

172 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket Nos. ER20-543-000
ER20-543-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND
DISMISSING REQUEST FOR STAY

(Issued September 17, 2020)

1. On December 9, 2019, PJM Interconnection, L.L.C. (PJM) filed a notice of cancellation (Notice of Cancellation), effective February 10, 2020, terminating an Interconnection Service Agreement (ISA) between Stonegate Power, LLC (Stonegate), Gateway Energy Center, LLC (Gateway), and Jersey Central Power & Light Company (JCPL) (Gateway ISA).¹ On December 30, 2019, Stonegate filed a protest to the Notice of Cancellation.
2. On February 7, 2020, the Commission issued an order accepting PJM's Notice of Cancellation of the Gateway ISA.² On March 6, 2020, Stonegate timely filed a request for rehearing of the Cancellation Order and a motion to stay the order while the rehearing request was pending.
3. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),⁴ however, we are modifying the discussion in the

¹ Designated as Second Revised Service Agreement No. 3476. *See PJM Interconnection, LLC*, Docket No. ER18-324-000 (Jan. 10, 2018) (delegated order) (approving Gateway ISA, as revised).

² *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,087 (2020) (Cancellation Order).

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁴ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in

Cancellation Order and continue to reach the same result in this proceeding, as discussed below.⁵ We also dismiss Stonegate's motion for stay, and grant PJM's motion to strike Attachment A to Stonegate's request for rehearing.

I. Background

4. Stonegate is the developer of a 560 MW natural gas-fueled combined cycle generating facility and a 20 MW battery storage facility, located in Sayreville, New Jersey (MEC Project). On June 2, 2016, Stonegate acquired from Gateway the Gateway Center project (Gateway Project), which had interconnection rights and a fully executed Interconnection Service Agreement and Interconnection Construction Service Agreement for queue positions R11 and Z2-109, for purposes of assigning those rights to the MEC Project.⁶

5. On December 9, 2019, PJM filed a Notice of Cancellation of the Gateway ISA. PJM stated that the notice of cancellation was due to milestones contained in the Gateway ISA being breached, and not cured, resulting in the default of the Gateway ISA pursuant to Appendix 2, section 16.1.3.⁷

6. In its protest to PJM's Notice of Cancellation, Stonegate stated that its default was the fault of PJM for improperly placing the Gateway Project in a one-year suspension period in September 2017, which was the subject of a separate complaint proceeding initiated by Stonegate.⁸ Stonegate alleged that PJM's action of putting the Gateway Project in a one-year suspension frustrated its ability to secure financing.

7. Specifically, Stonegate stated that it notified PJM on January 24, 2017, of its intention to suspend the Gateway ISA for up to 695 days and PJM confirmed receipt of

whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁵ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Cancellation Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ Stonegate Protest at 4-5; Rehearing Request at 4.

⁷ PJM Notice of Cancellation at 1.

⁸ *Stonegate Power LLC v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,014 (Complaint Order) (dismissing the complaint as moot in part and denying the complaint in part), *denying reh'g and request for stay*, 168 FERC ¶ 61,019 (2019) (Complaint Rehearing Order).

the request on January 25, 2017.⁹ Stonegate asserted that on September 14, 2017, PJM informed Stonegate that it was limiting the Gateway ISA's suspension to one year, due to its materially-adverse impact on a later-queued project. Stonegate stated that PJM informed Stonegate that the Material Modification at issue was the additional carrying cost of a letter of credit that CPV Shore, LLC (CPV Shore), owner of the later-queued Woodbridge Energy Center project (Woodbridge Project), had posted with PJM to secure construction of the n3647 network upgrade assigned to the Woodbridge Project.¹⁰

8. Stonegate asserted that on November 11, 2018, PJM notified Stonegate that it had re-studied the transmission system and determined that network upgrade n3647 was no longer needed. Accordingly, CPV Shore was no longer required to maintain security for the upgrade, and the Material Modification causing the suspension period for the Gateway Project to be reduced to one year had been eliminated.¹¹ Stonegate stated that it immediately notified PJM of its intention to place the Gateway Project back into suspension, but argued that simply placing the project back into full suspension did not adequately remedy the harm caused to Stonegate due to its time out of full suspension, which hindered Stonegate's ability to secure construction funding.¹²

9. Stonegate argued in its protest that, consistent with the Commission's long-held policies granting milestone extensions in ISA termination cases, the milestones should be extended because Stonegate was able to demonstrate: (1) there was no harm to lower-queued projects; (2) Stonegate had continuously worked to secure financing; (3) Stonegate had made substantial progress in project development; and (4) Stonegate made every effort to avoid default and did not engage in delay tactics, and that based on these factors, cancellation of the Gateway ISA would be unjust and unreasonable.¹³ Stonegate further argued that extension of the Gateway ISA milestones is consistent with Commission precedent and that the Commission should not rely on *Moncada NJ Solar*, *Merricourt*, *New Era Wind* or *Ellerth*, which were cited in support of the Commission's

⁹ Cancellation Order, 170 FERC ¶ 61,087 at P 7 (citing Stonegate Protest at 7).

¹⁰ *Id.* A "Material Modification" is defined as "[a]ny modification to an Interconnection Request that has a material adverse effect on the cost or timing of Interconnection Studies related to, or any Network Upgrades or Local Upgrades needed to accommodate, any Interconnection Request with a later Queue Position." PJM, OATT, Definitions – L - M - N (19.0.0).

¹¹ Cancellation Order, 170 FERC ¶ 61,087 at P 10 (citing Stonegate Protest at 23).

¹² *Id.* (citing Stonegate Protest at 11-12).

¹³ *Id.* PP 17-24.

determination in the Complaint Rehearing Order, because those cases are distinguishable on the facts.¹⁴

10. As a remedy, Stonegate requested a day-for-day extension of the Gateway ISA milestones, for each day lost between September 14, 2017, when PJM first notified Stonegate it was limiting its suspension to one year, and the date of an order in this docket granting an extension of the milestones. Stonegate also indicated that the facts of this case satisfy the Commission's criteria for granting waiver.

11. On February 7, 2020, the Commission issued an order accepting the Notice of Cancellation and rejecting Stonegate's arguments with respect to extending the Gateway Project milestones.¹⁵ The Commission also denied Stonegate's request for waiver of the PJM Tariff.¹⁶

II. Discussion

A. Request for Rehearing

12. On rehearing, Stonegate argues that the Commission erred: (1) by failing to find PJM acted unreasonably in refusing to extend the Gateway ISA milestones and by failing to find that the factors leading to a need for an extension of the Gateway ISA milestones were beyond Stonegate's control; (2) in relying on *Merricourt* to justify its decision to reject Stonegate's request for an extension of the Gateway ISA milestones; (3) by insufficiently addressing material submitted in the record and by failing to institute an evidentiary hearing based on genuine issues of material fact; and (4) by relying on PJM's January 21, 2020 Answer in rejecting Stonegate's arguments without considering Stonegate's February 6, 2020 Response.¹⁷

¹⁴ Stonegate Protest at 30-36 (citing *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,243, at P 19, *reh'g denied*, 164 FERC ¶ 61,206 (2018) (*Moncada NJ Solar*); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,172, at P 35 (2016), *reh'g denied*, 161 FERC ¶ 61,077 (2017) (*Merricourt*); *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, at P 28 (2014) (*New Era Wind*); *Midcontinent Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,114, *reh'g denied*, 145 FERC ¶ 61,038 (2013) (*Ellerth*)).

¹⁵ Cancellation Order, 170 FERC ¶ 61,087 at PP 29-34.

¹⁶ *Id.* P 35.

¹⁷ Rehearing Request at 5-6.

1. **PJM's Refusal to Extend the Gateway ISA Milestones**

a. **Cancellation Order**

13. In the Cancellation Order, the Commission found that PJM's Notice of Cancellation was proper under the plain terms of the Gateway ISA.¹⁸ The Commission also found that PJM had reasonably exercised its discretion not to extend the Gateway Project's milestones under section 212.5 of PJM's Tariff and denied Stonegate's request for an extension of the milestones for more than two years. The Commission was not persuaded that Stonegate's inability to meet the construction milestone was not caused by the Gateway Project, could not be foreseen, or could not have been remedied by Stonegate through the exercise of due diligence. Rather, the Commission found that Stonegate's inability to obtain financing was the result of Stonegate's action (or inaction) alone.¹⁹ The Commission stated that the Gateway ISA specifically provided for the possibility of a one-year suspension and it was reasonable to expect that Stonegate would have anticipated the possibility of such an event with respect to the development of the Gateway Project.²⁰ The Commission noted that Stonegate provided no verification or independent sources of confirmation from potential investors or lenders that the limitation of suspension to one year was the dispositive obstacle to obtaining financing of the Gateway Project, nor did Stonegate explain why it could not alter its development plan for the Gateway Project once its investors and lenders notified it that the development plan was unworkable under a one-year suspension.²¹ In addition, Stonegate was able to use its full 695-day suspension period and it was unclear what uncertainty existed after November 12, 2018 when the Gateway Project re-entered full suspension and during the next 330 days such that Stonegate could not obtain construction financing.²²

b. **Request for Rehearing**

14. On rehearing, Stonegate asserts that the Commission erred in finding that PJM reasonably exercised its discretion in rejecting Stonegate's request for an extension of the Gateway ISA milestones and that the events leading to a need for an extension of the

¹⁸ Cancellation Order, 170 FERC ¶ 61,087 at P 31.

¹⁹ *Id.* PP 32-33.

²⁰ *Id.* P 33 (citing Complaint Rehearing Order, 168 FERC ¶ 61,019 at PP 26, 30).

²¹ *Id.* P 33 n.44.

²² *Id.* P 33.

Gateway ISA milestones were within Stonegate's control. Stonegate contends that such findings were not supported by the record.²³

15. Stonegate argues that the Commission must consider the entirety of the interactions between PJM and Stonegate in order to reach a reasoned determination as to whether Stonegate's ability to finalize construction financing for the Gateway Project was within its control. First, Stonegate contends that the significant data errors in the feasibility and system impact studies for the initial MEC Project application, which Stonegate learned of in February 2016, demonstrate that PJM did not act reasonably. Stonegate claims that it lost nearly eleven months (March 2015 to February 2016) of valuable development time and project financing funds in trying to resolve the data discrepancies.

16. Next, Stonegate asserts that PJM acted unreasonably in waiting eight months into the Gateway Project suspension to notify Stonegate that it was limiting the suspension to one year, and then deciding to date the start of the one-year suspension retroactively to a date that occurred eight months earlier. Lastly, Stonegate asserts that PJM acted unreasonably when it decided to step aside in the negotiations with CPV Shore regarding Stonegate's efforts to resolve the alleged harm to CPV Shore's lower-queued project. Stonegate contends that this action accorded significant leverage to CPV Shore, which had no incentive to negotiate reasonably.

17. Stonegate argues that the Commission compounded its error by further finding that Stonegate's ability to move forward with project financing lay entirely within Stonegate's control. Stonegate argues that the Commission failed to adequately consider Mr. DeFelice's testimony indicating that Stonegate acted diligently in attempting to resolve financing concerns.²⁴ In particular, Stonegate takes issue with the Commission's statement in the Cancellation Order that it is "unclear what uncertainty existed after November 12, 2018 when the Gateway Project re-entered full suspension and during the next 330 days such that Stonegate could not obtain construction financing."²⁵ Stonegate states that its ability to place the Gateway Project back into suspension for 331 days, or 11 months, of the remaining suspension period did not place Stonegate back into the position it would have been in September 2017, because it "did not provide Stonegate the

²³ Rehearing Request at 9.

²⁴ *Id.* at 16-19.

²⁵ *Id.* at 21 (citing Cancellation Order, 170 FERC ¶ 61,087 at P 33).

time lost due to PJM's actions in providing Stonegate only four months' notice before the project suspension ended in January 2018."²⁶

18. Stonegate also contends that the Commission erred in finding that Stonegate's request for a two-year milestone extension demonstrates that the Gateway Project is speculative. Stonegate argues that the Commission's ruling ignores the lack of control Stonegate had over the events that led to its inability to move forward with project financing after PJM interfered with the suspension schedule. Stonegate also states that its proposed milestone extension does not mean that Stonegate needs two years to complete construction financing, but rather that Stonegate could reach the final milestone with an extension that gives back to the Gateway Project the time lost over the past two and a half years due to the uncertainty created by PJM's actions. Stonegate cites to Commission precedent granting extensions of 18 to 36 months to demonstrate that the extension requested here is reasonable.²⁷

19. Stonegate disputes the Commission's denial of its requested waiver of the Tariff, arguing that the Commission's conclusion that it was unclear what uncertainty remained after the Gateway Project went back into suspension does not comport with reasoned decision-making.²⁸

c. Determination

20. We are unpersuaded by Stonegate's arguments, which are generally the same as those raised in its protest. We continue to find PJM adhered to the terms of the Gateway ISA and its Tariff and reasonably exercised its discretion in rejecting Stonegate's request to extend the construction milestones.

21. Stonegate's arguments that PJM acted unreasonably are unpersuasive. First, the errors Stonegate alleges PJM committed in the study phases of the MEC Project concern a period before Stonegate acquired the Gateway Project²⁹ as well as before the project

²⁶ *Id.* at 23.

²⁷ *Id.* at 26-27 n.54 (citing *Fla. Power & Light Co.*, 98 FERC ¶ 61,226, at 61,896 (2002), *reh'g denied*, 99 FERC ¶ 61,318, at P 19 (2002) (*Fla. Power & Light Co.*); *S. Mont. Elec. Gen. & Trans. Coop. v. Northwestern Corp.*, 113 FERC ¶ 61,023, at P 26 (2005) (*Southern Montana*)).

²⁸ Rehearing Request at 24.

²⁹ *See supra* P 4.

was placed into suspension, and are therefore, irrelevant to the cause of Stonegate's current inability to obtain financing.

22. Next, with respect to Stonegate's argument that PJM acted unreasonably in waiting eight months to analyze impacts to a lower-queued project, we find that Stonegate's argument is a collateral attack on the Complaint Rehearing Order. In *Modesto Irrigation District*, the Commission stated that "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency."³⁰ In *Alamito Company*, the Commission stated "[t]he Commission's position on relitigation of issues is one where in the absence of new or changed circumstances requiring a different result, 'it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined.'"³¹ Stonegate raised generally the same argument on rehearing in the complaint proceeding in Docket No. EL19-19. The Commission denied Stonegate's rehearing request, finding that PJM acted consistent with Schedule M of the Gateway Project's Interconnection Construction Service Agreement.³² Stonegate does not point to anything that has changed to warrant our reconsideration of Stonegate's argument here. Lastly, with respect to PJM's decision to step aside in the negotiations with CPV Shore, it is unclear how PJM's decision caused Stonegate to be unable to obtain financing and satisfy the Gateway Project's milestones.

23. We also continue to find, as we did in the Cancellation Order, that Stonegate's inability to obtain financing was the result of Stonegate's action (or inaction) alone. Section 212.5 of PJM's Tariff provides that PJM "may reasonably extend any such milestone dates . . . in the event of delays not caused by the Interconnection Customer, such as unforeseen regulatory or construction delays that could not be remedied by the Interconnection Customer through the exercise of due diligence." Based on our review of the record, we are still persuaded that Stonegate's inability to meet the Gateway Project's construction milestone was caused by Stonegate, could have been foreseen, and could have been remedied by Stonegate through the exercise of due diligence. The Gateway Project's Interconnection Construction Service Agreement specifically provided for the

³⁰ *Modesto Irrigation Dist.*, 125 FERC ¶ 61,174, at P 10 n.16 (2008) (citing *Norfolk and W. Ry. Co. v. U.S.*, 768 F.2d 373 (D.C. Cir. 1985)).

³¹ *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order on reh'g*, 43 FERC ¶ 61,274 (1988) (citing *Cent. KS. Power Co., Inc.*, 5 FERC ¶ 61,291, at 61,621 (1978)); *see also Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 38 (2007).

³² Complaint Rehearing Order, 168 FERC ¶ 61,019 at P 24.

possibility of a one-year suspension and it is reasonable to expect that Stonegate would have anticipated such a contingency in the project's development plan.

24. We find unpersuasive Stonegate's contention that, in fact, there was no "red flag" that PJM might limit the Gateway Project's suspension rights to one year because Stonegate's due diligence search prior to its purchase of the project turned up no evidence that indicated that construction of network upgrades by a later-queued project was dependent on the construction of the Gateway Project. As stated above, a determination as to whether the Gateway Project's suspension would result in a Material Modification could only take place after the project was placed in suspension. Therefore, the efficacy of Stonegate's due diligence in this regard was limited.

25. In addition, section 212.5 of the PJM Tariff provides examples of the type of delays that could warrant an extension of a project's milestones ("unforeseen regulatory or construction delays that could not be remedied by the Interconnection Customer through the exercise of due diligence"). Stonegate's inability to obtain financing here is not of a similar a type.

26. Stonegate repeatedly states, as further evidence of the fact that the delay in meeting its construction milestone was caused by PJM, that the equity and debt investors with which Stonegate was working were unwilling to move forward with project financing discussions unless and until the Gateway Project was placed back into suspension. The Gateway Project, however, was placed back into suspension on November 12, 2018, and ultimately used its full suspension period of 695 days (i.e., 365 days from January 25, 2017, through January 24, 2018, and 330 days starting November 12, 2018). Nevertheless, the Gateway Project was still unable to obtain the necessary financing, which supports the Commission's previous finding that the temporary limitation of suspension to one year was not the dispositive obstacle to obtaining financing of the project.³³ Stonegate also continues to assert that a cloud of uncertainty hung over the Gateway Project, even after the project was put back into full suspension. We do not find that assertion compelling. After November 12, 2018, when the Gateway Project re-entered full suspension, Stonegate had 330 days of suspension and its milestones were extended coextensively. The only issue that remained uncertain after November 12, 2018, was whether the Commission would grant Stonegate an extension of its milestones as part of Stonegate's complaint. However, Stonegate created that uncertainty, and it would have been unreasonable for Stonegate to base its development plan on the success of that litigation. Stonegate also still does not explain why it could not alter its development plan for the Gateway Project once its investors and lenders notified it that the then-current development plan was unworkable under a one-year suspension.³⁴ The fact that Stonegate diligently sought to resolve its financing

³³ Cancellation Order, 170 FERC ¶ 61,087 at P 33 n.44.

³⁴ *Id.*

concerns does not mean that its inability to resolve those financing concerns was a delay “not caused by the Interconnection Customer” under section 212.5 of the PJM Tariff. As shown herein, the record demonstrates that the temporary limitation of suspension to one year was not the dispositive obstacle to obtaining financing. And even if it were, a one-year suspension was foreseeable under the Gateway Project’s Interconnection Construction Service Agreement.

27. We also find unpersuasive Stonegate’s argument that the Gateway Project’s re-entry into its remaining suspension period after November 12, 2018, failed to place Stonegate in the position it would have been in had PJM not limited the suspension period to one year. PJM placed Stonegate back into full suspension after November 12, 2018 for Stonegate’s remaining period of suspension, 330 days.³⁵ This action ensured that Stonegate received the full 695 days of suspension for the Gateway Project as provided under Schedule M.³⁶ Also, as Stonegate acknowledges, “[t]he effect of allowing the Gateway ISA to re-enter suspension was to move forward the next construction milestone under the Gateway ISA, from November 2018 to October 2019 a period equal to the remaining suspension period.”³⁷ While Stonegate continues to argue that the milestones should be extended to reflect the “period of time lost,” it is unclear what time it lost. Stonegate received all of the days of suspension it was entitled to under the Gateway ISA, and its milestones were extended coextensively with such suspension.

28. We also disagree with Stonegate’s argument that in other cases the Commission has granted milestone extensions, and therefore, the Commission’s decision to accept the Notice of Cancellation here is a departure from precedent.³⁸ As stated in the Cancellation Order, consistent with the Commission’s decision in *Merricourt*, we find that adhering to the terms of the Gateway ISA and PJM Tariff provides an appropriate framework for considering PJM’s Notice of Cancellation, as opposed to the factors suggested by Stonegate.³⁹ Further, in more recent cases than *Fla. Power & Light Co.* and *Southern*

³⁵ *Id.* P 33.

³⁶ As noted in the Cancellation Order, Stonegate used 365 days of suspension from January 25, 2017 through January 24, 2018, and the remaining 330 days starting November 12, 2018. Cancellation Order, 170 FERC ¶ 61,087 at P 33 n.45.

³⁷ Stonegate Protest, DeFelice Aff. at 42.

³⁸ Rehearing Request at 26-27.

³⁹ *Merricourt*, 161 FERC ¶ 61,077 at P 19 (denying rehearing of order accepting notice of termination of a generator interconnection agreement based on the “plain terms” of the MISO Tariff and declining to review whether interconnection customer has made consistent progress towards developing its generating facility or whether the request for Commercial Operation Date extension will not harm lower queued projects). In

Montana, the Commission has accepted notices of termination in light of missed deadlines.⁴⁰

29. For the foregoing reasons, we conclude that Stonegate's arguments that PJM did not act reasonably in refusing to extend the milestone dates are unpersuasive.⁴¹ Finally, the Cancellation Order denied Stonegate's request for waiver of the PJM Tariff, concluding that an extension to the milestone would not remedy the uncertainty and speculation surrounding the Gateway Project.⁴² Stonegate does not raise any new arguments pointing to evidence that disputes this finding and we continue to find waiver of the PJM Tariff to be unwarranted.

Merricourt, the Commission acknowledged that its prior consideration of other factors beyond the plain language of the tariff or contract introduced uncertainty regarding how the Commission would review requests for extensions. *Id.*; see also *Moncada NJ Solar*, 162 FERC ¶ 61,243 at PP 18-19 (finding that termination was appropriate based on a strict reading of the wholesale market participant agreement).

⁴⁰ Complaint Rehearing Order, 168 FERC ¶ 61,019 at P 40 n.58 (citing cases). The cases Stonegate cites in support, *Fla. Power & Light Co.* and *Southern Montana*, are also distinguishable on their facts. As Stonegate acknowledges, neither case involved milestone extensions granted in the context of termination proceedings or the PJM Tariff. Further, in *Fla. Power & Light Co.*, the extension the Commission granted applied only to the commercial operation date milestone and not to any construction milestones. *Fla. Power & Light Co.*, 99 FERC ¶ 61,318 at P 19. In *Southern Montana*, the Commission, in granting an extension, stated "there was no governing interconnection agreement between [Northwestern] and Southern Montana that memorialized a commercial operations date" when the complaint arose. *Southern Montana*, 113 FERC ¶ 61,023 at P 25 ("Rather, [Northwestern] was still conducting the studies required for the interconnection request when the cause for Southern Montana's complaint arose."). Here, there was a clearly established interconnection agreement, the Gateway ISA, which Stonegate violated.

⁴¹ Complaint Order, 167 FERC ¶ 61,014 at P 37 ("[W]e find that Schedule M of the Gateway Project ICSA is the applicable filed rate."); Complaint Rehearing Order, 168 FERC ¶ 61,019 at P 36; Cancellation Order, 170 FERC ¶ 61,087 at P 33.

⁴² *Id.* P 36 (noting that in its waiver request, Stonegate provides no finite timeframe by which it can secure the financing needed to meet its milestone and that the requested extension is based on the harm Stonegate purports to have experienced due to the time lapsed from September 14, 2017, when PJM notified Stonegate it would limit the suspension period to one year, until November 11, 2018, when PJM informed Stonegate that 330 days of the remaining full suspension period would be restored).

2. Whether the Commission Erred in Relying on *Merricourt*

a. Cancellation Order

30. In the Cancellation Order, the Commission declined to consider factors other than those in the Gateway ISA and PJM Tariff for purposes of deciding whether to grant Stonegate's milestone extension request. Consistent with the Commission's decision in *Merricourt*, the Commission found that adhering to the terms of the Gateway ISA and PJM Tariff provided an appropriate framework for considering PJM's Notice of Cancellation, as opposed to the factors suggested by Stonegate.⁴³

b. Request for Rehearing

31. Stonegate contends that the Cancellation Order inappropriately relied on *Merricourt* in rejecting Stonegate's request for an extension of the Gateway ISA milestones. Stonegate states that the facts in *Merricourt* were sufficiently different from those in this case, making *Merricourt* inapplicable. Stonegate argues that in *Merricourt*, MISO's tariff expressly precluded extension of the relevant project milestone beyond three years from the original milestone. Stonegate contends that, in contrast, PJM's Tariff provides PJM discretion to grant an extension of comparable milestones.⁴⁴ Stonegate argues that the Commission failed, in the Cancellation Order, to explain how *Merricourt* could apply when the tariff at issue in that case did not provide for a milestone extension whereas PJM's Tariff expressly does so.⁴⁵

32. Stonegate argues that instead of following the approach outlined in *Merricourt* for considering whether to grant an extension of milestones, the Commission should have instead followed the precedent in *Lakeswind* and *Illinois Power*.⁴⁶ Stonegate interprets this precedent as permitting the extension of milestones where a lower-queued project will not be harmed, and, where there is harm, permitting extension of milestones where the requesting party takes action that mitigates such harms and has made progress in

⁴³ *Id.* P 31 n.42 (citing *Merricourt*, 161 FERC ¶ 61,077 at P 19; *Moncada NJ Solar*, 162 FERC ¶ 61,243 at PP 18-19 (finding that termination was appropriate based on a strict reading of the wholesale market participant agreement)).

⁴⁴ Rehearing Request at 28-31.

⁴⁵ *Id.* at 29-30.

⁴⁶ *Id.* at 3-5, 28-31 (citing *Midwest Indep. Transmission Sys. Operator, Inc., order on reh'g and clarification*, 141 FERC ¶ 61,097 (2012) (*Lakeswind*); *Illinois Power Co.*, 120 FERC ¶ 61,237 (2007) (*Illinois Power*)).

construction.⁴⁷ Stonegate argues that in *Merricourt*, the Commission departed from the reasoning in *Lakeswind* and *Illinois Power* because of language in the MISO Tariff prohibiting extensions of the milestone beyond the initial three-year period. Stonegate contends that the Commission's decision to decline to review the factors in *Lakeswind* and *Illinois Power* does not make sense here where PJM's Tariff explicitly authorizes milestone extensions.⁴⁸ Further, Stonegate contends that to the extent the Commission's reliance on *Merricourt* is intended as a permanent change in policy for all cases regardless of the applicable tariff provisions, the Commission's decision is arbitrary and capricious.⁴⁹

c. Determination

33. Consistent with the analysis and determination in *Merricourt* and subsequently *Moncada NJ Solar*, we continue to find that the terms of the Gateway ISA and PJM Tariff provide an appropriate framework for considering PJM's Notice of Cancellation, as opposed to the factors suggested by Stonegate.⁵⁰ We also find that the differences between the PJM Tariff provisions at issue here and the MISO Tariff provisions at issue in *Merricourt* are not relevant to our decision to rely on the Gateway ISA and PJM Tariff as the framework for determining whether to grant an extension. While it is true that the PJM Tariff, unlike the MISO Tariff, gives PJM the discretion to extend a project's milestones, it does so under certain circumstances. The PJM Tariff provides that PJM "may reasonably extend any such milestone dates... in the event of delays not caused by the Interconnection Customer, such as unforeseen regulatory or construction delays that could not be remedied by the Interconnection Customer through the exercise of due diligence."⁵¹ Because the PJM Tariff expressly provides the circumstances where extension may be appropriate, PJM's Tariff does not require PJM to consider other factors, including those put forth by Stonegate. Therefore, consistent with our findings in *Merricourt* and *Moncada NJ Solar*,⁵² we continue to find it was appropriate to limit

⁴⁷ *Id.*

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 31-32.

⁵⁰ Cancellation Order, 170 FERC ¶ 61,087 at P 31.

⁵¹ PJM, OATT, 212.5, OATT, § 212.5 Milestones (0.0.0).

⁵² *Merricourt*, 161 FERC ¶ 61,077 at P 19; *Moncada NJ Solar*, 162 FERC ¶ 61,243 at PP 18-19.

consideration of the requested milestone extension to those circumstances identified in the Gateway ISA and PJM Tariff.

3. Adequacy of the Commission’s Consideration of Statements in the Record

a. Request for Rehearing

34. Stonegate takes issue with the Commission’s statement in the Cancellation Order that “Stonegate provides no verification or independent sources of confirmation from potential investors or lenders that limitation of suspension to one year was the dispositive obstacle to obtaining financing.”⁵³ Stonegate argues this statement is arbitrary and capricious and contends that consistent with Commission precedent, an evidentiary hearing should be held if the credibility of a witness is challenged.⁵⁴

35. Stonegate then quotes from various portions of Stonegate witness Mr. DeFelice’s testimony to demonstrate that Mr. DeFelice did independently testify under oath that the limitation of suspension to one year was the dispositive obstacle to obtaining financing.⁵⁵ Stonegate cites to Commission decisions involving material issues of disputed fact where the Commission conducted an oral hearing, even reversing orders on rehearing and setting cases for hearing, when the credibility of a witness was challenged.⁵⁶

36. Stonegate argues that submission of Mr. DeFelice’s sworn testimony establishes a *prima facie* case that the investors with which it was working were unwilling to move forward with finance discussions given the uncertainty of the Gateway Project’s ability to meet the Gateway ISA milestones without an extension of those deadlines. Because PJM and the Commission challenged those assertions, the Commission should have set the matter for hearing.⁵⁷

⁵³ Rehearing Request at 32 (citing Cancellation Order, 170 FERC ¶ 61,087 at P 33 n.44).

⁵⁴ *Id.*

⁵⁵ *Id.* at 32-34.

⁵⁶ *Id.* at 35-36 (citing, *e.g.*, *Southern Cos. Energy Mktg. Inc.*, 111 FERC ¶ 61,144 (2005) (reversing on rehearing and setting for evidentiary hearing challenges to a utility’s market-based rate analysis)).

⁵⁷ *Id.* at 37.

b. Determination

37. Nothing in Mr. DeFelice's testimony contradicts the statement in the Cancellation Order that Stonegate places at issue, nor does anything in his testimony warrant an evidentiary hearing in this proceeding. The Cancellation Order stated that Stonegate failed to provide confirmation from potential investors that the limitation of suspension to one year was the dispositive obstacle to obtaining financing. Stonegate responds that Mr. DeFelice was told that investors needed the Gateway Project back in suspension in order to move forward with financing decisions. The very fact that the Gateway Project was placed back into full suspension, and yet Stonegate was still unable to secure financing, demonstrates that the one-year suspension limitation was not the dispositive factor in Stonegate's inability to move the Gateway Project forward. Even at the time of the Cancellation Order, despite the fact that Stonegate was "very close" to obtaining constructing funding, Stonegate sought an extension of more than two additional years, a period longer than that originally specified in the Gateway ISA.⁵⁸ Again, this suggests that limitation of suspension to one year was not the dispositive obstacle to financing. For these reasons, we continue to find that Stonegate's inability to obtain financing was the result of Stonegate's action (or inaction) alone.⁵⁹

4. Whether the Commission Erred in Accepting PJM's Answer to Stonegate's Protest Without Considering Stonegate's Answer

a. Request for Rehearing

38. Stonegate argues the Commission erred by relying on arguments made in PJM's January 21, 2020 answer to Stonegate's Protest without considering Stonegate's February 6, 2020 Answer thereto.⁶⁰

b. Determination

39. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to a protest or answer unless otherwise ordered by the decisional authority.⁶¹ Therefore, the Commission acted well within its authority to rely on any answers that aided in its decision-making and reject those answers that did not. Moreover, Stonegate filed its answer the day before the Commission issued the Cancellation Order, a statutory

⁵⁸ Stonegate Protest at 36.

⁵⁹ Cancellation Order, 170 FERC ¶ 61,087 at P 33.

⁶⁰ Rehearing Request at 38-39.

⁶¹ 18 C.F.R. § 385.213(a)(2) (2020).

deadline required under FPA section 205. Thus, the Commission acted reasonably in refusing to consider Stonegate's February 6, 2020 Answer. Further, having now considered Stonegate's arguments on rehearing, we reach the same conclusions we reached in the Cancellation Order regarding Stonegate's request for milestone extensions.

B. Request for Stay

40. On March 6, 2020, Stonegate filed a motion for stay of the Cancellation Order while its request for rehearing remained pending. The request for a stay has been rendered moot and is hereby dismissed.

C. PJM's Motion to Strike Attachment A from the Rehearing Request

41. On March 23, 2020, PJM filed a motion to strike Attachment A from Stonegate's Rehearing Request.⁶² PJM states that, notwithstanding Stonegate's request to submit Attachment A on a privileged and confidential basis, Stonegate describes the substance of the attachment in the body of its rehearing request. PJM argues that Commission precedent is clear that new evidence may not be introduced in a request for rehearing. We agree.⁶³ Furthermore, we agree with PJM that Stonegate cannot circumvent this precedent by describing the newly-introduced material as an "offer of proof."⁶⁴ For these reasons, we grant the request to strike Attachment A.

⁶² See 18 C.F.R. § 385.212 (2020) (allowing parties to file motions so long as they meet the requirements of the rule).

⁶³ See, e.g., *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co., LLC*, 151 FERC ¶ 61,223, at P 42 (2015) ("Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality."); see also *S. Shore Energy, LLC*, 168 FERC ¶ 61,118, at P 12 & n.39 (2019) (citing *Calpine Oneta Power v. Am. Elec. Power Serv. Corp.*, 114 FERC ¶ 61,030, at P 7 (2006) ("The Commission looks with disfavor on parties raising new issues on rehearing. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.")).

⁶⁴ PJM Motion to Strike at 3 (citing *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy & Ancillary Servs.*, 127 FERC ¶ 61,269, at P 30 (2009), *order on reh'g*, 131 FERC ¶ 61,144 (2010) ("[i]n no event is an offer of proof a method by which parties can circumvent agency deadlines and introduce new evidence at the rehearing stage of a proceeding.")).

The Commission orders:

(A) In response to Stonegate's request for rehearing, the Cancellation Order is hereby modified and the result is sustained, as discussed in the body of this order.

(B) Stonegate's motion for stay is hereby dismissed, as discussed in the body of this order.

(C) PJM's motion to strike Attachment A from Stonegate's request for rehearing is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.