

the development of the record in a proceeding, or assist in the decision-making process.⁵ This Answer satisfies those standards and should be accepted because it addresses inaccurate and misleading statements, and provides additional information that will help the Commission fully evaluate the arguments raised by Green Power in its Motion and Requests. The NYISO, therefore, respectfully requests that the Commission accept this Answer. If the Commission grants the Motion to Intervene, it should also accept the NYISO's Motion to Answer so that the NYISO can address issues raised—inappropriately—for the first time on rehearing.

II. ANSWER

For the reasons stated below, the Commission should deny Green Power's Motion to Intervene Out-of-Time and Request for Rehearing and Stay of the Commission's June 2017 Order and Request for Order Directing Extension ("Motion and Requests").

A. *The Commission Should Deny Green Power's Motion to Intervene Out-of-Time*

The Commission applies the criteria set forth in Rule 214(d) in ruling on a motion to intervene out of time.⁶ Specifically, Rule 214(d)(1) provides that the Commission should consider the following in the case of late intervention requests:

- i. whether the movant had good cause for failing to file the motion within the time prescribed;
- ii. whether any disruption of the proceeding might result from permitting intervention;
- iii. whether the movant's interest is adequately represented by other parties in the proceeding;
- iv. whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

⁵ See, e.g., *Southern Cal. Edison Co.*, 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding).

⁶ 18 C.F.R. § 385.214(b)(3), (d).

v. whether the motion conforms to the requirements of Rule 214(b).

Green Power's request fails to satisfy the criteria set forth in Rule 214(d)(1)(i), Rule 214(d)(1)(ii), and Rule 214(d)(1)(iv).

First, Green Power fails to demonstrate good cause to justify the late intervention. Green Power delayed submitting its motion to intervene for well over a week after the date noticed by the Commission⁷ and five days after the Commission issued the June 2017 Order. The Commission has held that an entity carries the risk in deciding to intervene or not in a proceeding.⁸ Importantly, Green Power has been previously before the Commission on multiple occasions with regard to this specific project, including a 2014 request for a waiver of the OATT and a 2016 timely intervention and protest of a previous Notice of Cancellation.⁹ Moreover, with respect to this most recent Notice of Cancellation related to Green Power's project—the May 18 Filing, the NYISO specifically advised Green Power of the potential of filing such Notice of Cancellation weeks before the filing was submitted to the Commission. Green Power, therefore, had considerable notice in advance of the May 18 Filing. Additionally, upon a close read of the attachments, the asserted good cause is not supported by the facts.

In addition to failing to meet the good cause for delay criterion, Green Power also runs afoul of Rule 214(d)(1)(ii) and Rule 214(d)(1)(iv) because, contrary to Green Power's claims, Green Power's decision to delay submitting its Motion and Requests is nonetheless prejudicial

⁷ See Combined Notice of Filing #2 (May 18, 2017).

⁸ *Broadwater Energy LLC*, 124 FERC ¶ 61,225 (2008); see also *California Dep't of Water Res.*, 120 FERC ¶ 61,057, at P 13, *reh'g denied* 120 FERC ¶ 61,248 (2007), *petition for review denied sub nom. California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009) (“[T]he party bears the responsibility for determining when a proceeding is relevant to its interests, such that it should file a motion to intervene. When [it] fails to intervene in a timely fashion, it assumes the risk that the case will be settled in a manner that is not to its liking.”).

⁹ See *New York Indep. Sys. Operator, Inc. et al.*, 155 FERC ¶ 61,113, at PP 28-31 (April 29, 2016) (“April 2016 Order”) (rejecting the Notice of Termination based upon Green Power's cure of the alleged breach and default of the interconnection agreement prior to the interconnection agreement being terminated); *Green Power Energy LLC*, Letter Order, Docket No. ER14-1655-000 (April 30, 2014) (granting Green Power's request for a waiver of the Commercial Operation Date requirements of Attachments X and Z of the NYISO OATT).

and disruptive to the proceeding.¹⁰ Green Power’s stated justification for why there is no burden on the Commission should be disregarded.¹¹ While the Commission efficiently processed the June 2017 Order, it did so within the appropriate regulatory framework, and Green Power should not be able to now use it as a basis to support its request for an out-of-time intervention.

The Commission has repeatedly held that an out-of-time intervention filed *after* a dispositive order carries a higher burden due to the increased likelihood of prejudice to other parties and the burden upon the Commission, and “generally it is Commission policy to deny late intervention at the rehearing stage.”¹² Based on this well-established Commission precedent as well as the foregoing reasons, the NYISO respectfully requests that the Commission deny Green Power’s motion to intervene as its showing falls short of satisfying the higher burden necessary to support the Commission granting such a motion filed after the issuance of a dispositive order.

B. *Green Power’s Request for a Rehearing Should Be Denied as the Commission Appropriately Accepted the Notice of Cancellation*

If the Commission denies Green Power’s motion to intervene, the Commission should also deny the request for rehearing of the June 2017 Order because Section 313(a) of the Federal Power Act only permits a *party* to a proceeding to file a request for rehearing of a Commission order.¹³ Green Power is not a party to the proceeding and only now requests to intervene.

Notwithstanding Green Power’s delay in intervening, if the Commission were to consider its request for rehearing, the NYISO respectfully requests that the Commission deny such

¹⁰ While the NYISO submitted the Notice of Cancellation, it did so on behalf of the NYISO and National Grid. Even though not expressly filed as a “joint” submission, the filing letter expressly stated: “*the NYISO and National Grid respectfully request that the Commission accept this Notice of Cancellation of Service Agreement No. 1483 effective as of July 17, 2017 – sixty days from the date of this filing.*” *New York Indep. Sys. Operator, Inc.*, Notice of Cancellation of Service Agreement No. 1483 to the New York Independent System Operator, Inc. Open Access Transmission Tariff, Docket No. ER17-1624-000, at pp 1, 8 (May 18, 2017) (“May 18 Filing”) (emphasis added).

¹¹ Green Power Motion and Requests at p 9 & n 21.

¹² See *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,330, at P 7 (2005); accord *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,248, at P 15 (2012); *DC Energy LLC*, 144 FERC ¶ 61,024, at P 19 (2013); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 5 (2009).

¹³ 16 U.S.C. § 825l.

request. Green Power principally argues that the Commission erred in accepting the Notice of Cancellation because (i) the termination of the SGIA lacked grounds under the SGIA and the SGIP; and (ii) the NYISO failed to satisfy its burden for approval of a notice of cancellation of an interconnection agreement. The NYISO complied with its SGIP, the express terms of the SGIA, and Section 35.15 of the Commission's Rules, and Green Power's attempt to impose additional and inconsistent requirements should be rejected.

Initially, Green Power appears to blur the distinction between the withdrawal of its Interconnection Request from the NYISO Interconnection Queue and the termination of the SGIA and cancellation of the Service Agreement. The withdrawal of the Interconnection Request served as the basis to terminate the SGIA under the express terms of the SGIA. The NYISO, therefore, filed the Notice of Cancellation consistent with its tariff, the express terms of the SGIA, and the Commission's Rules.

1. *The NYISO Properly Withdrew Green Power's Interconnection Request from its Interconnection Queue*

The NYISO complied with its SGIP by withdrawing Green Power's Interconnection Request after Green Power failed to satisfy the requirements for requesting an extension of the Commercial Operation Date to January 2018. Green Power's Interconnection Request has been pending in the NYISO Interconnection Queue for approximately 13 years. During that time, the NYISO granted multiple extensions with the latest extension of the Commercial Operation Date to January 31, 2017 on the condition that Green Power complies with specific-agreed milestones (which Green Power proposed). As detailed in the May 18 Filing, Green Power failed to show reasonable progress against these milestones when it requested a January 2018 Commercial Operation Date, and the NYISO, therefore, properly determined that such request constituted a material modification of the Interconnection Request.

In accordance with Section 32.1.3.2 of Attachment Z, the NYISO evaluated whether Green Power’s latest extension request would constitute a material modification of its Interconnection Request based upon the requirements set forth in Section 30.4.4.5.2 of Attachment X.¹⁴ Contrary to the arguments of Green Power that an extension is “automatic” if a project has an interconnection request and submits an Officer certification,¹⁵ the NYISO was obligated under Section 30.4.4.5.2 to evaluate whether the project made reasonable progress against the regulatory and developmental milestones based upon the Officer certification and the information that the NYISO had in its possession. In considering the available information,¹⁶ the NYISO was required by its tariff to deny a further extension of the Commercial Operation Date and appropriately withdrew Green Power’s Interconnection Request.¹⁷

Having concluded that Green Power’s extension constituted a material modification, the NYISO relied upon provisions in the Large Facility Interconnection Procedures (“LGIP”) as guidance in withdrawing the Interconnection Request.¹⁸ The NYISO’s reliance is appropriate and consistent with prior Commission direction. Specifically, under Order No. 2006, the

¹⁴ Section 32.1.3.2 of Attachment Z to the OATT (“Extensions of Commercial Operation Dates for Small Generating Facilities are subject to the provisions of Section 30.4.4.5 of Attachment X to the OATT.”); *see* Section 30.4.4.5 of Attachment X of the OATT (providing for situations where a request to extend a Commercial Operation Date will not constitute a Material Modification of the Interconnection Request).

¹⁵ Green Power claims that Section 30.4.4.5.2 of Attachment X provides an “automatic extension” of the Commercial Operation Date if a party can demonstrate the two requirements under Section 30.4.4.5.2.1 and 30.4.4.5.2.2 of Attachment X. *See* Green Power Motion and Request, at pp 19-20. If a project cannot satisfy the requirements for an “automatic extension,” then the NYISO must affirmatively review a request to determine whether such extension would be a “Material Modification,” which requires a demonstration of harm. *See id.* Green Power’s interpretation is incorrect and renders the Commission-approved use of Section 30.4.4.5 of Attachment X in the SGIP superfluous and a nullity.

¹⁶ Green Power advised the NYISO that previously relied upon information supporting earlier extensions was no longer valid—*e.g.*, Green Power no longer had an executed turbine supply agreement.

¹⁷ Contrary to Green Power’s assertions, the NYISO attempted to work with the Interconnection Customer by repeatedly asking for information to understand what progress, if any, the project made against the agreed-upon milestones and reminded Green Power of its upcoming deadlines on multiple occasions.

¹⁸ *See* May 18, 2017 Filing, at Attachment II. Section 30.3.6 of Attachment X to the OATT provides, in relevant part, “if the Developer fails to adhere to all requirements of these Large Facility Interconnection Procedures, except as provided in Section 30.13.5 (Disputes), the NYISO shall deem the Interconnection Request to be withdrawn and shall provide written notice to the Developer of the deemed withdrawal and an explanation of the reasons for such deemed withdrawal.”

Commission directed Transmission Providers to use the provisions of the LGIP as guidance for interpretation and implementation in situations where the *pro forma* SGIP lacks specific provisions.¹⁹ In applying provisions of the LGIP, the NYISO provided notice of withdrawal on February 17, 2017 and afforded Green Power an opportunity to cure the deficiencies and/or commence the Dispute Resolution Process—all of which was to Green Power’s benefit. The NYISO submitted the May 18 Filing only after the cure period applicable to the withdrawal of the Interconnection Request expired and the Dispute Resolution process was completed.

Green Power now points to the Dispute Resolution process as an impediment to its project meeting the necessary regulatory and developmental milestones. However, much of the time it took to complete the Dispute Resolution process was largely in an effort to afford Green Power sufficient time to provide further documentation of progress to carry its burden under Section 32.1.3.2 of Attachment Z and Section 30.4.4.5.2 of Attachment X. However, having not received additional information from Green Power, the Dispute Resolution was concluded based on the information that was available. Moreover, in an effort to be transparent, the NYISO informed Green Power throughout the Dispute Resolution process of the possibility that a Notice of Cancellation of the SGIA would be filed with the Commission and that its timing would likely be immediately after conclusion of the Dispute Resolution discussions.

2. The Commission Properly Accepted the Notice of Cancellation of the Service Agreement

The Commission has routinely accepted a notice of cancellation of a service agreement when the Transmission Provider complied with its tariff and the Commission’s Rules, including

¹⁹ See *Standardization of Small Generator Interconnection Agreement and Procedures*, Order No. 2006, at PP 47-48, 59 (2005) (“Order No. 2006”).

when such cancellation is over the protests of the Interconnection Customer.²⁰ The NYISO met the Commission's standard to cancel the Service Agreement. Green Power incorrectly asserts that (i) the NYISO cannot terminate the SGIA without demonstrating that Green Power breached a term of the agreement under Article 7.6 of the SGIA, (ii) Section 7.6.3 of the SGIA is inapplicable, and (iii) there must be harm to other projects.²¹

Green Power overlooks the different types of default available under Article 7.6 by conflating the requirements under Sections 7.6.1 and 7.6.2 with Section 7.6.3. Article 7.6 of the SGIA affords essentially two types of defaults under the Commission-accepted SGIA.²² Sections 7.6.1 and 7.6.2 provide that when a party breaches a term or condition under the SGIA and fails to cure it, the breach results in a default under which a non-defaulting party may seek to terminate the SGIA.²³ Section 7.6.3, however, is clear that withdrawal of the Interconnection Request serves as an immediate default and termination of the SGIA. Section 7.6.3 applies when the Interconnection Request had been studied under a facilities study (which Green Power acknowledges was performed)²⁴ and is subsequently withdrawn from the NYISO Interconnection Queue.²⁵ In the event of termination under Section 7.6.3, the SGIA does not

²⁰ See, e.g., *PJM Interconnection L.L.C.*, 155 FERC ¶ 61,148 (2016) (denying a developer's protest to have its project reinstated because PJM followed its tariff in terminating the service agreement).

²¹ Green Power Motion and Requests, at pp 13-16. Contrary to Green Power's reliance on *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,008 (2011) ("*Lakeswind I*") for the standard under which the Commission should decide the present Motion and Requests, the Commission previously noted that *Lakeswind I* is "expressly limited . . . to the circumstances in that case." April 2016 Order, at n 49 (citing *Lakeswind I*, at P 30, *order on reh'g*, 141 FERC ¶ 61,097, at P 33).

²² The Commission accepted Green Power's SGIA as a non-conforming agreement in October 2009. See *New York Indep. Sys. Operator, Inc., et al.*, Letter Order, Docket No. ER09-1693-000 (2009).

²³ See Section 7.6.2 of the SGIA.

²⁴ Green Power Motion and Requests, at p 3.

²⁵ Green Power takes the position that Section 7.6.3 of the SGIA cannot apply because there is no Section 3.5.3 of the SGIP. Section 7.6.3 provides that "[i]n cases where the Interconnection Customer has elected to proceed under Section 3.5.3 of the SGIP, if the Interconnection Request is withdrawn or deemed withdrawn pursuant to the SGIP during the term of this Agreement, this Agreement shall terminate." "Section 3.5.3 of the SGIP" refers to the facilities study process under Section 3.5.3 of Section 32 of the OATT (Attachment Z) and Section 3.5.3 of the *pro forma* Small Generator Interconnection Procedure under Order No. 2006. Therefore, Section 7.6.3 applies to those

afford a cure period or the option to the non-defaulting parties to not proceed with the termination of the SGIA.²⁶

As explained to Green Power and more fully set forth above, the NYISO notified Green Power that its Interconnection Request was withdrawn on February 17, 2017.²⁷ As a result of the withdrawal, Section 7.6.3 required termination of the SGIA. To effectuate the termination, the NYISO filed with the Commission for acceptance the Notice of Cancellation to comply with Section 3.3 of the SGIA and Section 35.15 of the Commission's Rules. Under Section 35.15, the NYISO was mainly required to provide sixty (60) days' notice of the cancellation.²⁸ Here, the NYISO satisfied that requirement by affording Green Power sixty days' notice by requesting an effective date of July 17, 2017. Accordingly, the NYISO appropriately applied its tariff and complied with the necessary regulatory requirements in filing the Notice of Cancellation.

C. Green Power's Request for a Stay Should Be Denied

For the reasons set forth below, Green Power has failed to satisfy the standard to obtain a stay under the Administrative Procedure Act²⁹ because it has failed to show irreparable harm. In determining whether to grant a stay, the Commission will consider several factors with the most important being a showing that the requestor will suffer irreparable injury absent a stay.³⁰

IRs that elect to be or were studied under a facilities study. Since Green Power's facilities study was completed in 2009, Green Power's argument that Section 7.6.3 is inapplicable is without merit.

²⁶ Compare Section 7.6.2 of the SGIA with Section 7.6.3 of the SGIA ("if the Interconnection Request is withdrawn or deemed withdrawn pursuant to the SGIP during the term of this Agreement, *this Agreement shall terminate*") (emphasis added).

²⁷ See May 18 Filing, at Attachment II.

²⁸ 18 C.F.R. § 35.15(a).

²⁹ 5 U.S.C. § 705.

³⁰ In determining to grant a stay, the Commission will consider several factors, which typically include: "(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest." *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18; accord *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 158 (2006).

Green Power's claimed harm that the delay in the Commission acting prior to the effective date of the cancellation will have a "ripple effect on the . . . offtakers and sponsors" and result in termination of its project is highly speculative.³¹ If the cancellation were to become effective while the Commission was deliberating, an order in Green Power's favor on rehearing would result in the Commission rejecting the Notice of Cancellation and the Service Agreement would be reinstated. Green Power fails to provide any support as to why the cancellation being effective would suddenly result in offtakers and sponsors abandoning the project, particularly in light of the Motion and Requests pending before the Commission and the fact that offtakers' and sponsors' supported the project for over a decade without it yet going in service.

Moreover, as noted in its Motion and Requests, the NYISO and Green Power have already discussed the flexibility that the interconnection procedures provide if its project would re-enter the queue under a new Interconnection Request, such as waiver of the feasibility study.³² Green Power has an avenue to proceed with its project as planned, if it chooses to use it and, therefore, Green Power's claimed harm cannot rise to the level of irreparable harm. In sum, the NYISO respectfully submits that the Commission should deny the request for a stay.³³

D. *Green Power's Request for an Order Directing the Extension of the Commercial Operation Date is Beyond the Scope of this Proceeding*

In conjunction with its motion for late intervention and request for rehearing and stay of the June 2017 Order, Green Power also requests the Commission to extend its project's Commercial Operation Date to June 2018. This request amounts to a five-month extension beyond what Green Power requested from the NYISO in January 2017. Having never sought an 18-month extension from the NYISO, the request lacks a legal basis and is, in reality, a request

³¹ Green Power Motion and Requests, at p 28.

³² *Id.* at Attachment F, Exhibit H.

³³ *AES Sparrows*, 129 FERC ¶ 61,245, at P 18 ("If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, [the Commission] need not examine the other factors.").

to waive provisions of the OATT within the present proceeding.³⁴ The Commission has consistently required that complaints be separate and apart from motions to intervene and protests.³⁵ Green Power's present waiver request is akin to a complaint and beyond the scope of the present proceeding. Even if the Service Agreement is reinstated (a result the NYISO disagrees with), the Commission should nevertheless deny the present request.

III. CONCLUSION

WHEREFORE, the New York Independent System Operator, Inc. respectfully requests that the Commission grant its Motion for Leave to Answer and accept this Answer, and that the Commission take action consistent with this Answer.

Respectfully submitted,

By: /s/ Sara B. Keegan
Sara B. Keegan, Senior Attorney
Brian R. Hodgdon, Attorney
New York Independent System Operator, Inc.
10 Krey Boulevard
Rensselaer, New York 12144
(518) 356-6000
Email: skeegan@nyiso.com
bhodgdon@nyiso.com

July 5, 2017

³⁴ Green Power points to *Lakeswind I*, as Commission precedent to support its request for an extension of the project's Commercial Operation Date in the present proceeding. See Green Power Motion and Request, at pp 28-29. However, Green Power's reliance on the Commission's holding in *Lakeswind I* is misplaced. There, the Commission did not evaluate whether it would or could grant an extension, and ultimately did not grant an extension in its order. See *Lakeswind I*, at PP 24-25. Moreover, as previously stated, the Commission noted the limited breadth of its holding in that proceeding. See footnote 21, *supra*.

³⁵ See, e.g., *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040, at PP 61,062-63 (1990) (stating that complaints must be titled as such and cannot be included as part of a protest or motion to intervene); *Entergy Serv., Inc.*, 52 FERC ¶ 61,317, at P 62,270 (1990) (stating that complaints must be filed separately from motions to intervene and protests); *Yankee Atomic Elec. Co.*, 60 FERC ¶ 61,316, at 62,096-97 n.19 (1992) (same).

cc: Michael Bardee
Anna Cochrane
Jette Gebhart
Kurt Longo
David Morenoff
Daniel Nowak
Larry Parkinson
J. Arnold Quinn
Douglas Roe
Kathleen Schnorf
Gary Will

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 5th day of July 2017.

/s/ Joy A. Zimmerlin

Joy A. Zimmerlin
New York Independent System Operator, Inc.
10 Krey Blvd.
Rensselaer, NY 12144
(518) 356-6207