

143 FERC ¶ 61,172
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 24, 2013

In Reply Refer To:
Air Energy TCI, Inc.
Docket No. ER13-1341-000

Stoel Rives LLP
Attn: Jason Johns, Esq.
Counsel for Air Energy TCI, Inc.
900 SW Fifth Avenue
Suite 2600
Portland, OR 97204-1268

Dear Mr. Johns:

1. On April 25, 2013, Air Energy TCI, Inc. (TCI) filed a request for waiver of the two-year deadline requirement in Attachment S and Attachment X of the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT). The Commission grants the requested waiver.

2. Attachment S of the NYISO OATT governs the requirements for a facility to be included in the Annual Transmission Reliability Assessment for a given Class Year. To be eligible for inclusion in a Class Year, a project must: (i) have NYISO approve the Interconnection System Reliability Impact Study for the project; and (ii) satisfy the regulatory milestone.¹ The regulatory milestone can be satisfied in a number of ways, including under the New York State Environmental Quality Review Act (SEQRA), obtaining a determination by the lead agency for the project that the draft environmental impact statement for the large facility (DEIS) is adequate for public review.² If a project fails to meet the regulatory milestone within two years of the NYISO's approval of the system Reliability Impact Study for the Project, the project's interconnection request will

¹ NYISO OATT § 25.6.2.3.1 (1.0.0).

² NYISO OATT § 25.6.2.3.1.1.3 (1.0.0).

be deemed withdrawn in accordance with section 30.3.6 of the Large Facility Interconnection Procedures in Attachment X of the OATT.³

3. TCI states that it is the developer of the proposed 71 MW Crown City Wind Energy Project (Crown City Project) located in Cortland County, New York. It states that the Interconnection System Reliability Impact Study for the Crown City Project was approved by the NYISO Operating Committee on October 7, 2010. However, TCI states that it was required to complete the DEIS regulatory milestone by October 9, 2012 in order to maintain compliance with the two-year timeline imposed by NYISO's OATT.

4. Under the New York State environmental review process, Cortland County Legislature (Cortland County) is acting as lead agency for TCI's DEIS. TCI states that in June 2012, it was advised by Cortland County that the Crown City Project would be required to undertake the SEQRA scoping process. TCI contends that previous conversations with Cortland County led it to believe that scoping would not be required.⁴ TCI states that it worked with the Cortland County's special environmental and legal advisors to agree to a draft scoping document, concluding on June 25, 2012, and that this draft scoping document was subsequently issued by TCI on July 3, 2012, to receive public and agency comment. TCI states that Cortland County initially agreed, on June 12, 2012, to a two-week public and agency scoping period, but on July 3, 2012, Cortland County extended the scoping period to thirty days to enable a public meeting to receive final public comment on the scoping document.

5. TCI asserts that various issues and unsubstantiated complaints raised by local citizens substantially increased the complexity of the DEIS more than TCI and its consultants originally anticipated.⁵ TCI states that the final scope was approved by Cortland County on September 13, 2012, leaving little time for TCI to submit a DEIS to be fully reviewed and voted on at the Cortland County Legislature's monthly meeting on September 27, 2012—the only remaining meeting by Cortland County before TCI's deadline for the regulatory milestone. TCI states that it submitted its DEIS on September 17, 2012, but Cortland County voted to defer a determination on the DEIS until the next meeting on October 25, 2012. TCI adds that this meeting yielded no determination and on October 30, 2012, Cortland County determined that the DEIS was not adequate for public review.

³ NYISO OATT § 25.6.2.3.2 (1.0.0).

⁴ TCI Petition for Waiver at 3, n.4.

⁵ *Id.* at 4.

6. TCI states that the cure period provided in section 30.3.6 of Attachment X for TCI's failure to complete the regulatory milestone expired November 1, 2012, by which time it had not yet completed the regulatory milestone. TCI adds that it was informed by NYISO on November 5, 2012, that the Crown City Project had been withdrawn from the interconnection queue. TCI states that on November 1, 2012, it sought waiver from the Commission of the two-year deadline requirement in Attachment S and Attachment X of the NYISO tariff, asking for a 45-day extension until December 17, 2012, to complete the regulatory milestone. However, according to TCI, it was unable to complete the regulatory milestone within the timeframe designated in its petition, and the Commission dismissed, without prejudice, TCI's request for waiver as moot on January 2, 2013.⁶

7. TCI states that, on March 28, 2013, TCI's DEIS received a unanimous vote of adequacy by Cortland County, thus completing the regulatory milestone. TCI now requests a one-time waiver of the two-year timeline for completing the regulatory milestone in section 25.6.2.3.2 of Attachment S and section 30.3.6 of Attachment X.

8. TCI argues that granting the waiver is justified as its failure to satisfy the regulatory milestone within the two-year timeline was due to a good faith error in anticipating unique circumstances that delayed the DEIS process.⁷ It further argues that the requested waiver is limited in scope and, given its unique circumstances, granting the petition will not provide a generic precedent for other interconnection customers to apply for a waiver from tariff requirements. Furthermore, TCI argues that granting the waiver would resolve a concrete problem, specifically, the Crown City Project's removal from the generator interconnection queue due to TCI's failure to timely meet the regulatory milestone. Since the regulatory milestone has now been achieved, granting the waiver would restore the Crown City Project to the queue and make it eligible to participate in NYISO's 2013 Class Year Study. Further, according to TCI, the 2013 Class Year Study uniquely coincides with the few remaining solicitations by New York State Energy Research and Development Authority (NYSERDA) for renewable energy, and TCI's inclusion in the next Class Year Study is vital for its participation in those solicitations. Finally, TCI claims that the waiver will have no adverse impact on any other interconnection customers as the Class Year Study has not commenced yet, nor will it commence until June 1, 2013 at the earliest.⁸

⁶ *Air Energy TCI, Inc.*, 142 FERC ¶ 61,005 (2013).

⁷ TCI Petition for Waiver at 7.

⁸ Starting with the 2013 Class Year, NYISO will commence its Class Year Studies on March 1, June 1, or September 1 following the completion of the prior Class Year Study. NYISO OATT § 25.5.9 (2.0.0). As of April 30, 2013, the 2012 Class Year Study

9. TCI requests an effective date on or before May 24, 2013, because if the waiver is granted, this will allow TCI to join the 2013 Class Year prior to its start date and thus cause no delay to the Class Year or disruptions to other customers' interconnection study assumptions. Further, according to TCI, if the waiver is denied, TCI will be required to re-apply to the NYISO generator interconnection queue and the resultant change in the Crown City Project's timeline may have a significant impact on TCI's prospects in developing the project. TCI adds that, in the event of Commission denial, it desires to begin the interconnection process as soon as possible.

10. Notice of TCI's filing was published in the *Federal Register*, 78 Fed. Reg. 26,025 (2013) with interventions and protests due on or before May 10, 2013. On May 10, 2013, NYISO filed a motion to intervene and comments. On May 14, 2013, Cortland County filed comments. On May 16, 2013, Certain Citizens of Cortland, Homer, Solon, and Truxton, New York (Private Citizens) filed comments.⁹ Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the unopposed motion to intervene serves to make the entity that filed it party to this proceeding.

11. NYISO states that it is concerned that granting the waiver may raise questions regarding the applicability of the same regulatory milestone to other projects, particularly since this is a substantive milestone reflecting the progress of the project rather than an administrative milestone.¹⁰ NYISO adds that the Commission accepted its proposal to require developers to meet this two-year deadline and has since emphasized the importance of meeting deadlines in the interconnection procedures. NYISO also states that the Crown City Project has an opportunity to submit a new Interconnection Request and obtain Operating Committee approval of an Interconnection System Reliability Impact Study in time to join the next Open Class Year.¹¹

12. Cortland County's comments are directed to TCI's statements regarding the timetable and facts of the DEIS process. Cortland County states that TCI's interpretation of past events is incorrect and that TCI has litigated its complaints in court and lost.

was not complete, thus making June 1, 2013 the earliest possible start date for the 2013 Class Year Study. *See* Docket No. ER13-1380-000, NYISO Transmittal Letter at 29.

⁹ We will accept the late-filed comments of Cortland County and Private Citizens. We note that neither Cortland County nor Private Citizens filed a motion to intervene in this proceeding.

¹⁰ NYISO Comments at 4.

¹¹ *Id.* at 5.

Cortland County attaches to its filing the November 21, 2012 comments it submitted in Docket No. ER13-296-000¹² and a copy, in part, of the Cortland County Supreme Court decision in *Air Energy TCI, Inc. v. The County of Cortland*.¹³

13. In its November 21, 2012 comments, Cortland County asserts that its deliberative bodies never made a determination that a scoping process would not be required before submission of the DEIS. Cortland County further asserts that it made numerous efforts to accommodate TCI in an expedited manner and that the lengthy process can be attributed to deficiencies in TCI's submissions, the complexity of the project, and TCI's failure to allow adequate time for the process. With respect to *Air Energy TCI, Inc.*, Cortland County states that, as noted by the judge, TCI created the dilemma it faces.

14. Private Citizens request that the Commission deny TCI's waiver request. Similar to NYISO, Private Citizens state that granting such a waiver may raise questions regarding the applicability of the same regulatory milestone to other projects. They also state that they reaffirm Cortland County's filing, including its attachments. Private Citizens attach to their filing the November 20, 2012 comments that they, and others, submitted in Docket No. ER13-296-000.¹⁴ The comments assert that TCI is responsible for the delays in the DEIS process. Private Citizens also attach to their filing a "Notice of Violation of Wind Farm Code of Conduct" (Notice of Violation)¹⁵ that was received by TCI for failure to publicly disclose the full name of any Municipal Officer or Relative who has a financial interest in any property identified for potential wind farm development whether or not a formal signed agreement has been reached with the landowner.

15. Although not the only basis for a grant of waivers, the Commission has previously granted one-time waivers of tariffs in situations where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needed to

¹² See *supra* P 6 and note 6.

¹³ We note that Cortland County omitted pages 7 and 8 of the decision.

¹⁴ See *supra* P 6 and note 6.

¹⁵ The New York State Attorney General's Office issued the Notice of Violation and assessed a penalty of \$25,000. Notice of Violation at 2.

be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹⁶

16. We find that TCI has demonstrated good cause to grant the request for a tariff waiver because TCI's requested waiver satisfies the aforementioned conditions. TCI explains that it made a good faith effort to meet the regulatory timeline. The commentors' filings do not persuade us otherwise.¹⁷ Further, the waiver is of limited scope in that TCI has currently met the regulatory requirement, albeit, nearly five months after the cure period. Thus we are not granting an open-ended waiver, but rather a limited extension of the time allowed to meet the regulatory milestone. Failure to meet the regulatory milestone created a concrete problem for TCI in that it was withdrawn from the 2013 Class Year, and such withdrawal may eliminate its ability to participate in the remaining NYSERDA solicitations for renewable energy. A waiver granted by the Commission would remedy this problem. Finally, because the 2013 Class Year has not yet started, we believe that granting the waiver will not harm the other members of the Class Year or cause undue administrative hardship for NYISO. While we recognize NYISO's need to remove projects from the queue that are not making progress toward development, we believe the facts and circumstances of this case do not indicate a lack of progress on the part of TCI. Further, we note that our grant of waiver is limited to the facts and circumstances of the case before us and we do not intend that NYISO's regulatory milestones should be taken lightly.

¹⁶ See *ISO New England-EnerNOC, Inc.*, 122 FERC ¶ 61,297 (2008); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008); *Cent. Vermont Pub. Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation, LLC*, 120 FERC ¶ 61,007 (2007).

¹⁷ We note that TCI's petition in *Air Energy TCI, Inc.* for a declaration that the DEIS was adequate for public review under SEQRA and an annulment of the Legislature's resolution to the contrary was dismissed as not ripe for review given the early stage of the administrative procedure and the court's unwillingness to substitute its judgment for that of the agency. Cortland County May 14, 2013 Comments, *Air Energy TCI, Inc. v. The County of Cortland*, Index No. 12-554, at 10 (N.Y. Sup. Ct. Cortland Co. Dec. 5, 2012).

17. Accordingly, the Commission grants TCI's requested waiver effective as of the date of this order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.