

170 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

NYC ENERGY LLC

Docket No. ER20-629-000

ORDER DENYING WAIVER

(Issued March 19, 2020)

1. On December 18, 2019, NYC ENERGY LLC (NYCE) submitted a request, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ for a limited waiver of a tariff provision requiring withdrawal from New York Independent System Operator, Inc.'s (NYISO) interconnection queue for failure to comply with certain interconnection procedure requirements (Waiver Request). Specifically, NYCE seeks waiver of the withdrawal provision set forth in Section 30.3.6 of Attachment X of NYISO's Open Access Transmission Tariff (OATT)² to allow its interconnection request to be reinstated as an active request holding Queue Position 522 in NYISO's interconnection queue. As discussed below, we deny NYCE's Waiver Request.

I. Background

2. NYCE states that it is a New York limited liability company and is seeking to construct and operate a 79.9 MW energy storage project to be located on a barge moored at an existing Brooklyn Navy Yard pier (Project).³ NYCE states that the Project will be connected to Consolidated Edison of New York, Inc.'s 34.5 kV system at the Hudson Avenue Substation in Brooklyn, New York. NYCE states that the Project is a modification of a previously permitted 79.9 MW combined cycle gas/oil fired generating facility.

3. According to NYCE, it submitted its interconnection request on December 14, 2015, and received an approval of a System Reliability Impact Study from the NYISO

¹ 18 C.F.R. § 385.207(a)(5) (2019).

² NYISO, NYISO Tariffs, NYISO OATT, 30.3 OATT Attach. X Interconnection Requests (10.0.0).

³ Waiver Request at 2.

Operating Committee on June 21, 2018.⁴ NYCE states that NYISO also completed a materiality review of the Project regarding a change in technology on August 2, 2019. NYCE states that it notified NYISO of its intention to enter the 2019 Class Year and that NYISO acknowledged NYCE's request on August 16, 2019.⁵ NYCE further states that it delivered an executed Facilities Study Agreement (FSA) to NYISO on September 11, 2019 along with all other required materials, including a \$100,000 FSA study deposit.⁶

4. Section 25.6.2.3.1.1 of Attachment S of NYISO's OATT provides that, in order to satisfy the regulatory milestone, an applicable regulatory body (e.g., local, state, or federal) must determine that the permitting application submitted to site and construct the Large Facility is complete. NYCE states that when it submitted the executed FSA, it believed that it had satisfied the regulatory milestone identified in Attachment S of NYISO's OATT based upon a conditional finding by NYISO of no adverse impacts made under the State Environmental Quality Review Act and City Environmental Quality Review dated January 10, 2000 for its previous generation Project.⁷ NYCE explains that, after further consultation, NYISO staff concluded that the negative declaration under the environmental reviews was not applicable to the Project. NYCE states that NYISO disagreed with NYCE's conclusion that the Project satisfies the regulatory milestones set forth in Section 25.6.2.3.1 of Attachment S⁸ of NYISO's OATT because the Project qualified for Class Year entry as of the date the Operating Committee approved the Large Facility's Interconnection System Reliability Impact Study as set forth in Section 25.6.2.3.1.3 of Attachment S⁹ of NYISO's OATT. NYISO notified NYCE that it would be ineligible to participate in the 2019 Class Year Study and that its interconnection

⁴ *Id.*

⁵ *Id.* at 2-3.

⁶ *Id.* at 3.

⁷ *Id.*

⁸ Section 25.6.2.3.1 of Attachment S of NYISO's OATT provides for the requirements that a Large Facility must satisfy for its project to be included in a given Class Year Study.

⁹ Section 25.6.2.3.1.3 of Attachment S of NYISO's OATT provides that a Large Facility is considered to have satisfied the regulatory milestone and will qualify for Class Year entry as of the date the Operating Committee approved the Large Facility's Interconnection System Reliability Impact Study if none of the permitting processes referred to in Sections 25.6.2.3.1.1 and 25.6.2.3.1.2 apply to it.

request was deemed withdrawn pursuant to Section 30.3.6 of Attachment X¹⁰ because NYCE had failed to meet the submittal deadlines.¹¹ NYCE states that, as a result, it is no longer pursuing that approach and does not seek to be a participant in the 2019 Class Year.

II. NYCE's Waiver Request

5. NYCE requests that the Commission waive the requirements of NYISO's OATT, Attachment X, Section 30.3.6.¹² NYCE asserts that such a waiver would allow NYCE to retain an active Queue Position in NYISO's interconnection queue.¹³ NYCE claims that, if its interconnection request is not reinstated, it will incur the loss of the substantial time and funds invested into the Project to date and will have to incur additional delays and costs. NYCE avers that it believed in good faith that it followed the OATT requirements for meeting all required regulatory milestones.

6. NYCE argues that granting its limited waiver request is consistent with prior Commission rulings regarding one-time waivers of deadlines contained in the OATT.¹⁴ NYCE asserts that the underlying cause of the failure to meet the deadline was a good faith error.¹⁵ NYCE states that it submitted an executed FSA on September 11, 2019 under the belief that it had satisfied the applicable regulatory milestones. NYCE asserts that, upon notice of NYISO's position that NYCE had not met the regulatory milestone provision of Section 25.6.2.3.1.3 of Attachment S of NYISO's OATT, NYCE offered to come into compliance by submitting a sufficient payment to meet the Attachment S requirements.¹⁶

¹⁰ Section 30.3.6 of Attachment X of NYISO's OATT governs the withdrawal of a project that fails to comply with the requirements under the Large Facility Interconnection Procedures (LFIP) and specifically prohibits extending the deadline for the submittal of deposits required under Section 25.6.2.3.1 of Attachment S.

¹¹ Waiver Request at 1.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 1.

7. NYCE states that the withdrawal of NYCE's interconnection request would result in the loss of NYCE's substantial investment and commitment of resources in the Project without concomitant benefit.¹⁷ NYCE contends that granting the waiver will not harm any other projects pursuing interconnection service and that a one-time waiver is therefore, appropriate.¹⁸

III. Notice of Filing and Responsive Pleadings

8. Notice of NYCE's filing was published in the *Federal Register*, 84 Fed. Reg. 71,402 (Dec. 27, 2019), with protests and interventions due on or before January 8, 2020. NYISO filed a timely motion to intervene and comments.

9. NYISO states that it supports NYCE's Waiver Request, considering the unique circumstances surrounding it.¹⁹ NYISO states that under the LFIP, the facilities study is performed on a combined basis for a Class Year of projects that are first eligible to enter a given Class Year when they have satisfied the developmental milestones identified in Section 25.6.2.3.1 of Attachment S of the OATT.²⁰ According to NYISO, a project would be subject to withdrawal if the developer fails to satisfy the requirements within 30 days of tendering a Class Year study agreement, as outlined in Section 30.3.6 of Attachment X of NYISO's OATT. If the project does not become a member of the Class Year, it may lose its queue position.

10. NYISO states that, when NYCE sought to enter the 2019 Class Year, it asserted that a Conditional Negative Declaration under the environmental reviews issued on January 10, 2000 applied to the Project as it was modified from a combustion gas turbine

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ NYISO Comments at 4-5.

²⁰ *Id.* at 2. NYISO asserts that, under Section 30.8.1 of Attachment X of NYISO's OATT, the developer must deliver to NYISO, within 30 calendar days, all of the following: (1) the required technical data specified in the data sheet appended to the *pro forma* Class Year Study Agreement; (2) the Class Year Project's interconnection service evaluation election; (3) for Large Facilities not yet In-Service, an updated proposed In-Service Date, Initial Synchronization Date and Commercial Operation Date; (4) a study deposit of \$100,000; and (5) if the developer has not satisfied the applicable regulatory milestone described in Section 25.6.2.3.1.1 of Attachment S to the OATT, a two-part deposit consisting of \$100,000 plus \$3,000/MW as required by Section 25.6.2.3.1(ii)(2). *Id.* (citing OATT § 30.8.1).

facility to a battery storage facility.²¹ NYISO explains that it advised NYCE that the Conditional Negative Declaration did not satisfy the regulatory milestone requirements under Section 25.6.2.3.1 of Attachment S as it did not appear to apply to the Project and that it requested additional information from NYCE. According to NYISO, on September 24, 2019, NYCE corrected its understanding of the Conditional Negative Declaration and told NYISO that no regulatory milestones applied to the Project. NYISO notes that multiple times it sought additional information to validate this assertion by NYCE.²² NYISO states that NYCE failed to demonstrate to NYISO that its Project satisfied a regulatory milestone identified in Attachment S of NYISO's OATT by the Class Year start date or, in the alternative, to submit the two-part deposit in lieu of satisfying the regulatory milestone within the required time frame.²³ According to NYISO, absent a waiver from the Commission, NYISO could not accept the two-part deposit for NYCE's Project after September 16, 2019.²⁴

11. NYISO states that it does not dispute NYCE's assertion that no adverse harm will result to other projects if the Waiver Request is granted because NYCE's Project no longer seeks to participate in the 2019 Class Year.²⁵ NYISO states that the Project will not harm any other projects in the interconnection queue given NYISO's Class Year structure. NYISO explains that, if reinstated, the Project will have the ability to enter the next two Class Years upon meeting the entry requirements before it exhausts the number of Class Years it can enter pursuant to Section 25.6.2.3.4 of Attachment S of NYISO's OATT, and that the Project will be similarly situated with other projects that have met similar developmental milestones to enter a Class Year.²⁶

²¹ See *id.* at 2-3 n.6.

²² *Id.* at 3 n.6.

²³ *Id.* at 2.

²⁴ *Id.* at 3 n.7.

²⁵ *Id.* at 5.

²⁶ *Id.* Moreover, NYISO has proposed revisions to the Class Year entry process and requirements, currently pending before the Commission in Docket No. ER20-638-000, that aim to expedite and streamline the process for entering a Class Year and to modify the existing rules regarding withdrawal from the interconnection queue if a project elects to retract its request to enter a Class Year. NYISO notes that, if accepted by the Commission, these revisions could have produced a different outcome for NYCE or afforded an avenue for the relief that NYCE seeks in the Waiver Request. *Id.* at 5-6.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), NYISO's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Substantive Matters

13. We deny NYCE's request for waiver of Section 30.3.6 of Attachment X of NYISO's OATT. The Commission has previously 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.²⁷ We find that NYCE's Waiver Request does not satisfy these criteria.

14. Specifically, although we find no evidence of ill intent by NYCE, we find that NYCE has not demonstrated that it acted in good faith. Here, the OATT provided NYCE with two options to ensure that its interconnection request was not deemed withdrawn under OATT Section 30.3.6. The record reveals no reason why NYCE could not have satisfied the regulatory milestone in accordance with OATT Sections 25.6.2.3.1.1, 25.6.2.3.1.2, and 25.6.2.3.1.3.²⁸ Alternatively, NYCE could have submitted a deposit in lieu of satisfying the regulatory milestone within the timeframe specified in the OATT.²⁹ NYCE complied with neither of these two options. Further, NYCE did not demonstrate (or even claim) that payment of the deposit was delayed due to circumstances beyond its control. In addition, NYCE has not adequately explained why it assumed that prior

²⁷ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

²⁸ NYISO, NYISO Tariffs, NYISO OATT, 25.6 OATT Attach. S Cost Allocation Methodology For ERIS (7.0.0), § 25.6.2.3.1(ii)(1).

²⁹ *Id.* § 25.6.2.3.1(ii)(2). While the Dissent notes that NYCE ultimately offered to pay this deposit, it does not acknowledge that when NYCE did so, the deposit was untimely under NYISO's OATT. Dissent at P 2.

regulatory reviews for a different generating facility would satisfy the regulatory milestone in the NYISO OATT.³⁰

15. For similar reasons, we find that NYCE fails to demonstrate that its Waiver Request is limited in scope. The Commission has found that a waiver is not limited in scope if the party requesting waiver does not provide a compelling reason why it should be afforded special treatment compared to others.³¹ Here, NYCE seeks to shield itself from the consequences of its choices.³² We find no reason based on the record here to afford NYCE preferential treatment after failing to comply with either option provided by the OATT.

16. For these reasons, we deny NYCE's Waiver Request. The

Commission orders:

NYCE's Waiver Request is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ While the Dissent recognizes NYCE's attempt to use an earlier Conditional Negative Declaration for a generating project that had changed, the Dissent fails to note that, as discussed above, the declaration was almost twenty years old.

³¹ See *Cal. Transmission Project Corp.*, 168 FERC ¶ 61,012, at P 16 (2019); see also *see also Meridian Energy USA, Inc. v. Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,206, at P 29 (2013).

³² *Enerwise Global Techs., Inc.*, 170 FERC ¶ 61,084, at P 20 (2020).

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FEDERAL ENERGY REGULATORY COMMISSION

NYC ENERGY LLC

Docket No. ER20-629-000

(Issued March 19, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because I would grant NYC ENERGY LLC's (NYCE) request for waiver. NYCE is developing a roughly 80 MW battery storage facility that would interconnect with Consolidated Edison's system in Brooklyn.¹ The basic issue here is that NYCE failed to comply with certain of NYISO's interconnection procedures and, as a result, lost its position in the interconnection queue. Those procedures require a generator to take a series of steps within thirty days of executing its Class Year Interconnection Facilities Study Agreement (Class Year Study Agreement).² One of those steps is to show that the generator has satisfied the applicable regulatory milestone laid out in Attachment S to NYISO's Tariff.³ In the event that the generator has not satisfied that step, it may instead opt to pay an additional deposit of \$3,000 per MW on top of the \$100,000 deposit required of all generators.⁴ If the generator fails to take all the actions required in the thirty-day period, it is not eligible to participate in the relevant class year and may lose its place in the interconnection queue.⁵

2. NYCE's planned facility was originally designed as a dual-fuel oil/gas combined-cycle unit.⁶ Last year, however, NYCE decided to develop the project as a battery storage facility instead.⁷ Before that change, NYCE applied for and received a conditional determination from the state and the city that its proposed facility would have

¹ Waiver Request at 2.

² NYISO Comments at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Waiver Request at 2.

⁷ *Id.* at 3. NYISO determined that this was a non-material change in technology for the purpose of maintaining its queue position. *Id.* at 1-2.

no adverse environmental impacts.⁸ NYCE sought to use those determinations to satisfy the regulatory milestone requirement in Attachment S.⁹ NYISO concluded that those determinations did not satisfy that requirement in light of the design change and, therefore, that NYCE had not satisfied all the Attachment S conditions within thirty days of signing its Class Year Study Agreement.¹⁰ Upon learning of NYISO's determination, NYCE offered to pay the additional \$3,000/MW deposit.¹¹ Nevertheless, NYISO concluded that NYCE had failed to meet the requirements of Attachment S and removed the project from its interconnection queue.¹²

3. NYCE then filed this waiver request. NYISO filed comments supporting the waiver request, noting in particular that it would not have adverse consequences for the planning process or entities in the interconnection queue.¹³ No one opposed the waiver. As today's order observes, the Commission generally considers four factors in evaluating a request for a tariff waiver: (1) whether the applicant acted in good faith; (2) whether the waiver is of limited scope; (3) whether the waiver addresses a concrete problem; and (4) whether the waiver has undesirable consequences, such as harming third parties.¹⁴

4. I believe that NYCE's waiver request satisfies those four criteria and is in the public interest. First, I see nothing in the record—or today's order—indicating that NYCE did not act in good faith. After all, it does not strike me as totally unreasonable to assume that, if an oil/natural-gas fired unit can pass environmental muster, then a non-emitting battery storage facility is likely to clear that bar as well. In any case, the record indicates that, after learning of NYISO's final determination, NYCE promptly offered to make the additional deposit.¹⁵ Second, I believe that the waiver request is limited in

⁸ *Id.* at 3.

⁹ *Id.*; NYISO Comments at 3 & n.6.

¹⁰ NYISO Comments at 2-3 & n.6.

¹¹ Waiver Request at 3.

¹² NYISO Comments at 3.

¹³ NYISO Comments at 4-5.

¹⁴ *NYC ENERGY LLC*, 170 FERC ¶ 61,230, at P 13 (2020) (Order).

¹⁵ Waiver Request at 1. The Majority contends that I “do[] not acknowledge” that, by that point, the payment was untimely. Order, 170 FERC ¶ 61,230 at n.30. Of course it was untimely; that is why NYCE had to file this waiver request. But that hardly shows that NYCE did not act in good faith.

scope insofar as it applies only to this facility and only to this single failure to comply with the applicable deadlines. Third, the waiver request remedies a concrete problem wherein a resource that is progressing towards development and is willing to put up the additional collateral required by the Tariff would lose its interconnection queue position because of a misinterpretation of the Tariff—one my colleagues also recognize was made with no “ill intent.”¹⁶ Finally, I agree with NYISO that granting the waiver would not have undesirable consequences, such as harming third parties.¹⁷

5. The Commission, however, rejects the waiver request, concluding that it both was not made in good faith and is not limited in scope. On good faith, the Commission’s position is that NYCE has not shown good faith because it could have submitted the additional deposit at that outset rather than trying to prove that it met the regulatory milestone.¹⁸ That is true enough, but I also understand why NYCE sought to rely on its previous environmental determinations rather than fork over an additional quarter-million dollars in collateral.¹⁹ The fact that NYCE could have—and, in hindsight, should have—taken a different path does not, in my view, indicate that it acted in bad faith.²⁰

6. On the scope of the waiver request, the Commission finds that NYCE has failed to “provide a compelling reason why it should be afforded special treatment.”²¹ In other words, the Commission suggests that the waiver request is not limited in scope because NYCE has not shown that it deserves a waiver.²² That seems to be beside the point. We

¹⁶ Order, 170 FERC ¶ 61,230 at P 14.

¹⁷ NYISO Comments at 5.

¹⁸ Order, 170 FERC ¶ 61,230 at P 14.

¹⁹ As noted, the additional collateral requirement is \$3,000 per MW, NYISO Comments at 2, which comes out to \$240,000 for an 80 MW facility.

²⁰ The Majority states that I failed to note that the relevant environmental determinations were issued years ago. Order, 170 FERC ¶ 61,230 at n.31. But nothing in this record—certainly not NYISO’s comments—suggest that the age of the environmental determinations was at all relevant to NYISO’s finding that NYCE had not complied with Attachment S.

²¹ *Id.* P 15.

²² As I have previously noted, any third-party tariff waiver request is, by definition, a request for special treatment since it is asking for a departure from the generally applicable tariff language. See *Enerwise Global Techs., Inc.*, 170 FERC ¶ 61,084, at P 4 (2020)

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can disagree about whether NYCE's request deserves to be granted or whether NYCE deserves to be treated differently than other interconnecting resources, but that hardly seems relevant to whether the particular waiver request in front of us is limited in scope. Accordingly, I disagree that NYCE has failed to satisfy any prong of the four-part waiver test.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

Document Content(s)

ER20-629-000.DOCX1