

185 FERC ¶ 61,019
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

South Shore Energy, LLC
Dairyland Power Cooperative
Nemadji River Generation, LLC

Docket No. ER23-2596-000

ORDER GRANTING WAIVER REQUEST

(Issued October 6, 2023)

1. On August 9, 2023, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ South Shore Energy, LLC (South Shore), Nemadji River Generation, LLC (Nemadji River), and Dairyland Power Cooperative (Dairyland) (collectively, Applicants) filed a request for waiver of: (1) Article 2.3.1 in the Amended and Restated Generator Interconnection Agreement (GIA) among South Shore as interconnection customer, American Transmission Company LLC (ATC) as transmission owner, and Midcontinent Independent System Operator, Inc. (MISO) as transmission provider (collectively, the parties) (Amended GIA); and (2) section 4.4.4 in Attachment X of MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). Applicants request that the Commission grant waiver to allow for a one-year extension of the commercial operation deadline for their planned 625 MW natural gas combined-cycle generating facility (Project), from December 1, 2027, to December 1, 2028. As discussed below, we grant Applicants' waiver request.

I. Background

2. Attachment X of the Tariff contains MISO's Generator Interconnection Procedures (GIP). GIP section 4.4.4 provides, in relevant part, that:

Consistent with Article 2.3.1 of the GIA, once that GIA is executed or filed unexecuted, if the Generating Facility fails to reach Commercial Operation by the Commercial Operation Date set forth in the GIA, such Commercial Operation Date as set forth in the GIA may be extended by Interconnection

¹ 18 C.F.R. § 385.207(a)(5) (2022).

Customer for a period up to three consecutive years, after which Transmission Provider shall terminate the GIA if the Generating Facility has still failed to reach Commercial Operation.²

3. Article 2.3.1 of the Amended GIA provides, in relevant part, that:

This GIA shall be terminated by Transmission Provider if the Generating Facility or a portion of the Generating Facility fails to achieve Commercial Operation by the Commercial Operation Date established in accordance with Section 4.4.4 of Attachment X, including any extension provided thereunder³

4. Applicants state that South Shore is a wholly owned subsidiary of ALLETE, Inc., an energy services company headquartered in Duluth, Minnesota.⁴ Applicants state that Nemadji River is a wholly owned subsidiary of Basin Electric Power Cooperative, a not-for-profit generation and transmission cooperative that provides service to its 131-member distribution cooperatives. Applicants state that Dairyland is a not-for-profit generation and transmission cooperative that provides wholesale electric service to 24-member distribution cooperatives that provide retail electric sales to their members.⁵

5. Applicants state that they are jointly developing the Project in Superior, Wisconsin, which will be known as the Nemadji Trail Energy Center.⁶ Applicants explain that South Shore, Nemadji River, and Dairyland will own 20%, 30%, and 50% of the Project, respectively, and have rights to the output of the Project in proportion to their ownership. Applicants indicate that South Shore has been contracted to take the lead in developing, constructing, operating, and maintaining the Project.⁷

² MISO, Tariff, attach. X, § 4.4.4 (158.0.0).

³ Amended GIA, art. 2.3.1.

⁴ Waiver Request at 2, n.4.

⁵ *Id.* at 3.

⁶ *Id.* at 2-3. Applicants state that the Project includes the installation of a new on-site 345 kV collector bus and a 345 kV transmission line to interconnect the output from the Project to a new offsite 345 kV substation southeast of the Project site. *Id.* at 3, n.5.

⁷ *Id.* at 3.

6. Applicants state that the Project is requesting to interconnect to ATC's Arrowhead-Stone Lake 345 kV transmission line.⁸ Applicants state that, aside from facilities located at the point of interconnection, the Project has been assigned one network upgrade, which involves the replacement of the existing Stone Lake substation 345/161 kV transformer with one of a larger size (Stone Lake Upgrade). Applicants indicate that a Facility Construction Agreement (FCA) for the assigned network upgrade has been executed with Northern States Power Company and MISO.⁹

7. Applicants state that, on July 29, 2020, the parties executed a GIA for the Project (Original GIA), which set a backfeed date of November 10, 2023 and an initial synchronization date of November 21, 2023. Applicants further state that interconnection customer Milestone 14 in Appendix B to the Original GIA specified a December 1, 2024 commercial operation date for the Project. Applicants state that, on August 26, 2022, the parties executed the Amended GIA, which established a revised commercial operation date of March 1, 2027 for the Project.¹⁰

8. Applicants state that GIP section 4.4.4 and Article 2.3.1 of the Amended GIA provide that the commercial operation date can be extended for a grace period of up to three years.¹¹ Applicants explain that, because the Original GIA established a December 1, 2024 commercial operation date, if the Project fails to achieve commercial operation by December 1, 2027, MISO must terminate the Amended GIA.

9. Applicants state that the Rural Utilities Service of the United States Department of Agriculture (RUS) is Dairyland's principal lender and the lead federal agency reviewing the Project. Applicants explain that Dairyland intends to request financial assistance from RUS under its Electric Loan Program for Dairyland's share of the Project costs, which subjects the Project to environmental review under the National Environmental Policy Act of 1969 (NEPA).¹² Applicants emphasize that RUS's environmental review has been significantly delayed, which in turn has delayed the commencement of

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.* at 7 (citing 42 U.S.C. § 4321 et seq.; 40 C.F.R. pts. 1500-1508; 7 C.F.R. pt. 1970).

construction of the Project, as RUS regulations strongly discourage an applicant for funding from commencing construction before completion of the environmental review.¹³

10. Further, Applicants explain that the Project also requires an individual wetland permit from the United States Army Corps of Engineers (Army Corps), which is also subject to NEPA review. Applicants state that the Army Corps indicated that it intends to adopt RUS's environmental review as its own and incorporate language from the RUS decision document into the wetland permit. Therefore, Applicants contend that RUS's delay affects both the funding of the Project and issuance of a necessary permit.¹⁴ Applicants explain that the site preparation that must take place before any construction of the Project commences will affect jurisdictional wetlands and cannot proceed without the federal wetland permit. Additionally, Applicants state that the Public Service Commission of Wisconsin also has prohibited any construction from commencing until all required permits have been received.¹⁵

11. Applicants argue that the delays in RUS's environmental review are entirely outside of their control. Applicants assert that they requested an environmental review from RUS more than five years ago and that they have completed all tasks to facilitate the review in a timely manner.¹⁶ Applicants state that the process began with a scoping meeting on September 17, 2017, followed by Dairyland's subsequent preparation of requisite environmental documentation and a report. Applicants explain that RUS adopted and issued Dairyland's report as the agency's Environmental Assessment (EA) for the Project, and following publication of the requisite notices, the public review period concluded on November 30, 2020.¹⁷

12. Applicants state that RUS initially completed its environmental review in June of 2021, issued a Finding of No Significant Impact (FONSI), and concluded that the Project's impacts to the environment and the quality of the human environment had been adequately addressed. Applicants contend that, at that point, they understood the environmental review process was complete, and they expected that the Project could still meet its commercial operation date requirements in the Amended GIA. However, Applicants argue that an unprecedented request by opposition to the Project to supplement the EA was granted by RUS, resulting in RUS rescinding the FONSI.

¹³ *Id.*

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 8-9.

¹⁷ *Id.* at 9.

Applicants assert that Dairyland was subsequently directed to prepare a supplemental EA, addressing greenhouse gas emissions, which was published on June 24, 2022. Applicants explain that after reviewing public comments, a revised supplemental EA was published on July 28, 2023. Applicants state that RUS is not expected to complete its additional environmental review until at least September 2023, and the regulatory process is not expected to conclude until on or around December 1, 2023. Applicants explain that the Project's location in northern Wisconsin makes it subject to significant seasonal construction constraints that, when combined with the unexpected permitting delays, pushes the start of construction back to the first expected ground thaw in April 2024. Applicants argue that, due to the delays in the completion of the environmental review, commercial operation of the Project is no longer achievable before the December 1, 2027 deadline.¹⁸

II. Waiver Request

13. Applicants request waiver of GIP section 4.4.4 and Article 2.3.1 in the Amended GIA to allow for a one-year extension of the commercial operation deadline for the Project, from December 1, 2027, to December 1, 2028.¹⁹

14. Applicants assert that the waiver request satisfies the Commission's criteria for granting waiver. First, Applicants argue that the waiver request is made in good faith and that they are not attempting to arbitrarily delay commercial operation of the Project.²⁰ Applicants state that when it became clear that delays would affect their ability to meet the commercial operation deadline for the Project, they acted promptly to develop and submit a waiver request. Applicants state that, through 2022, they were able to manage the construction schedule to meet the commercial operation deadline for the Project, which required the timely completion of the NEPA review process. Applicants argue that they did not have any control over RUS's decision to restart its NEPA review process or RUS's delays in completing the supplemental EA process. Applicants contend that the federal delays, combined with other project requirements, have rendered the commercial operation deadline unachievable. Applicants state that they, nevertheless, are continuing forward with engineering, procurement (at risk of higher cost), and generator interconnection requirements for the Project, including construction of the Stone Lake Upgrade.²¹

¹⁸ *Id.* at 11-13.

¹⁹ *Id.* at 1-2, 4-7.

²⁰ *Id.* at 11-13.

²¹ *Id.* at 12.

15. Second, Applicants contend that the requested waiver is limited in scope, both in terms of duration and applicability. Applicants state that the duration of the waiver request is limited to a one-year extension of the commercial operation deadline for the Project, from December 1, 2027, to December 1, 2028. Applicants further state that the waiver would apply to only one section of the GIP and to a single interconnection request.²²

16. Third, Applicants contend that the requested waiver addresses a concrete problem. Applicants state that meeting the commercial operation deadline requires construction on the Project to begin in 2023, which Applicants argue is not feasible due to the permitting and approval delays. Applicants state that a typical natural gas combined cycle generating facility requires three years for construction; however, the Project is not typical. Applicants explain that, in addition to seasonal construction constraints, the Project site requires a significant amount of preparation work, including the relocation of two transmission lines, a gas pipeline, and fiber optic facilities; the expansion of an existing stormwater pond; and site fill and grading. In addition, Applicants state that the Project will be enclosed in a building, which will provide important reliability and safety functions but also adds a significant amount of time to the construction process. Applicants explain that the Project's unique site features, design requirements, and location in northern Wisconsin add nearly a year to a typical construction schedule for a natural gas combined cycle generating facility. Applicants contend that these factors, combined with the NEPA review process delays and state wetland permitting requirements, renders the commercial operation deadline unachievable. Applicants assert that granting the waiver request would remedy these concrete issues and allow them to complete construction and development of the Project.²³

17. Finally, Applicants contend that granting waiver will not have any undesirable consequences, such as harm to third parties. Applicants assert that, if the Commission grants the waiver request, no other interconnection requests will be impacted or restudied as a result, nor would any interconnection request's queue position be affected.²⁴ Applicants state that the FCA that South Shore executed for the Stone Lake Upgrade provides an in-service date of July 2026, which Applicants state will be maintained if the waiver request is granted. Applicants argue that other interconnection customers waiting for the Project to complete the Stone Lake Upgrade will not be harmed because granting the waiver would not modify or alleviate Applicants' obligation to pay for the upgrade. Applicants also state that a one-year extension of the commercial operation deadline will avoid the required termination of the Project; Applicants note that the Project will support the operation of the

²² *Id.* at 13.

²³ *Id.* at 13-17.

²⁴ *Id.* at 17 (citing *Pub. Serv. Co. of N.M.*, 140 FERC ¶ 61,230, at P 63 (2012)).

transmission system in a critical area of the upper Midwest. In addition, Applicants argue that granting the waiver request will provide them, MISO, and other market participants in the interconnection queue with additional certainty, which will benefit those parties, avoid the specter of potentially cascading restudies that could delay MISO's interconnection queue, and improve reliability in the footprint by ensuring needed generation comes online.²⁵

18. Applicants assert that they are authorized to state that MISO is supportive of the waiver request and that ATC does not oppose it.²⁶

III. Notice and Responsive Pleadings

19. Notice of Applicants' filing was published in the *Federal Register*, 88 Fed. Reg. 55,688 (Aug. 16, 2023), with interventions and protests due on or before August 30, 2023. ATC filed a timely motion to intervene. On September 6, 2023, MISO filed a motion to intervene out-of-time.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), ATC's timely, unopposed motion to intervene serves to make it a party to this proceeding.

21. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant MISO's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

22. We grant Applicants' waiver request. Specifically, we grant Applicants' request for waiver of Article 2.3.1 in the Amended GIA and GIP section 4.4.4 to allow for a one-year extension of the commercial operation deadline for the Project, from December 1, 2027, to December 1, 2028. The Commission has 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

²⁵ *Id.* at 17-20.

²⁶ *Id.* at 2.

consequences, such as harming third parties.²⁷ We find that the circumstances of Applicants' waiver request satisfy these criteria.

23. First, we find that Applicants have acted in good faith to develop the Project in accordance with the Amended GIA and MISO's GIP. Applicants state that, through 2022, they were able to manage the construction schedule to meet the commercial operation deadline of December 1, 2027.²⁸ However, Applicants contend that delays in the completion of the NEPA review process, which they argue was beyond their control, combined with other project requirements, have rendered the commercial operation deadline unachievable. Applicants state that when it became clear that delays would affect their ability to meet the commercial operation deadline, they promptly acted to develop and submit a waiver request.²⁹

24. Second, we find that the requested waiver is limited in scope because it represents a one-time waiver of Article 2.3.1 in the Amended GIA and GIP section 4.4.4 to allow for a one-year extension of the commercial operation deadline for the Project, from December 1, 2027, to December 1, 2028. The limited waiver only applies to this deadline and does not relieve Applicants of any financial requirements associated with the Amended GIA. Further, if the Project does not achieve commercial operation by December 1, 2028, the Amended GIA will be subject to termination by MISO at that time.

25. Third, we find that granting waiver will remedy a concrete problem. Absent waiver, MISO must terminate the Amended GIA if the Project does not achieve commercial operation by the December 1, 2027 deadline. However, Applicants state that meeting the commercial operation deadline requires construction to begin in 2023, which Applicants argue is not feasible because of permitting and approval delays.³⁰ Applicants also explain that the Project's unique site features, design requirements, and location in northern Wisconsin add nearly a year to the typical three-year construction schedule for a natural gas combined cycle gas generating facility.³¹ We find that granting waiver will provide additional time needed for Applicants to

²⁷ See, e.g., *Citizens Sunrise Transmission LLC*, 171 FERC ¶ 61,106, at P 10 (2020); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

²⁸ Waiver Request at 11-12.

²⁹ *Id.*

³⁰ *Id.* at 3.

³¹ *Id.* at 16.

receive all required permits, secure financing, complete construction of the Project, and achieve commercial operation.

26. Finally, we find that granting waiver will not have undesirable consequences, such as harming third parties. Applicants assert that no interconnection customers will be negatively impacted by the extension of the Project's commercial operation deadline. Applicants state that South Shore has executed an FCA for the Stone Lake Upgrade and that the current in-service date for the upgrade will be maintained if waiver is granted. Thus, Applicants argue that other interconnection customers waiting for the Project to complete the Stone Lake Upgrade will not be harmed because a waiver would not modify or alleviate Applicants' obligation to pay for the upgrade.³²

The Commission orders:

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

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

³² *Id.* at 17-18.

Document Content(s)

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