

171 FERC ¶ 61,042  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER20-922-000

ORDER GRANTING WAIVER

(Issued April 16, 2020)

1. On January 30, 2020, the New York Independent System Operator, Inc. (NYISO) submitted a request for waiver of certain language in the definition of “Public Power Entity”<sup>1</sup> in Section 2.16 of NYISO’s Market Administration and Control Area Services Tariff (Services Tariff). According to NYISO, waiver would allow NYISO to continue granting unsecured credit, up to \$1 million annually each, to government entities that do not meet NYISO’s currently effective definition of Public Power Entity, while NYISO works with stakeholders to revise the Public Power Entity definition and receive approval from the Commission. As discussed below, we grant NYISO’s waiver request.

**I. Background**

2. NYISO’s Services Tariff establishes various credit requirements for customers participating in the NYISO-administered wholesale markets, including the criteria for a customer to qualify for a grant of unsecured credit.<sup>2</sup> Relevant here, Section 26.5.3.6 of the Services Tariff establishes that a Public Power Entity may qualify for approval of up to \$1 million in unsecured credit without demonstrating a qualifying tangible net worth or submitting to the credit assessment required for other entities.<sup>3</sup> The Services Tariff defines a Public Power Entity as:

An entity which is either (i) a public authority or corporate municipal instrumentality, including a subsidiary thereof, created by the State of New York that owns or operates generation or transmission and that is authorized to produce,

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<sup>1</sup> For the definition of “Public Power Entity,” *see infra* P 2.

<sup>2</sup> *See* NYISO, NYISO Tariffs, Services Tariff, § 26.2.2 (3.0.0).

<sup>3</sup> *Id.* § 26.5.3.6 (8.0.0).

transmit, or distribute electricity for the benefit of the public, or (ii) a *municipally owned electric system that owns or operates control distribution facilities and provides electric service*, or (iii) a cooperatively owned electric system that owns or controls distribution facilities and provides electric service.<sup>4</sup>

## II. Waiver Request

3. NYISO states that, in the course of an administrative review, NYISO discovered an inconsistency between the language under subsection (ii) of the definition of Public Power Entity and how NYISO applies that language. Specifically, NYISO explains that it has extended up to \$1 million in unsecured credit to municipally owned electric systems regardless of whether they own or control distribution facilities and provide electric service. NYISO states that this error began as early as 2004 when the Commission approved the relevant Services Tariff provisions. NYISO notes that it has been unable to determine why the definition of Public Power Entity was drafted to include only municipally owned electric systems that own or control distribution facilities and provide electric service. NYISO elaborates that it established this \$1 million of unsecured credit in recognition that municipal entities generally do not present significant risk of nonpayment but are unable to demonstrate creditworthiness through conventional indicators.<sup>5</sup>

4. NYISO requests a nine-month waiver of the language in its Public Power Entity definition that limits the scope of that definition to a municipally owned electric system that owns or controls distribution facilities and provides electric service, while NYISO works with stakeholders to revise the Public Power Entity definition and receive approval from the Commission.<sup>6</sup> NYISO explains that its proposed waiver would allow NYISO to continue its approximately 15-year practice of providing up to \$1 million in unsecured credit to municipally owned electric systems irrespective of whether they own or control distribution facilities and provide electric service.<sup>7</sup> NYISO believes that this practice is reasonable because a government entity's status as a municipally owned electric system that owns or controls distribution facilities and provides electric service does not

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<sup>4</sup> *Id.* § 2.16 (14.0.0) (emphasis added).

<sup>5</sup> Waiver Request at 3-4.

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *Id.* at 1, 3-4.

materially affect the credit risks presented by that government entity.<sup>8</sup> Additionally, NYISO requests that the Commission excuse any instances of past non-compliance with the provision at issue.<sup>9</sup>

5. NYISO asserts that its request for a waiver satisfies the Commission's four waiver criteria.<sup>10</sup> First, NYISO argues that it acted in good faith in its administration of Section 25.5.3.6 of the Services Tariff and has not intentionally disregarded the limitations of its currently-effective definition of a Public Power Entity.<sup>11</sup> NYISO states that it extended unsecured credit to government entities regardless of whether they owned or operated distribution facilities and provided electric service because that was NYISO's good faith understanding of how the Services Tariff should be administered in light of the credit profiles of government entities.<sup>12</sup> NYISO further states that, when it discovered the discrepancy, it took immediate action to address the issue.<sup>13</sup>

6. Second, NYISO contends that the requested waiver is of limited scope because it involves a single tariff provision.<sup>14</sup> Specifically, NYISO states that the requested waiver is only intended to eliminate the requirement in Section 2.16(ii) of the Services Tariff that requires a government entity to be a "municipally owned electric system that owns or controls distribution facilities and provides electric service" in order to be eligible to receive unsecured credit pursuant to Section 26.5.3.6.<sup>15</sup> NYISO further states that only 10 municipalities or other government entities have been identified as being affected by the requested waiver. Additionally, NYISO explains that it is only asking that the waiver remain in place for a temporary period, not to exceed nine months, while NYISO works

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<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 2 n.1.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

with stakeholders to revise the Public Power Entity definition and receive approval from the Commission.<sup>16</sup>

7. Third, NYISO asserts that the requested waiver is necessary to address a concrete problem, namely, that there is no reasoned basis to discriminate against municipalities or other government entities that do not own or control distribution facilities and provide electric service.<sup>17</sup> NYISO contends that its current practice is reasonable because a government entity's status as a municipally owned electric system that owns or controls distribution facilities and provides electric service does not materially affect the credit risks presented by a government entity. NYISO explains that, in either case, these government entities operate to serve their loads without a profit-seeking interest and they have the ability to raise revenues through taxation and other sources of revenue not available to private sector entities. NYISO further explains that these factors generally result in a lower risk profile that supports the extension of up to \$1 million in unsecured credit to government entities without subjecting them to the same review criteria applied to private sector entities that have different commercial objectives and different counterparty credit risk profiles. NYISO states that, in addition to generally posing a lower credit risk, government entities sometimes lack access to credit support more readily available to other entities.<sup>18</sup> Moreover, NYISO argues that the requested waiver is needed to allow NYISO to continue extending relatively small amounts of unsecured credit to these government entities and that depriving such entities of access to this credit could unnecessarily create business difficulties for these entities that Section 25.5.3.6 was intended to avoid.<sup>19</sup>

8. Fourth, NYISO states that the requested waiver will have no adverse consequences for any party.<sup>20</sup> NYISO explains that it has engaged in the practice discussed above for years without materially increasing the financial risks to NYISO or other market participants and without adversely affecting any other party.<sup>21</sup> NYISO further explains that continuing this practice should not increase financial risks to NYISO or market

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<sup>16</sup> NYISO states that it expects few, if any, additional municipalities or other government entities to seek unsecured credit pursuant to this requested waiver. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

participants, or harm third parties.<sup>22</sup> NYISO notes that, on the other hand, denying the requested waiver could needlessly harm government entities that do not own or control distribution facilities and provide electric service.<sup>23</sup>

### **III. Notice of Filing and Responsive Pleadings**

9. Notice of NYISO's filing was published in the *Federal Register*, 85 Fed. Reg. 7545 (Feb. 10, 2020), with interventions and protests due on or before February 20, 2020. The New York Association of Public Power and the New York Transmission Owners<sup>24</sup> filed timely motions to intervene. No comments or protests were filed.

### **IV. Discussion**

#### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

#### **B. Substantive Matters**

11. We grant NYISO's prospective waiver request. 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.<sup>25</sup>

12. We find that the circumstances of NYISO's waiver request satisfy these criteria. First, we find that NYISO acted in good faith because it did not intentionally disregard the limitations set forth in the currently effective definition of Public Power Entity and

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> The New York Transmission Owners include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Lighting Company d/b/a Power Supply Long Island; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

<sup>25</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

took this self-correcting action promptly upon discovering the limitation in its current definition for the benefit of its stakeholders, with whom NYISO is already working to develop a permanent solution. Second, we find that NYISO's waiver request is limited in scope because it will only remain in place for nine months and only involves the language in a subsection of a definition. Also, NYISO states that it may not need waiver for the full nine-month period as it is currently working with its stakeholders on an Federal Power Act section 205 filing to address this issue. Third, we find that the waiver will address a concrete problem because, as NYISO states, granting the waiver will avoid needlessly creating practical business difficulties for certain municipal and government entities. Also, granting the waiver is consistent with the underlying purpose of Section 26.5.3.6 of NYISO's currently effective Services Tariff, which recognizes that municipal entities generally do not present significant risk of nonpayment but are unable to demonstrate creditworthiness through conventional indicators. Fourth, we find that NYISO's waiver request does not have undesirable consequences, such as harming third parties, because, as NYISO explains, there has not been any material increase to the financial risks of NYISO or other market participants, and denying the requested waiver could needlessly harm government entities that do not own or control distribution facilities and provide electric service.

13. The waiver requested by NYISO, and granted by the Commission, has prospective effect only. We note, however, NYISO admits that, in the past, it "extended unsecured credit under Section 26.5.3.6 to government entities, regardless of whether they own or control distribution facilities and provide electric service."<sup>26</sup> Further, "NYISO began extending the \$1 million in unsecured credit to certain of these entities at least as early as 2004."<sup>27</sup> These extensions of unsecured credit were not permitted by the Services Tariff. However, we will exercise our discretion in addressing such matters<sup>28</sup> and, given the facts and the record before us in this matter, take no action with respect to the instances of NYISO's past non-compliance with the Services Tariff.

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<sup>26</sup> Waiver Request at 6.

<sup>27</sup> *Id.* at 3-4.

<sup>28</sup> *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives").

The Commission orders:

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

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.