7-8 (citing *MISO*, 138 FERC ¶ 61,233, at PP 152-154 (2012); *Midwest Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,294, at P 13 (2009)).

²⁴ *Id.* at 8.

²⁵ The intervening New York Transmission Owners are Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

to revise the OATT retroactively, in violation of Commission policy, to reach an outcome not currently contemplated by the language of the OATT. NYISO argues that the language of the OATT, which was approved by the Commission, is unambiguous, and the relief requested is impermissible under the filed rate doctrine. NYISO further states that, even if there were any ambiguity about the plain language of the OATT, there would be no basis for Flint Mine's proposed reinterpretation.²⁷

11. NYISO argues that Flint Mine tries to create ambiguity by citing to irrelevant language in its OATT.²⁸ NYISO contends that Flint Mine's references to sections 30.13 and 30.14 of its OATT pertain to study deposits that a developer pays for the performance of one of the three specific interconnection studies outlined in section 30 of its OATT. NYISO argues that these tariff sections do not apply to the two-part deposit made in lieu of satisfying regulatory milestones in OATT section 25.6.2.3.1.²⁹

12. NYISO states that its goal in developing the in-lieu-of deposit was to make sure that only serious projects enter a Class Year.³⁰ NYISO reasons that, when presented with the risk of losing the in-lieu-of deposit, a project developer would have to make the decision as to whether its application for a regulatory permit was sufficiently advanced that it was prudent to move forward despite the risk of forfeiture of the \$100,000. Thus, according to NYISO, any caselaw addressing study deposits would be distinguishable and inapplicable to the circumstances of an in-lieu-of deposit. Moreover, NYISO states that it was clear from the language of the transmittal letter attached to the proposed language in section 25.6.2.3.1 that it intended for the in-lieu-of deposit to be at risk of forfeiture.³¹ NYISO argues that this characterization is contrary to Flint Mine's argument that it had "no indication" that the in-lieu-of deposit would be non-refundable.³²

²⁶ NYISO Answer at 2.

²⁷ *Id.* at 2-3.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9.

³⁰ *Id.* at 11.

³¹ *Id.* (citing NYISO Interconnection Filing, Transmittal Letter, Docket No. ER17-830-000, at 7 (filed Jan. 23, 2017) ("Moreover, notwithstanding the additional time provided to the Developer, the Developer still has an incentive to satisfy its regulatory milestone as soon as possible. Otherwise, as described above, *the Developer may forfeit the \$100,000 first part of its deposit.*") (emphasis added)).

³² *Id.* at 11-12.

13. NYISO argues that its OATT is clear that, when a developer that has used the two-part deposit under section 25.6.2.3.1 to access a Class Year and subsequently fails to meet the applicable regulatory milestone by the deadline, the developer forfeits the \$100,000 in-lieu-of deposit. NYISO adds that the D.C. Circuit has held that the “filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations.”³³ NYISO argues that, accordingly, the Commission has no discretion to interpret NYISO’s OATT in a way that is inconsistent with the plain language of the OATT. NYISO continues that Flint Mine’s arguments about whether the forfeiture of the in-lieu-of deposit are just and reasonable are irrelevant in the face of the clear language and intent of NYISO’s OATT. NYISO concludes that Flint Mine’s complaint is without merit and must be denied.

V. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the timely, unopposed motion to intervene serves to make the New York Transmission Owners parties to this proceeding.

B. Substantive Matters

15. We find that NYISO did not violate its OATT in not refunding the in-lieu-of deposit and that NYISO’s OATT does not violate the Commission’s cost causation principles. We agree with NYISO as to the meaning of the OATT language at issue in this case. NYISO OATT section 25.6.2.3.1 provides that the \$100,000 in-lieu-of deposit is refundable if the regulatory milestone is satisfied within the prescribed one-year cure period. Thus, as Flint Mine concedes, that provision did not require NYISO to refund Flint Mine’s in-lieu-of deposit if the regulatory milestone was not satisfied within twelve months of the August 9, 2019 Start Date of the NYISO’s Class Year 2019 Facilities Study.³⁴ This OATT provision was filed with and accepted by the Commission without protest³⁵ and is part of the filed rate. In addition, as discussed further below, the other cited NYISO OATT provisions also do not require that NYISO refund the in-lieu-of

³³ *Id.* at 10 (citing *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018)).

³⁴ *See* Complaint at 3 (“NYISO determined that it was not authorized to refund the \$100,000 portion of [Flint Mine’s] milestone deposit at that time. [Flint Mine] does not challenge this NYISO determination in this Complaint.”) (footnote omitted).

³⁵ *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER17-830-000 (Feb. 21, 2017) (delegated order).

deposit at issue here. As such, Flint Mine had notice that its in-lieu-of deposit was at risk of forfeiture if Flint Mine failed to meet the regulatory milestone within the one-year cure period, which is exactly what occurred.

16. Flint Mine's reliance on sections 30.13 and 30.14 of NYISO's OATT, which require refunds of the unused portions of the interconnection study deposits and study costs, and the *MISO* decision,³⁶ which addressed, *inter alia*, refunds of milestone payments, is misplaced. Under NYISO's OATT, the study deposits in sections 30.13 and 30.14 serve to provide an up-front payment to cover (in whole, or at least in part) the actual costs of the interconnection study; thus, it is consistent with Commission precedent that any unused portion of those study deposits is refunded or used to offset future interconnection study costs for the project.³⁷ *MISO* involved MISO's M2 milestone payments that interconnection customers must submit before entering the Definitive Planning Phase of MISO's generator interconnection study process. MISO's M2, M3, and M4 milestone payments are ultimately applied to the initial payment³⁸ of 20% of the costs of the network upgrades identified in the ultimate facilities study.³⁹ Thus, the Commission found that, although not a deposit, any portion of the milestone payment above the costs resulting from an interconnection customer's withdrawal must be refunded to the withdrawing customer, consistent with the Commission's cost causation policy.⁴⁰

17. In contrast, the in-lieu-of deposit in section 25.6.2.3.1 is a *voluntary* payment that a project developer pays to proceed to the next step in the interconnection process *in lieu of* satisfying the regulatory milestone. Flint Mine's arguments analogizing in-lieu-of payments to NYISO's interconnection study deposits and MISO's milestone payments fail to recognize the different purposes of each payment. Whereas the interconnection study and milestone payments cited by Flint Mine relate to projects readily progressing through the queue, the in-lieu-of payment provides some level of flexibility to developers that have failed to meet the requisite milestones while also serving to discourage non-ready projects from joining a Class Year. The Commission has not found that non-refundable voluntary in-lieu-of deposits violate cost causation principles.

³⁶ See *MISO*, 138 FERC ¶ 61,233.

³⁷ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,294 at P 13.

³⁸ An initial payment is what an interconnection customer needs to pay before executing a Generator Interconnection Agreement with MISO.

³⁹ See *Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,003, at PP 25, 37, 43 (2017).

⁴⁰ *MISO*, 138 FERC ¶ 61,233 at P 156.

18. In sum, Flint Mine did not demonstrate that forfeiture of the \$100,000 portion of the in-lieu-of deposit, described in section 25.6.2.3.1 of NYISO's OATT, is inconsistent with the OATT. Flint Mine also did not demonstrate that the existing OATT is unjust and unreasonable. We therefore deny Flint Mine's complaint.

The Commission orders:

For the reasons discussed above, the Commission hereby denies Flint Mine's complaint.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.