

151 FERC ¶ 61,062
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Erie Power LLC

Docket No. ER15-1153-000

ORDER DENYING WAIVER

(Issued April 21, 2015)

1. On February 27, 2015, Erie Power LLC (Erie Power) submitted a request for a waiver of Section 25.6.2.3.1 of Attachment S to the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT) which requires participants in NYISO's 2015 Class Year¹ to have received approval of their System Reliability Impact Study from NYISO's Operating Committee by March 1, 2015. For the reasons discussed below, the Commission denies waiver.

I. Background

2. In 2014, Erie Power purchased the North East Cogeneration Plant (North East Plant), a decommissioned electric generating facility in North East, Pennsylvania² after the facility had already lost its Capacity Resource Interconnection Service (CRIS) rights. Shortly after acquiring the North East Plant, Erie Power filed a request for waiver of Section 25.9.3.1 of Attachment S³ and Section 30.3.3.1 of Attachment X⁴ of the NYISO

¹ NYISO OATT Section 25.1.2 defines "Class Year" as "The Group of generation and merchant transmission projects included in any particular Class Year Interconnection Facilities Study (Annual Transmission Reliability Assessment and/or Class Year Deliverability Study), in accordance with the criteria specified in Attachment S and Attachment Z for including such projects."

² Although located in Pennsylvania, the plant was electrically connected to New York at National Grid's South Ripley substation in the Town of Ripley, New York and provided thermal energy to the adjacent Welch Foods, Inc., processing plant.

³ Attachment S - Rules To Allocate Responsibility for the Cost of New Interconnection Facilities

OATT (2014 waiver request) with the Commission in Docket No. ER14-2056-000, to restore the North East Plant's CRIS rights. On July 15, 2014, the Commission denied Erie Power's 2014 waiver request, finding that Erie Power knowingly purchased a deactivated plant when the three-year window in the Tariff to reactivate the plant had already expired and failed to justify waiver.⁵

II. Waiver Request

3. Section 25.6.2.3.1 of Attachment S of the NYISO OATT sets forth the criteria required for a project to be eligible to participate in the Class Year process. Under that section, a project becomes eligible to become a Class Year Project if, on or before the Class Year Start Date, it satisfies two developmental milestones: (i) the Operating Committee has approved the Interconnection Reliability Impact Study for the project, and (ii) the regulatory milestone has been satisfied.⁶ Erie Power asserts that, for purposes of the 2015 Class Year, it has satisfied all of the criteria except receipt of Operating Committee approval of its System Reliability Impact Study by March 1, 2015. Therefore, Erie Power requests waiver of this requirement.⁷

4. In support of its request for waiver, Erie Power states it did everything it could to meet the March 1 deadline, and its inability to do so was due, at least in part, to circumstances beyond its control. Erie Power explains that it commenced the interconnection process, and submitted an interconnection request to NYISO in May 2014, concurrent with its request in Docket No. ER14-2056-000 to restore its CRIS rights. Erie Power states that NYISO formally processed its interconnection request on June 2, 2014. Erie Power, NYISO, and National Grid then entered into a tri-party System Reliability Impact Study Agreement on November 20, 2014. Erie Power states that it was advised by NYISO that the System Reliability Impact Study base cases for the North East Plant were completed on December 18, 2014, and that NYISO anticipated that it would direct its consultants to begin preparing the draft System Reliability Impact Study report on January 7, 2015. However, Erie Power states that it wasn't until February 13, 2015, that NYISO actually directed its consultants to begin preparing the System Reliability Impact Study report. Erie Power states that the System Reliability Impact

⁴ Attachment X - Standard Large Facility Interconnection Procedures (Applicable to Generating Facilities that exceed 20 MWs and to Merchant Transmission Facilities).

⁵ *Erie Power LLC*, 148 FERC ¶ 61,038 (2014) (*Erie Power*).

⁶ *See* NYISO OATT, Attachment S, Section 25.6.2.3.1.

⁷ Erie Power February 27, 2015 Filing at 5.

Study report can take up to 60 days to prepare and has a comment period of 30 days thereafter.⁸

5. Erie Power argues that the facts and circumstances of this case demonstrate good cause to grant the requested waiver. Specifically, Erie Power asserts: (1) it is seeking the waiver in good faith; (2) the waiver is of limited scope; (3) there exists a concrete problem that must be remedied; and (4) granting the waiver will not harm any other market participant or other third party.⁹

6. Erie Power emphasizes that it proceeded in good faith to comply with all procedural requirements of Attachments S and X of the NYISO OATT.¹⁰ Erie Power maintains that it worked diligently to comply with and provide responses to all information and other requests from NYISO related to its interconnection request. Erie Power adds that it has demonstrated its motivation to recommence operations at the North East Plant by seeking to preserve its CRIS rights in Docket No. ER14-2056, while simultaneously commencing NYISO's interconnection process. Erie Power states that its study scope and base cases were developed in sufficient time to meet the March 1, 2015 deadline, and that it sought and obtained agreement from the interconnecting transmission owner to expedite its review of the System Reliability Impact Study once it becomes available. Erie Power reiterates that it did everything it could to meet the March 1, 2015 deadline, and its inability to obtain approval of its System Reliability Impact Study was due, at least in part, to circumstances beyond its control.

7. Erie Power claims that the requested waiver is limited in scope and is procedural rather than substantive. Erie Power contends that it does not know precisely when the System Reliability Impact Study will be presented to the Operating Committee for approval but, based on the latest information it has received from NYISO, it appears that the System Reliability Impact Study will be completed in May-June 2015, and that Operating Committee approval could be obtained at the June 11, 2015 meeting.¹¹ Erie Power explains that it is not seeking to truncate or avoid any portion of the substantive review of its project, as its waiver request is limited to the issue of timing. Erie Power

⁸ *Id.* at 3-4.

⁹ *Id.* at 5.

¹⁰ *Id.* at 11.

¹¹ Erie Power Response at 3.

also asserts that there is precedent for the Commission granting limited waivers of the type sought here.¹²

8. Erie Power is concerned that, if its procedural waiver request is not granted, it could be years before it has another opportunity to enter a class year interconnection process that would allow it to participate in NYISO's capacity markets, noting that NYISO's last completed Class Year process commenced in 2012 and was not completed until 2015. Erie Power contends that the inclusion of North East Plant in NYISO's markets would aid system reliability, reduce congestion, and benefit National Grid's customers.¹³ Erie Power argues that, unlike brand new plants that enter the Class Year process before or during construction, the North East Plant is already constructed and most of the interconnection facilities are already in place. Erie Power asserts that, given the potential duration of the Class Year process, the likely timing of receipt of Operating Committee approval of the System Reliability Impact Study and NYISO's prior acknowledgement that a short delayed entry of a generator to the process would not adversely affect the process,¹⁴ the limited waiver would not hinder NYISO from timely completing the Class Year studies or process. Further, once in the Class Year, the North East Plant would still be subjected to all of the substantive requirements of Attachment S.¹⁵ Erie Power adds that it sought the waiver before the March 1 deadline so that NYISO can properly plan for the inclusion of the North East Plant in the Class Year, even though its actual entrance will be slightly delayed.

9. Next, Erie Power claims that there exists a concrete problem to be remedied.¹⁶ Erie Power states that the problem is that it has an existing cogeneration facility that it

¹² Erie Power February 27, 2015 Filing at 6-8 (citing *Air Energy TCI, Inc.*, 143 FERC ¶ 61,172 (2013); *Stony Creek Energy LLC*, 131 FERC ¶ 61,059 (2010)).

¹³ *Id.* at 4. According to Erie Power, when it submitted its 2014 waiver request for preservation of the North East Plant's CRIS rights, National Grid filed comments supporting the request stating that the North East Plant has the ability to relieve additional congestion on the Western New York 230 kV system and that having the North East Plant as a resource will therefore both improve the reliability of the West New York transmission system and reduce congestion costs to National Grid customers. (*See Erie Power*, 148 FERC ¶ 61,038 at P 12).

¹⁴ *Id.* at 6 (citing *Stony Creek Energy LLC*, 131 FERC ¶ 61,059 at PP 7-8 (2010)).

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 8-9.

seeks to restart and participate in both the energy and capacity markets, and that participation in both the energy and capacity markets is essential since the energy revenues from the plant may not be sufficient to cover all of the plant's costs. Erie Power asserts that timely restart of the plant would also be helpful to Welch Foods, a consumer of low cost process steam from the North East Plant. Erie Power argues that there can be no legitimate dispute in this case that the public interest is best served by the expeditious re-entry of the North East Plant into the NYISO's markets.

10. Erie Power also claims that granting the waiver request will not harm any other market participant.¹⁷ Erie Power states that there are no buyer-side mitigation rules applicable in Zone A, so there is no need to consider the effect of the North East Plant's re-entry on capacity prices. Erie Power asserts that granting the waiver request should not delay NYISO's Class Year process or unduly burden any other Class Year participant or any other market participant, as the Commission has already determined in the cases it cited that there is no harm to other Class Year members or the process by granting limited procedural waivers of the type sought here. Erie Power contends that it is cognizant of NYISO's concerns about setting precedent, and respectfully submits that a bureaucratic rule, established primarily for convenience in administration of the Class Year interconnection process, should not become a barrier to the ability of a generator to participate in the wholesale electricity and capacity markets. Erie Power argues that the facts and circumstances of this situation are very unique, in that there are no other known existing cogeneration facilities that are seeking, or may seek, to recommence electrical and thermal operations in New York, that are able to do so essentially in the exact manner they formerly operated, and that would provide immediate reliability and economic benefits to the local community and the state in general.

11. Finally, Erie Power requests Commission action on or before April 16, 2015. Erie Power states that it does not know precisely when its System Reliability Impact Study will be presented to the Operating Committee for approval, but it contends that the earliest possible date would be the April Operating Committee meeting, which is scheduled to occur on April 16, 2015. Approval of the waiver is requested for the same date so that if the System Reliability Impact Study is presented and approved then, the project would be added without delay to the 2015 Class Year.

II. Notice of the Filing and Responsive Pleadings

12. Notice of Erie Power's waiver request was published in the *Federal Register*, 80 Fed. Reg. 12,474 (2015), with interventions and protests due on or before March 20, 2015. On March 16, 2015, comments were filed by Welch Foods. On March 20, 2015, a

¹⁷ *Id.* at 9-10.

motion to intervene and comments were filed by NYISO. On March 31, 2015, Erie Power filed a response to NYISO's comments.

13. Welch Foods supports Erie Power's waiver request and urges the Commission to grant it. Welch Foods states that the closure of the North East Plant in 2010 forced its manufacturing plant in North East, Pennsylvania to obtain steam from more costly sources and that expeditious recommencement of operations at the North East Plant resulting from an approval of Erie Power's waiver request would aid Welch Foods by helping to stabilize and reduce operating costs. Welch Foods states that a denial of Erie Power's waiver request could delay Erie Power's plans to restart the North East Plant which would have adverse impacts on Welch Foods. Welch Foods asserts that Erie Power should not be penalized and precluded from participating in NYISO's capacity markets because of bureaucratic delays and circumstances outside of its control. Welch Foods claims that the public interest is best served by, and the equities weigh heavily in favor of, granting Erie Power's waiver request.¹⁸

14. NYISO states that it understands Erie Power to be requesting: (1) that its project be permitted to enter Class Year 2015 without satisfying the tariff-mandated eligibility requirement set forth in Section 25.6.2.3.1(i) of Attachment S (i.e., that it be permitted to enter Class Year 2015 without having an Operating Committee-approved System Reliability Impact Study); and (2) that Erie be provided an open-ended extension within which to complete this Class Year eligibility requirement.¹⁹ NYISO contends that Erie Power has satisfied one of the two Class Year eligibility milestones, the regulatory milestone, but has not yet satisfied the second Class Year eligibility requirement, a System Reliability Impact Study approved by the NYISO Operating Committee.

15. NYISO states that it has certain concerns regarding Erie's request and requests that the Commission consider these concerns in its decision on the merits of the waiver request. NYISO states that it is primarily concerned that the waiver is not of limited scope and may therefore raise questions regarding the applicability of the same tariff requirements as applied to other projects. NYISO asserts that this is particularly true given that this is a substantive milestone, and not simply an administrative deadline, and

¹⁸ Welch Foods Comments at 1-2.

¹⁹ NYISO Comments at 3-4 (stating the waiver request indicates that Erie Power anticipates obtaining Operating Committee approval of its System Reliability Impact Study as early as April 16, 2015, but provides no outer bound on when it may actually meet this Class Year milestone. Moreover, NYISO notes that Erie Power meeting the April 16, 2015 date is unlikely).

could impact the Class Year 2015 schedule.²⁰ NYISO states that the Commission has never waived either of the Class Year eligibility requirements and, to date, no project has ever been permitted to enter a Class Year without having satisfied both milestones prior to the Class Year Start Date.²¹ NYISO contends that an Operating Committee approved System Reliability Impact Study is an essential pre-requisite to Class Year entry.

16. NYISO is also concerned that granting the requested waiver could impact the Class Year 2015 schedule, because NYISO will not have the technical outputs of the System Reliability Impact Study to use in the Class Year base cases.²² NYISO contends that, to the extent the Commission grants the requested waiver significantly after the March 1, 2015 Class Year Start Date, NYISO would be required to add the Erie Facility to the Class Year after the Class Year membership has been finalized. NYISO asserts that adding a facility after the notice period for Class Year entry has passed will only complicate and delay its base case efforts (especially if Erie fails to obtain Operating Committee approval and has to withdraw from Class Year 2015, increasing the time and expense of the Class Year Study).²³

17. NYISO argues that it is not clear what unique circumstances exist here that (1) warrant a waiver of the generally applicable requirement or (2) distinguish this project from the other projects that have not yet satisfied the same milestone but otherwise qualify for Class Year entry. NYISO asserts that allowing one project developer to enter a Class Year Study without meeting the same requirements that other project developers must meet would lead to an inequitable result.²⁴

18. In response to NYISO, Erie Power asserts that NYISO appears to have misconstrued the extent of the waiver Erie Power is seeking. Erie Power states that it is not seeking a waiver of the requirement to complete a System Reliability Impact Study for its North East Plant. Erie Power states that it is only seeking an extension of the deadline for obtaining that approval from the Operating Committee. Indeed, Erie Power asserts that the System Reliability Impact Study is already being prepared, and according to the information provided by NYISO to Erie Power, it should be completed within the

²⁰ *Id.* at 5.

²¹ *Id.* at 6.

²² *Id.* at 8.

²³ *Id.* at 8.

²⁴ *Id.* at 9.

next month or two and the Operating Committee approval could be received by June 2015. Erie Power notes that NYISO's comments speak to actions significantly after the March 1, 2015 Class Year Start Date and when the Class Year is far along in the process. Erie Power asserts, however, that the completion of the System Reliability Impact Study in May-June 2015 is a relatively short delay from the commencement of the process and it should not pose any undue burdens on the NYISO or other Class Year members.

19. Moreover, Erie Power argues that the timing is largely under NYISO's control, not Erie Power's, as NYISO is in charge of completing the System Reliability Impact Study. Erie Power contends that it continues to coordinate with National Grid on other aspects of this matter and National Grid has advised Erie Power that it stands ready to move forward quickly with its review of the System Reliability Impact Study once NYISO provides it.

20. Erie Power argues that NYISO suggests treating Erie Power differently than other developers would lead to an inequitable result; however, Erie Power states that there are no other facts before the Commission indicating that any other similarly situated developer would be treated inequitably. Erie Power disagrees with NYISO's characterization of its process as flexible, stating that a flexible process would accommodate Erie Power, and not erect a barrier to entry. Indeed, Erie Power asserts that an inequity would arise from failing to grant the waiver and thereby denying New York consumers the benefits they will receive from the re-entry of the plant into NYISO's markets.

III. Discussion

A. Procedural Issues

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Erie Power's response because it has provided information that assisted us in our decision-making process.

B. Commission Determination

22. The Commission has previously granted waivers of tariff provisions when: (1) the entity seeking the waiver acted in good faith; (2) the waiver is of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable

consequences, such as harming third parties.²⁵ Erie Power argues that its request for waiver meets these criteria. We disagree. Accordingly, we deny Erie's requested waiver.

23. In taking this action, we emphasize that NYISO's regulatory and developmental milestones should not be taken lightly and we generally decline granting waivers of these milestones as we believe it is important for parties to meet them.²⁶

24. We find that Erie Power has not demonstrated that its requested waiver is of limited scope. The Commission has granted tariff waivers for limited periods that would result in the inclusion of a project in the requested Class Year when the requesting party already possessed all the necessary approvals and the Commission extended the March 1 deadline to a date certain. For instance, in *Air Energy*, Air Energy TCI, Inc. (TCI) had received the necessary regulatory approvals five months after the deadline for satisfying NYISO's regulatory milestones. In granting TCI's waiver request, the Commission found that it was "not granting an open-ended waiver, but rather a limited extension of the time allowed to meet the regulatory milestone."²⁷ However, Erie Power has not received the necessary Operating Committee approval of its System Reliability Impact Study. Therefore, we cannot determine whether or when Erie Power will be able to satisfy NYISO's tariff-mandated eligibility requirements; Erie Power acknowledges that it does not know precisely when its System Reliability Impact Study will be presented to the Operating Committee for approval.

25. Furthermore, absent additional clarity as to whether and when Erie Power will be able to satisfy NYISO's Class Year eligibility requirements, we cannot determine whether Erie Power's waiver request has the potential to harm third parties. As NYISO explains, if it were to add Erie Power's facility to the Class Year after the Class Year membership has been finalized, it could complicate and delay its base case efforts. NYISO also maintains that, if Erie fails to obtain Operating Committee approval and has

²⁵ See *New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,108, at P 14 (2012). See also, e.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,184, at P 13 (2011); *ISO-New England Inc.*, 134 FERC ¶ 61,182, at P 8 (2011); *California Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,004, at P 10 (2010); *ISO-New England Inc.-EnerNOC, Inc.* 122 FERC ¶ 61,297 (2008); *Central Vermont Pub. Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation, LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

²⁶ *Air Energy TCI, Inc.*, 143 FERC ¶ 61,172, at P 16 (2013) (*Air Energy*); accord, *Stony Creek Energy LLC*, 131 FERC ¶ 61,059 (2010).

²⁷ *Air Energy*, 143 FERC ¶ 61,172, at P 16.

to withdraw from Class Year 2015, the time and expense of the Class Year Study could increase. However, the potential existence and extent of any such impacts depends on whether and when Erie Power ultimately receives the Operating Committee's approval. Given this uncertainty, Erie Power has not convinced us that there will be no harm to third parties.

26. For the reasons discussed above, the Commission denies Erie Power a waiver of section 25.6.2.3.1 of Attachment S of NYISO's OATT. This decision is without prejudice to Erie Power filing another request for waiver should it ultimately satisfy the developmental milestones.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.