

184 FERC ¶ 61,086
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bull Run Energy LLC

Docket No. ER23-2140-000

ORDER GRANTING WAIVER REQUEST

(Issued August 7, 2023)

1. On June 12, 2023, pursuant to Rules 207(a)(5) and 212 of the Commission's Rules of Practice and Procedure,¹ Bull Run Energy LLC (Bull Run) submitted a request for waiver of section 25.6.2.3.2 of Attachment S and section 30.11.1 of Attachment X to the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (OATT), which require Bull Run to satisfy the applicable regulatory milestone by August 9, 2023 (Regulatory Milestone Requirement). Bull Run seeks waiver of these provisions to allow it to complete the Regulatory Milestone Requirement by August 9, 2024. As discussed below, we grant Bull Run's waiver request.

I. Background

2. Section 25.6.2.3.2 of Attachment S to the NYISO OATT provides:

A project must satisfy the applicable regulatory milestone in Section 25.6.2.3.1.1, above, within six months after the date the ISO tenders to the project Developer the Standard Large Generator Interconnection Agreement [(LGIA)] for the project pursuant to Section 30.11.1 of Attachment X to the ISO OATT.²

3. Section 30.11.1 of Attachment X to the NYISO OATT provides, in relevant part:

¹ 18 C.F.R. §§ 385.207(a)(5), 385.212 (2022).

² NYISO, NYISO Tariffs, NYISO OATT, § 25.6 (Attachment S – Cost Allocation Methodology For ERIS) (10.0.0), § 25.6.2.3.2. Capitalized terms used but not otherwise defined in this order have the meanings ascribed to them in the NYISO OATT.

Within six months after the date the ISO tenders the draft LGIA, the Developer must have satisfied the applicable regulatory milestone described in Section 25.6.2.3.1 of Attachment S. If the Developer has not done so, the ISO will withdraw the Interconnection Request pursuant to Sections [sic] 25.6.2.3 of Attachment S to the OATT and pursuant to Section 30.3.6 of this Attachment X.³

4. Bull Run states that it submitted a request for interconnection service to NYISO on December 15, 2015, and was assigned Queue No. Q521 in NYISO's interconnection queue. Bull Run states that on February 9, 2023, NYISO tendered a draft LGIA to Bull Run. Therefore, Bull Run explains, the Regulatory Milestone Requirement requires Bull Run to satisfy the applicable regulatory milestone by August 9, 2023 before its interconnection request is withdrawn and its queue position is lost.

5. Relevant to its waiver request, Bull Run explains that it is developing a 449 MW wind-powered generation facility in Clinton County, New York (Project).⁴ Bull Run further explains that, as part of New York State's efforts to increase the consumption of renewable energy in New York City, the New York State Energy Research and Development Authority (NYSERDA) issued a request for proposals that would achieve this goal.⁵ Bull Run states that one of the two projects selected in NYSERDA's solicitation was Clean Path New York, an \$11 billion portfolio that consists of 23 generation projects, totaling 3,800 MW of nameplate capacity, and a 175 mile HVDC transmission line delivering their power to New York City. Bull Run states that the Project is the single largest generation project in the Clean Path New York portfolio. Bull Run further states that Clean Path New York's Tier 4 Renewable Energy Certificate Purchase and Sale Agreement with NYSERDA requires all components of the portfolio to be operational by June 2027. Bull Run states that it has spent \$12 million in development costs, made a nonrefundable security posting of \$32,113,966 to NYISO, and acquired 46,000 acres of land required for the Project.⁶

6. Bull Run states that in 2015, it began the application process under Article 10 of the New York Public Service Law (Article 10), the then-applicable permitting regime in New York for such a generation project.⁷ Bull Run states that it submitted its Article 10

³ NYISO, NYISO Tariffs, NYISO OATT, § 30.11 (Attachment X – Standard Large Generator Interconnection Agreement) (6.0.0), § 30.11.1.

⁴ Waiver Request at 2, 5, 13.

⁵ *Id.* at 2.

⁶ *Id.* at 13.

application in August 2019. As part of this process, Bull Run states that it solicited community input, collected responses from multiple state agencies and the public, and undertook a wide range of engineering, wildlife, and wetland surveys and other site evaluation efforts.

7. Bull Run explains that, while it was working to respond to deficiencies in its Article 10 application, New York adopted the Accelerated Renewable Energy Growth and Community Benefit Act, which added a new section 94-c to the New York Executive Law (Section 94-c Process) and established the Office of Renewable Energy Siting (ORES) in order to streamline the permitting of renewable energy systems.⁸

8. Bull Run states that it concluded that the Section 94-c Process provided a more efficient process with greater specificity on technical project detail requirements, which Bull Run believes will lead to a faster completeness determination than the Article 10 process.⁹ For this and other reasons, Bull Run states that it withdrew its Article 10 application in preparation for a new application under the Section 94-c Process in September 2021.¹⁰ Bull Run explains that, under the new permitting regime, all of the wildlife and wetland studies previously submitted under the Article 10 process were considered out-of-date by the New York State Department of Environmental Conservation and needed to be performed again following Bull Run's transition to the Section 94-c Process. Bull Run states that it also had to renew consultation efforts with affected municipalities, agencies, and communities. Bull Run adds that ORES has requested follow up habitat studies, which must be performed during the growing season of any given year.

9. Bull Run states that it is on track to submit the Section 94-c application in September 2023, although it is continuing to work with ORES to try to move the schedule forward to at least August 2023.¹¹ However, Bull Run explains, following the submittal of the Section 94-c application ORES must review the application within 60 days, at which time it will either deem the application complete or issue a notice of deficiency requesting additional information. Bull Run states that, to date, there have been no projects submitted to ORES that have not received at least one notice of deficiency. Therefore, Bull Run states that it expects to receive at least one deficiency notice. Bull Run states that for these reasons, it will not be possible for Bull Run to fulfill

⁷ *Id.* at 8.

⁸ *Id.* at 8-9.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 3, 10-11.

¹¹ *Id.* at 11-12.

the Regulatory Milestone Requirement by August 9, 2023, as required by section 25.6.2.3.2 of Attachment S and section 30.11.1 of Attachment X to the NYISO OATT. Bull Run adds that, although there are 10 possible milestones that could be utilized for a project developer to satisfy the Regulatory Milestone Requirement in the NYISO OATT, only the Section 94-c completion is applicable to Bull Run.¹²

II. Waiver Request

10. Bull Run requests waiver of the Regulatory Milestone Requirement set forth in section 25.6.2.3.2 of Attachment S and section 30.11.1 of Attachment X to the NYISO OATT in order to allow Bull Run to complete the Regulatory Milestone Requirement by August 9, 2024.¹³ Bull Run argues that its waiver request satisfies the Commission's criteria for granting waiver.¹⁴

11. First, Bull Run argues that it has acted in good faith at all times in its development and permitting efforts. Bull Run asserts that it was only due to a change in law that caused Bull Run to change course and enter the more efficient Section 94-c Process.

12. Second, Bull Run contends that its requested relief is limited in scope because it is not open-ended, and instead, would establish a finite date by which Bull Run must submit evidence of completion of the Regulatory Milestone Requirement. Bull Run states that it seeks waiver of only one deadline directly impacted by changes to New York law and is not seeking relief from any financial requirements associated with its interconnection request.

13. Third, Bull Run argues that its requested relief addresses a concrete problem.¹⁵ Bull Run states that, absent waiver, its interconnection request will be withdrawn and its queue position lost. Bull Run explains that in order to get back into the queue it would be required to submit a new interconnection request, which would optimistically take more than two years to result in an LGIA. Bull Run states that it would also have to restart the Section 94-c Process because Bull Run would need to complete a new System Reliability Impact Study before Bull Run could submit a new Section 94-c application.¹⁶ Bull Run

¹² *Id.* at 12-13.

¹³ *Id.* at 13-14.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 15-16.

¹⁶ See N.Y. Comp. Codes R. & Regs. tit. 19, ch. XVIII, pt. 900, §§ 900-2.2, 900-2.22, Ex. 21 (requiring siting permit applications to include certain exhibits, including an Exhibit 21 that includes a system reliability impact study performed in

states that, under this timeline, it would not be able to construct and operate the Project by June 2027 or otherwise meet its obligations under its contract with NYSERDA.¹⁷

14. Fourth, Bull Run asserts that its requested relief will not create any undesirable consequences, such as harm to third parties.¹⁸ Bull Run states that waiving the deadline will not cause any projects behind it in the queue to spend additional monies or be assigned additional upgrades. Bull Run states that its requested waiver would allow Bull Run to meet the Regulatory Milestone Requirement no later than August 9, 2024, which is prior to the end of Class Year 2023. As such, Bull Run asserts that its requested relief will not negatively impact the following class year.

15. Bull Run requests Commission action by August 7, 2023 to provide commercial certainty to Bull Run before expiration of the existing August 9, 2023 deadline.¹⁹ Bull Run commits to include updates on its progress in the Section 94-c Process in its quarterly reports to NYISO, as required under section 9 of the NYISO Reliability Planning Process Manual.²⁰

III. Notice and Responsive Pleading

16. Notice of Bull Run's filing was published in the *Federal Register*, 88 Fed. Reg. 40,804 (June 22, 2023), with interventions and protests due on or before July 3, 2023. NYISO filed a timely motion to intervene and comments.

17. NYISO states that it takes no position on the merits of Bull Run's request for waiver. NYISO, however, raises its concern that a waiver in this proceeding may raise questions regarding the applicability of milestone requirements for other projects.²¹ NYISO states that, if the Commission grants Bull Run's waiver request, it requests that the Commission confirm that waiver is based solely on the circumstances related to the Project and should not be construed as having any impact on the applicability of the same requirements to other large facilities in NYISO.

accordance with the NYISO OATT).

¹⁷ Waiver Request at 2, 16.

¹⁸ *Id.* at 16-17.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 2-3 (citing NYISO, *Manual 26: Reliability Planning Process Manual*, 47 (July 2022), https://www.nyiso.com/documents/20142/2924447/rpp_mnl.pdf/67e1c2ea-46bc-f094-0bc7-7a29f82771de).

²¹ NYISO Comments at 5.

18. NYISO does not dispute Bull Run's assertion that granting the waiver request will not harm other projects in NYISO's interconnection queue in the near term. NYISO, however, notes that the longer the delay in satisfying the Regulatory Milestone Requirement, the greater the potential for adverse impacts to other projects due to delays in the Project or its inability to proceed.²² NYISO states that, based on Bull Run's representations concerning the status of its application process with ORES, NYISO believes that August 9, 2024 would be a reasonable deadline by which Bull Run must satisfy the Regulatory Milestone Requirement and that waiver should only be granted until August 9, 2024. NYISO also supports Bull Run's proposal to include with its quarterly milestone status reports to NYISO updates concerning its progress in the Section 94-c Process.

19. NYISO also supports Bull Run's request for Commission action by August 7, 2023 to provide the parties with certainty concerning the application of the Regulatory Milestone Requirement.²³

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), NYISO's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

21. We grant Bull Run's request for waiver of section 25.6.2.3.2 of Attachment S and section 30.11.1 of Attachment X of the NYISO OATT to allow Bull Run to meet the Regulatory Milestone Requirement by August 9, 2024. 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.²⁴ As discussed below, we find that the circumstances of Bull Run's waiver request satisfy these criteria.²⁵

²² *Id.* at 5-6.

²³ *Id.* at 6.

²⁴ 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 As NYISO recognizes, waiver of tariff requirements should not be construed as having any impact on the applicability of the same requirements to other projects. NYISO Comments at 5. The Commission considers requests for waiver of tariff

22. First, we find that Bull Run has acted in good faith. Bull Run has made reasonable efforts to meet the Regulatory Milestone Requirement by August 9, 2023, including pursuing the necessary permits and approvals over several years, incurring significant development costs, posting nonrefundable security associated with its interconnection request, and acquiring land required for the Project.²⁶ Second, we find that the waiver is limited in scope because it entails a one-time waiver of section 25.6.2.3.2 of Attachment S and section 30.11.1 of Attachment X to the NYISO OATT to allow a one-year extension of the date by which Bull Run must satisfy the Regulatory Milestone Requirement. The waiver only applies to a single tariff deadline, does not relieve Bull Run of any financial or other requirements, and does not apply to any other facility. Third, we find that the waiver request addresses a concrete problem. Absent waiver, Bull Run would be required to withdraw its interconnection request²⁷ and lose its position in NYISO's interconnection queue,²⁸ which Bull Run asserts would compromise its ability to meet its responsibilities under its contract with NYSERDA, including to begin operating by June 2027.²⁹ Finally, we find that the requested waiver will not have undesirable consequences, such as harming third parties, because it will allow Bull Run to meet the Regulatory Milestone Requirement no later than August 9, 2024, which is prior to the end of Class Year 2023, and, thus, will not negatively affect the following class year.

requirements on a case-by-case, fact-specific basis.

²⁶ See Waiver Request at 13, 16.

²⁷ NYISO, NYISO Tariffs, NYISO OATT, § 30.11 (Attachment X – Standard Large Generator Interconnection Agreement) (6.0.0), § 30.11.1.

²⁸ NYISO, NYISO Tariffs, NYISO OATT, § 30.3 (Attachment X – Interconnection Requests) (16.0.0), § 30.3.6.

²⁹ See Waiver Request at 2.

The Commission orders:

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

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.