On April 30, 2020, pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure,\(^1\) Borrego Solar Systems, Inc. (Borrego) submitted a request for waiver and expedited action. In its request for waiver, Borrego seeks waiver of certain provisions in Appendix DD, section 3.5.3 of the California Independent System Operator Corporation’s (CAISO) Open Access Transmission Tariff (Tariff) related to Borrego’s request to enter CAISO’s transmission interconnection cluster study process. On July 2, 2020, Borrego filed a motion for expedited action and remedial relief, pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure\(^2\) and sections 205, 206, and 309 of the Federal Power Act (FPA)\(^3\) (Motion for Remedial Relief). As discussed below, we dismiss Borrego’s requests for waiver and remedial relief as moot.

\(^1\) 18 C.F.R. § 385.207 (2020).


\(^3\) 16 U.S.C. §§ 825d(e); 825e(a); 825h.
I. **Request for Waiver**

2. Borrego seeks limited waiver of Appendix DD, section 3.5.3 of CAISO’s Tariff\(^4\) to permit Borrego to correct its application to participate in CAISO’s transmission interconnection cluster study (Cluster 13). Borrego states that it is developing two electric storage projects (Projects) for which it anticipated entering Cluster 13 during the 2020 application window, which closed on April 15, 2020. Borrego states that it submitted what it believed to be a complete application to enter Cluster 13 on April 14, 2020. However, Borrego states that CAISO informed Borrego on April 17, 2020 that two documents in the applications were not formatted properly.

3. Borrego explains that due to challenges associated with COVID-19 and California’s social distancing measures and stay-at-home order, it was unable to perform a complete data verification of its application package. Borrego further explains that it was hampered in securing the necessary capital to support the financial security requirements due to the unanticipated impacts of COVID-19 on capital markets during the application window and that it was prevented from conducting face-to-face meetings in March 2020 to secure landowner authorizations necessary for a site control demonstration. As a result, Borrego was unable to submit its application package early enough in the application window to cure deficiencies in the application prior to its close. Borrego continues that CAISO’s Tariff does not have a mechanism to accept corrected application materials submitted after the close of the application window.\(^5\) Borrego thus seeks limited waiver of Appendix DD, section 3.5.3 of CAISO’s Tariff to allow CAISO to accept the corrected technical data format and enable Borrego’s projects to enter

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4 Appendix DD of CAISO’s Tariff provides the Generator Interconnection and Delivery Allocation Procedures that govern interconnection requests. Section 3.3.1 provides for an application window from April 1 to April 15, during which interconnection customers may submit applications to join CAISO’s annual cluster study process. Section 3.5.3 states that customers that submit “their Interconnection Requests more than five (5) Business Days before April 15 will receive notification from the CAISO regarding their Interconnection Request’s completion, and will have an opportunity to provide any missing information by April 15.” Section 3.5.3 further states that interconnection customers that “submit or correct their Interconnection Requests within five (5) Business Days of April 15 may not receive notification by April 15, will not receive an extension of the April 15 deadline, and must have submitted a complete Interconnection Request to be validated pursuant to Section 3.5.2.”

5 Waiver Request at 2.
Cluster 13. Borrego explains that without waiver, it will be unable to enter CAISO’s transmission interconnection process until 2021.6

4. Borrego states that its request for waiver satisfies the Commission’s requirements for granting waiver. Specifically, Borrego states that the requested waiver is limited in scope and duration as it applies only to Appendix DD, section 3.5.3. Borrego further states that the requested waiver addresses a concrete problem presented by COVID-19 and will enable CAISO to implement a fair and just solution in a manner that supports a customer in these challenging times. Borrego also contends that the requested waiver was submitted in good faith and will not have undesirable consequences.7 Borrego states that CAISO supports the request for waiver.8

II. Motion for Remedial Relief

5. In its Motion for Remedial Relief, Borrego requests that the Commission grant Borrego’s request for waiver, arguing that granting the request does not violate the fixed rate doctrine or the rule against retroactive ratemaking.9 Alternatively, Borrego seeks relief pursuant to FPA section 309,10 contending that the circumstances surrounding COVID-19 constitute a force majeure event during the application window and requests that the Commission authorize CAISO, pursuant to FPA section 309, to accept the validated interconnection request package and to allow Borrego’s two energy storage projects to participate in the 2020 cluster study.11 Borrego states that with the Commission’s authorization, CAISO will include the Projects in the 2020 cluster study, asserting that Commission action is needed on or before July 23, 2020 for the Projects to be included.12

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6 Id. at 3.
7 Id. at 4.
8 Id. at 5.
9 Motion for Remedial Relief at 2-4.
10 16 U.S.C. § 824h.
11 Motion for Remedial Relief at 7-8.
12 Id. at 3.
III. Notice and Responsive Pleadings

6. Notice of Borrego’s request for waiver was published in the Federal Register, 85 Fed. Reg. 27,410 (May 8, 2020), with interventions and protests due on or before May 5, 2020. None was filed.

7. Notice of Borrego’s Motion for Remedial Relief was published in the Federal Register, 85 Fed. Reg. 41,579 (July 10, 2020), with interventions and protests due on or before July 7, 2020. CAISO filed comments.

8. CAISO states that its annual interconnection request window is April 1 to April 15, and that its Tariff expressly precludes curing deficiencies in interconnection requests after the close of the window. CAISO supports Borrego’s request for waiver and seeks a Commission ruling on the request for waiver by July 24, 2020. CAISO explains that after July 24, 2020, CAISO must begin its Phase I interconnection study for Cluster 13 in order to maintain the study deadlines set forth in its Tariff, and it therefore must exclude Borrego.13

IV. Discussion

9. We dismiss as moot Borrego’s request for waiver of Appendix DD, section 3.5.3 of CAISO’s Tariff. The deadline for CAISO to accept Borrego’s interconnection request and admit Borrego’s electric storage projects into Cluster 13 was July 24, 2020, and thus has passed. We find that these circumstances render Borrego’s requested waiver moot, and we therefore dismiss the request for waiver. For the same reason, we also dismiss Borrego’s Motion for Remedial Relief.

The Commission orders:

Borrego’s request for waiver and Motion for Remedial Relief are hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(SEAL)

Kimberly D. Bose,
Secretary.

13 CAISO Comments at 1-2.
DANLY, Commissioner, concurring:

1. The Commission’s order issued today in this docket addresses a request for a retroactive waiver.\(^1\) Nine other orders issued at the Commission’s October Public Meeting address similar waiver requests.\(^2\) In addition, the Commission issued two such orders on September 30, 2020, shortly before the October Public Meeting.\(^3\) In total, that is twelve orders issued in less than three weeks addressing retroactive waiver requests. I have several concerns about these orders, which I discussed briefly in my dissents to the Montana-Dakota and Lightsource orders that were issued on September 30 and again in greater detail in my dissent to the Sunflower order that is being issued today.

2. I concur in the result of the Commission’s order in this proceeding because, unlike several of the Commission’s other orders, the Commission’s order in this proceeding does not exceed its legal authority. Here, we have not granted a retroactive waiver that violates the related doctrines prohibiting such waivers: the filed rate doctrine and the rule against retroactive ratemaking.\(^4\) Instead, we have dismissed Borrego’s waiver request as moot because the Commission did not act on the waiver by the requested date of July 24, 2020.

\(^{1}\) See Borrego Solar Sys. Inc., 172 FERC ¶ 61,052 (2020).


\(^{4}\) See Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief, 171 FERC ¶ 61,156, at P 5 (2020).
2020, and thus it is too late for CAISO to accept Borrego’s interconnection request and admit Borrego’s electric storage projects into Cluster 13.

3. Although I agree with the dismissal of the waiver request, I disagree that it is appropriate to dismiss the request on mootness grounds. Borrego made every effort to make the Commission aware of the need to act on its request before it was too late. Yet our order provides no explanation for our waiting over five months before ruling, by which time we could provide no relief. This must be difficult for Borrego to accept, especially since, while we dismiss their request, the Commission approves other retroactive waivers on a timely basis. This is one of three orders issued today in which the Commission has—inexcusably in my view—denied retroactive waivers on mootness grounds without providing any justification for our delay which caused the waiver requests to become moot.\(^5\) The Commission’s delay may not violate any legal principles, but this is not how we should treat entities subject to our regulation and oversight.

4. Instead of denying on mootness grounds, I would have found that Borrego’s waiver request violated the filed rate doctrine and the rule against retroactive ratemaking. Borrego filed on April 20, 2020, to waive Appendix DD, section 3.5.3 of California Independent System Operator Corporation’s (CAISO) Open Access Transmission Tariff, to accept a corrected interconnection application after the tariff deadline. The Commission had no legal authority to grant this waiver. There was no prior notice that the interconnection deadline could be deferred or ignored,\(^6\) and the Commission cannot use section 309 of the Federal Power Act\(^7\) to ignore the express terms of the tariff for equitable considerations.\(^8\) If we had ruled in this fashion, Borrego would have received a reasoned explanation for the denial of its waiver request.

5. If Borrego and CAISO wish to avoid this outcome when a party seeking to interconnect has failed to submit a completed application by the tariff deadline, CAISO can file to change its tariff. CAISO could propose to permit mostly complete applications; it could extend the deadline; it could provide notice to all parties of the circumstances when the deadline will be waived. There are many options that fall within

\(^5\) The other two orders are the *Mariposa* order and the *Vineyard* order.


the Commission’s legal authority, but the Commission has no power to retroactively change the express terms of CAISO’s tariff.

6. I would have denied the waiver request on these grounds, rather than wait until the deadline lapsed and declare it moot without providing any explanation for the delay. This would avoid the inconsistent decision making and lack of guidance that I discuss in more detail in my dissent in the Sunflower order.\(^9\)

For these reasons, I respectfully concur.

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James P. Danly
Commissioner

\(^9\) See Sunflower, 172 FERC ¶ 61,054 (Danly, Comm’r, dissenting).