

170 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. ER20-617-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued February 14, 2020)

1. On December 17, 2019, New York Independent System Operator Inc. (NYISO) filed, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to Attachment Y and Rate Schedule 10 of its Open Access Transmission Tariff (OATT) to establish procedures providing for the consideration of cost containment provisions (Cost Caps) in proposed transmission projects submitted in its Public Policy Transmission Planning Process.² As discussed below, we accept the filing, effective February 16, 2020, as requested.

I. Background

2. NYISO's Order No. 1000³-compliant Public Policy Transmission Planning Process⁴ is contained in Attachment Y of its OATT. Pursuant to this process, the New

¹ 16 U.S.C. § 824d (2018).

² NYISO, NYISO Tariffs, OATT, sched. 10, § 6.10 (13.0.0); NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.1 (24.0.0); NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4 (19.0.0); NYISO, NYISO Tariffs, OATT, Attach. Y, apps. A-D (15.0.0).

³ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g & clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

⁴ The Public Policy Transmission Planning Process is defined as “[t]he process by which the ISO solicits needs for transmission driven by Public Policy Requirements,

York Public Service Commission (New York Commission) first identifies a Public Policy Transmission Need.⁵ As part of that determination, the New York Commission may also prescribe a regional cost allocation method that is specific to the associated Public Policy Transmission Need. Second, NYISO solicits proposed solutions to any identified Public Policy Transmission Need. Third, NYISO evaluates the viability and sufficiency of proposed transmission and non-transmission solutions to the Public Policy Transmission Need. Finally, upon the New York Commission's confirmation of a Public Policy Transmission Need based on the viability and sufficiency evaluation, NYISO evaluates and selects the more efficient or cost-effective transmission solution to satisfy the Public Policy Transmission Need.⁶

3. NYISO's Public Policy Transmission Planning Process does not currently provide Developers⁷ the ability to voluntarily submit Cost Caps as part of their proposed solutions to Public Policy Transmission Needs and does not include specific metrics by which NYISO can evaluate and enforce Cost Caps proposed by Developers.

II. NYISO's Filing

4. NYISO proposes to revise Attachment Y and Rate Schedule 10 of the OATT to establish provisions for Cost Caps for transmission projects proposed by Developers in NYISO's Public Policy Transmission Planning Process. NYISO states that its proposed revisions will establish: (1) tariff mechanisms by which a Developer may voluntarily include a binding Cost Cap as part of a proposed transmission project submitted in the Public Policy Transmission Planning Process; (2) how NYISO will evaluate in a quantitative and qualitative manner Cost Caps proposed by Developers to select the more efficient or cost-effective transmission solution to a Public Policy Transmission Need; (3) the manner in which Cost Caps will be implemented as part of the rate recovery for a selected transmission project; and (4) the requirements to include any Cost Caps in the *pro forma* Development Agreement that must be entered into between NYISO and the

evaluates all proposed [Projects] on a comparable basis, and selects the more efficient or cost effective [Project], if any, for eligibility for cost allocation under the ISO Tariffs." NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.1.1 (23.0.0).

⁵ A Public Policy Transmission Need is defined as "[a] transmission need identified by the [New York Commission] that is driven by a Public Policy Requirement pursuant to [s]ections 31.4.2.1 through 31.4.2.3." *Id.*

⁶ *Id.* § 31.4 (18.0.0).

⁷ A Developer is defined as "[a] person or entity, including a Transmission Owner, sponsoring or proposing a project pursuant to [the tariff provisions]." *Id.* § 31.1.1 (23.0.0).

Developer of the selected project. NYISO also proposes additional, related tariff revisions.⁸ NYISO states that its focus in this filing is on establishing a framework for Cost Caps, and that it will consider the application of this framework to the situation in which a transmission owner elects to build, own, and recover the costs of upgrades to its existing transmission facilities in future stakeholder discussions.⁹

5. NYISO proposes to establish tariff mechanisms by which a Developer may voluntarily include a binding Cost Cap¹⁰ as part of its proposed Public Policy Transmission Project submitted in the Public Policy Transmission Planning Process. NYISO states that a Developer is not required to propose a Cost Cap, but a Developer that proposes a Cost Cap must include it in the project information that it submits to NYISO in response to NYISO's solicitation for proposed solutions to Public Policy Transmission Needs.¹¹

6. NYISO states that a Cost Cap is a Developer's commitment to contain certain categories of capital costs, defined as Included Capital Costs, in the form of either a hard or soft Cost Cap. NYISO states that proposed OATT section 31.4.5.1.8.1 defines Included Capital Costs as "all capital costs incurred by a Developer to plan for and construct a transmission project, and to make it ready for its intended use."¹² NYISO states that all other categories of capital costs, defined as Excluded Capital Costs in section 31.4.5.1.8.2, will not be subject to the Cost Cap. NYISO states these Excluded Capital Costs are types of costs that cannot reasonably be estimated or foreseen by Developers within the 60-day project proposal window with sufficient certainty to subject the costs to the Cost Cap.¹³ NYISO states that, except for the Cost Cap, all other issues

⁸ NYISO Filing at 5.

⁹ *Id.*

¹⁰ A Cost Cap is defined as "[a] Developer's commitment to contain the capital costs of its proposed Public Policy Transmission Project in accordance with the requirements in [s]ection 31.4.5.1.8." NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.1.1 (24.0.0).

¹¹ NYISO Filing at 6.

¹² *Id.*

¹³ *Id.* at 8.

associated with a Developer's cost recovery for its selected transmission project (e.g., return on equity, prudence of recoverable costs) will be determined by the Commission.¹⁴

7. NYISO states that proposed OATT section 31.4.5.1.8 provides that a Developer may submit a Cost Cap either in the form of a hard or soft Cost Cap. NYISO proposes to define a hard Cost Cap for Included Capital Costs as "a dollar amount for those costs above which the Developer commits in its proposed transmission project not to recover from ratepayers."¹⁵ NYISO proposes to define a soft Cost Cap for Included Capital Costs as "a dollar amount for those costs above which the Included Capital Costs are shared between the Developer and ratepayers based on a defined percentage."¹⁶ NYISO will assess a transmission project's estimated costs and the benefits of the Cost Cap differently based on whether the Developer proposes a hard or soft Cost Cap.¹⁷

8. NYISO states that proposed OATT section 31.4.5.1.8.1.1(i)-(iii) requires Developers to always include as Included Capital Costs the costs of conducting an environmental assessment of the transmission site, and to also include environmental investigation and remediation costs based upon the extent of their knowledge of such issues as they arise in the normal course of planning and constructing a transmission project.¹⁸ NYISO states that its proposed tariff revisions recognize that the precise costs of environmental remediation and mitigation costs are not reasonably foreseeable, especially in the 60-day project proposal window. Accordingly, NYISO states that proposed OATT section 31.4.5.1.8.2.1 includes as Excluded Capital Costs "unforeseeable environmental remediation and environmental mitigation costs."¹⁹

9. NYISO asserts that Developers that voluntarily submit a Cost Cap are expected to include their known site investigation and remediation costs. NYISO explains that, for Developers that do not submit a voluntary Cost Cap, NYISO will employ its independent consultant to calculate cost estimates of known environmental investigation and remediation costs to include in the projects' capital cost estimates. NYISO adds that it will not estimate or include unforeseeable environmental remediation and mitigation

¹⁴ *Id.*

¹⁵ NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.5.1.8.3 (19.0.0).

¹⁶ *Id.*

¹⁷ NYISO Filing at 10.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

costs in calculating transmission projects' total capital costs. NYISO asserts that these classifications of environmental remediation and mitigation costs represent a just and reasonable treatment of such costs for Cost Caps.²⁰

10. NYISO states that proposed OATT section 31.4.5.8.3 provides that if a Developer elects to propose a soft Cost Cap for its Included Capital Costs, the Developer's percentage of cost sharing under a soft Cost Cap shall be at least 20 percent. NYISO states that it adopted this minimum 20 percent for a Developer's share of cost overruns because values less than that sharing level are unlikely to provide any incentive to Developers to actually contain their capital costs.²¹

11. NYISO proposes to revise the selection metrics of its Public Policy Transmission Planning Process to assess Cost Caps proposed by Developers as one consideration among a host of metrics that NYISO utilizes to evaluate and select the more efficient or cost-effective transmission solution to a Public Policy Transmission Need. NYISO contends that its proposed metrics evaluate Developers' Cost Caps quantitatively and qualitatively. According to NYISO, these revisions enhance its approach of evaluating each project based on the totality of its performance across the broad-range of all cost and non-cost-based selection metrics.²² NYISO proposes a standardized process to address certain categories of capital costs across all transmission projects, and states that it will fairly and evenly apply the selection metric to multiple project proposals from many Developers without adding significant time to its current evaluation and selection process.²³

12. NYISO explains that it currently engages independent consultants to review the project information submitted by a Developer, including its project cost estimate, and relies on the independent consultants' analyses and estimates in evaluating project proposals' performance under each metric.²⁴ NYISO proposes to establish a new OATT section 31.4.8.2.1 to estimate the total capital costs of each proposed transmission project that NYISO will use for purposes of assessing the performance of a proposed transmission project under the cost-based metrics.²⁵

²⁰ *Id.*

²¹ *Id.* at 10.

²² *Id.* at 11.

²³ *Id.* at 11-12.

²⁴ *Id.* at 13.

²⁵ *Id.*

13. NYISO states that it will calculate the total capital costs for each proposed transmission project by adding the amount of the Included Capital Costs for the project to that of Excluded Capital Costs. NYISO explains that it will use the amount of Included Capital Costs from Developers that propose a Cost Cap, and it will use its independent consultants' estimates for Included Capital Cost items for Developers that do not propose a Cost Cap. NYISO adds that it will use its independent consultants to estimate the amounts of Excluded Capital Costs in all instances. NYISO states that certain capital costs that are unforeseeable, such as costs related to unforeseeable environmental remediation or mitigation costs, will not be added into the calculation of projects' total capital costs.²⁶

14. NYISO proposes that if a Developer elects to submit a hard Cost Cap, NYISO will use the amount of the hard Cost Cap submitted by the Developer as the amount for the Included Capital Costs.²⁷ NYISO states that if a Developer elects to submit a soft Cost Cap and the capped amount is above the amount estimated by NYISO's independent consultant, NYISO proposes to use the amount of the soft Cost Cap as the amount for the Included Capital Costs.²⁸ NYISO states that if, however, a Developer elects to submit a soft Cost Cap and the capped amount is below the amount estimated by NYISO's independent consultant, NYISO will calculate an adjusted value for the Included Capital Costs.²⁹

15. NYISO's proposed OATT section 31.4.5.1.8.4 requires a Developer to specify any contingency percentage and escalation factors applicable to the Included Capital Costs in its Cost Cap. NYISO states that for any portions of the total capital costs of a transmission project where the estimate from the independent consultant is used (rather than a proposed Cost Cap), NYISO and its independent consultant may add appropriate contingency percentages and escalation factors. NYISO's proposed OATT section 31.4.4.3.1 provides that before issuing a solicitation for solutions, and to the extent practicable, NYISO will present to Developers and interested parties any contingency percentage and escalation factors that its independent consultant will use.³⁰

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 14.

³⁰ *Id.* at 14-15.

16. NYISO proposes to insert a new selection metric in OATT section 31.4.8.1.2 concerning NYISO's qualitative evaluation of any Cost Cap that was voluntarily submitted by a Developer, and establish a new section 31.4.8.2.2 to detail how NYISO will assess proposed transmission projects under the new qualitative metric.³¹ NYISO proposes to evaluate the quality of capital Cost Caps by considering the effectiveness of the proposed Cost Cap in providing an incentive to the Developers to contain their Included Capital Costs and protecting ratepayers from Included Capital Cost overruns, and the magnitude of the difference between the Cost Cap and the independent cost estimate.³² NYISO states that if the Cost Cap proposed by the Developer is much lower than the cost estimates assessed by NYISO's independent consultants, the proposed OATT revisions authorize NYISO to request additional technical and financial capability information from the Developer to better assess the risk of under-estimation to project completion.³³

17. NYISO proposes to insert a new section 6.10.6 in Rate Schedule 10 of the OATT to establish the manner in which a Developer's Cost Cap will be implemented as part of the Developer's recovery of its project costs.³⁴ NYISO states that its proposed revisions to Rate Schedule 10 and section 31.4 of the OATT will require the Developer of a selected transmission project to file with the Commission any Cost Cap that it proposed as part of the rate for its project. In addition, NYISO proposes to amend the *pro forma* Development Agreement between NYISO and the Developer to include the Cost Cap proposed by the Developer of a selected project.³⁵ NYISO states that the proposed revisions prohibit the Developer from seeking, and require the Developer to agree in the Development Agreement that it will not seek to recover, either through its transmission rates or through any other means, costs it incurs for Included Capital Costs above its agreed-upon Cost Cap.³⁶ NYISO states that proposed section 6.10.6.5 provides that all other matters concerning a Developer's recovery of the costs of its transmission project

³¹ *Id.* at 15.

³² *Id.*

³³ *Id.* at 16.

³⁴ *Id.* at 18. NYISO also proposes revisions to sections 6.10.4.1, 6.10.4.2, 6.10.5.1, 6.10.5.2.2, and 6.10.5.3.1 to clarify that the existing cost recovery requirements for Developers that propose a Cost Cap for a Public Policy Transmission Project are subject to this new section 6.10.6.

³⁵ *Id.*

³⁶ *Id.*

will be submitted and decided by the Commission pursuant to the existing requirements in Rate Schedule 10 concerning a Developer's recovery of its costs.³⁷

18. NYISO proposes to establish limited, specified excusing conditions from the Cost Cap. Proposed OATT section 6.10.6.2 provides that a Developer may recover costs above its agreed-upon Cost Cap for Included Capital Costs only to the extent that such costs arise from an excusing condition. NYISO states that the Developer must file the excusing conditions along with the Cost Cap at the Commission, and the excusing conditions must be included along with the Cost Cap in the Development Agreement.³⁸

19. NYISO states that proposed section 6.10.6.3 of Rate Schedule 10 requires a Developer to achieve the percentage cost sharing that it submitted to NYISO in a soft Cost Cap either through: (1) foregoing rate recovery of that percentage of capital costs in excess of the soft Cost Cap; or (2) an alternative rate mechanism that may adjust rate recovery through only a reduction in the return on equity and any applicable incentives solely on the amount in excess of the soft Cost Cap. NYISO contends that these provisions ensure that ratepayers will be protected from cost overruns that exceed a Developer's Cost Cap.³⁹

20. NYISO also proposes to include a *Mobile-Sierra* clause in Article 15.3 of the Development Agreement to "make explicit the parties' intent to require that the 'public interest' standard be met for any changes to the Developer's Cost Cap for the Included Capital Costs and the related provisions in Article 15.3 of the Development Agreement."⁴⁰ NYISO states that this clause will not limit the Commission's discretion to review the reasonableness of Developers' costs or the prudence of Developers' expenditures on Included Capital Costs under the Cost Cap. NYISO explains that the *Mobile-Sierra* clause applies only to the Cost Cap for Included Capital Costs.⁴¹

³⁷ *Id.* at 18-19.

³⁸ *Id.* at 19.

³⁹ *Id.* at 19-20.

⁴⁰ *Id.* at 22 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010)).

⁴¹ *Id.* at 25.

21. NYISO proposes to make conforming revisions to the *pro forma* Development Agreement concerning the Cost Cap requirements. Specifically, NYISO proposes to revise the breach requirements in Article 7.1 to provide that a breach will occur if the Developer fails to file with the Commission its Cost Cap or seeks to recover costs not permitted by the Cost Cap, except as permitted by the excusing conditions. NYISO also proposes to revise the survival requirements in Article 14 to provide that the cost recovery provisions in Articles 15.3 and Appendix D of the *pro forma* Development Agreement will survive termination, expiration, or cancellation of the agreement.⁴²

22. NYISO proposes to initially maintain as confidential a Developer's proposed total amount of Included Capital Costs and any cost sharing percentage contained in the Cost Cap. NYISO contends that if a Developer's project is not found to be viable or if the Developer elects not to proceed with a project, NYISO will continue to maintain the Developer's Cost Cap information as confidential. NYISO states that if, however, NYISO determines that a Developer's project is viable and sufficient and the Developer elects to proceed to be evaluated for purposes of selection, NYISO will include the total amount of Included Capital Costs and any cost sharing percentage contained in the Cost Cap in the draft Public Policy Transmission Planning Report⁴³ that is publicly provided and reviewed by stakeholders. NYISO explains that disclosing this information about the Developer's Cost Cap is important to the openness and transparency to all interested parties of information relevant to the evaluation and selection of the more efficient or cost-effective transmission solution to a Public Policy Transmission Need.⁴⁴

III. Notice of Filing and Responsive Pleadings

23. Notice of NYISO's filing was published in the *Federal Register*, 84 Fed. Reg. 72,354 (2019), with protests and interventions due on or before January 7, 2020.

⁴² *Id.* at 25-26.

⁴³ A Public Policy Transmission Planning Report is "[t]he report approved by the ISO Board of Directors pursuant to this Attachment Y on the ISO's evaluation of all Public Policy Transmission Projects and Other Public Policy Projects proposed to satisfy an identified Public Policy Transmission Need pursuant to Section 31.4.6 and the ISO's selection of a proposed Public Policy Transmission Project, if any, that is the more efficient or cost effective solution to the identified Public Policy Transmission Need pursuant to Section 31.4.8." NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.1.1 (23.0.0).

⁴⁴ NYISO Filing at 26.

24. Timely motions to intervene were filed by NRG Power Marketing LLC; Transource Energy, LLC (Transource); City of New York; Calpine Corporation; New York Association of Public Power; and New York Transco, LLC. NextEra Energy Transmission New York, Inc. and Multiple Intervenors filed out-of-time motions to intervene.

25. The New York Commission filed a notice of intervention and comments. Indicated New York Transmission Owners (Indicated TOs); Long Island Power Authority and Power Supply Long Island (jointly, LIPA); and LS Power Grid New York and LS Power Grid New York Corporation I (jointly, LS Power) filed timely motions to intervene and comments. On January 22, 2020, Transource filed out of time comments. All commenters support Commission approval of NYISO's filing.

26. On January 22, 2020, Indicated TOs filed an answer to LS Power's comments.

A. Comments

27. The New York Commission states that NYISO's filing seeks to address the absence of mechanisms in NYISO's OATT for Developers to submit Cost Caps, and for NYISO to evaluate and enforce those Cost Caps, by implementing the necessary regulatory mechanisms.⁴⁵ The New York Commission states that, while NYISO is not required to adopt such mechanisms, they are an important aspect to ensuring that ratepayers obtain the benefits associated with the Public Policy Transmission Planning Process, which the Commission structured under Order No. 1000 to allow for competition among Developers. The New York Commission states that the ability of Developers to submit binding Cost Caps, which NYISO can enforce, will advance the use of the competitive process and help ensure that NYISO can truly select a project that is the most cost-effective.⁴⁶

28. Indicated TOs agree with NYISO's approach to establish the Cost Cap mechanisms set forth in the filing, and to address cost containment treatment for upgrades proposed by a non-incumbent Developer to an incumbent transmission owner's existing transmission facilities in future stakeholder discussions. Indicated TOs reserve the right to address cost containment for upgrades when NYISO addresses them in the future.⁴⁷

⁴⁵ New York Commission Comments at 3.

⁴⁶ *Id.* at 3-4.

⁴⁷ Indicated TOs Comments at 1-2.

29. LIPA states that its support for NYISO's filing is informed by its understanding that NYISO's proposed Cost Cap mechanisms do not adversely affect LIPA's status before the Commission as a non-jurisdictional utility or modify any of the existing NYISO tariff language addressing the review and approval of cost recovery, including a Cost Cap, for transmission projects undertaken by LIPA as the selected developer.⁴⁸ LIPA states that it has consulted with NYISO and NYISO has informed LIPA that it concurs with LIPA's interpretation; accordingly, with this confirmation, LIPA states that it supports the filing.⁴⁹

30. LS Power states that, although the filing does not fully reflect all of LS Power's positions, it is not protesting the filing in order to avoid potentially delaying what is a significant step forward in competitive transmission within New York.⁵⁰ LS Power states that it strongly supports competition in the development of transmission because competition results in benefits to consumers through lower costs, risk-shifting provisions, and innovative project designs.⁵¹ LS Power adds that NYISO's filing furthers the policy of delivering consumer benefits and cost savings to the ratepayers of New York. LS Power asserts that the filing reflects a more standardized approach to Cost Caps than what exists currently and includes many compromises among stakeholders.⁵²

31. LS Power takes the position that differences in capital structure and return on equity can provide material ratepayer savings in the annual revenue requirement, even when the capital costs of project proposals are relatively similar, and so supports cost containment mechanisms for these components of project proposals in addition to those for capital costs.⁵³ LS Power asks that the Commission clarify that NYISO has the legal authority to consider evaluation of capital structure or return on equity in the evaluation process. LS Power argues that such clarification could help encourage NYISO to take additional cost containment review steps in the future.⁵⁴

⁴⁸ LIPA Comments at 3.

⁴⁹ *Id.* at 6.

⁵⁰ LS Power Comments at 1.

⁵¹ *Id.* at 4.

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ *Id.* at 5-6.

32. LS Power also raises concern about the potential for gaming related to what constitutes unforeseeable environmental mitigation. LS Power asserts that the concern is that there is an incentive for Developers to omit material environmental mitigation costs from an estimate and rely on the ability to recover such costs outside of a Cost Cap as Excluded Capital Costs. LS Power does not propose any modifications to NYISO's filing but seeks clarification that NYISO acknowledges its role in ensuring Developer's proposals reflect what should be knowable environmental mitigation for any given work in New York State, and that gaming does not occur.⁵⁵

33. Transource states that it supports NYISO's proposal to focus on only capital costs.⁵⁶ Transource states that it also supports the clarity and certainty provided by NYISO's definitions of excusing conditions and Excluded Capital Costs.⁵⁷ Finally, Transource states that it supports NYISO's proposal on soft Cost Caps, which Transource contends enhances the application of the proposed quantitative and qualitative metrics NYISO will use to evaluate Cost Caps.⁵⁸

B. Answer

34. In its answer, Indicated TOs state that in NYISO's cost containment proposal, NYISO does not propose to assess capital structure or return on equity elements. Indicated TOs add that the cost containment mechanism that is before the Commission in this proceeding has been reviewed and approved through NYISO's stakeholder process. Accordingly, Indicated TOs request that the Commission deny LS Power's requested clarification as beyond the scope of this proceeding. Indicated TOs contend that if and when the issues implicated by LS Power's request are properly before the Commission in a section 205 or 206 filing, all parties will have an opportunity to brief the associated legal and policy issues.⁵⁹

⁵⁵ *Id.* at 7.

⁵⁶ Transource Comments at 4.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 6.

⁵⁹ Indicated TOs Answer at 2.

IV. Discussion

A. Procedural Matters

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁶⁰ the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

36. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁶¹ we grant Multiple Intervenors' and NextEra Energy Transmission New York Inc.'s late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁶² We accept Indicated TOs' answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

38. We find that NYISO's proposed revisions to Attachment Y and Rate Schedule 10 of its OATT to establish procedures providing for the consideration of Cost Caps in proposed transmission projects submitted in its Public Policy Transmission Planning Process are just and reasonable and therefore accept NYISO's filing, effective February 16, 2020, as requested. NYISO's Public Policy Transmission Planning Process does not currently provide Developers with the ability to voluntarily propose binding Cost Caps as part of a proposed transmission project nor does it include specific metrics for NYISO to use to evaluate proposed Cost Caps as part of its selection of the more efficient or cost-effective transmission solution to a Public Policy Transmission Need. NYISO's OATT also lacks provisions for NYISO to enforce Cost Caps and for Developers to implement Cost Caps as part of the rate recovery for a selected transmission solution. NYISO's filing appropriately establishes mechanisms for Developers to propose, and NYISO to evaluate and enforce, Cost Caps for capital costs in a manner that promotes competition in NYISO's Public Policy Transmission Planning Process, thereby assisting NYISO in its selection of the more efficient or cost-effective transmission solution to Public Policy Transmission Needs.

39. With regard to LS Power's request that the Commission clarify that NYISO has

⁶⁰ 18 C.F.R. § 385.214 (2019).

⁶¹ *Id.* § 385.214(d).

⁶² *Id.* § 385.213(a)(2).

the legal authority to consider cost containment measures beyond capital costs, we find this request to be beyond the scope of this proceeding, which is limited to NYISO's Cost Cap proposal for capital costs.

40. We disagree with LS Power's concern about the potential for gaming related to unforeseeable environmental mitigation.⁶³ NYISO proposes to require Developers to always include as Included Capital Costs the costs of conducting an environmental assessment of the transmission site and environmental investigation and remediation costs based on their knowledge of such issues as they arise in the normal course of planning and constructing their project.⁶⁴ At the same time, NYISO proposes to prohibit Developers from including Excluded Capital Costs, which include unforeseeable environmental mitigation and remediation costs that "are not anticipated by the Developer or are otherwise indeterminable based upon information reasonably available to the Developer at the time of submission."⁶⁵ As part of its assessment of proposed Cost Caps in its evaluation and selection process, NYISO will estimate both Included and Excluded Capital Costs. Although NYISO will not explicitly estimate unforeseeable environmental mitigation or remediation costs,⁶⁶ to the extent a Developer should have included environmental mitigation or remediation costs as Included Capital Costs because they are indeed foreseeable,⁶⁷ NYISO's estimate should reflect higher Included Capital Costs than the proposed Cost Cap.⁶⁸ In such a case, NYISO may: calculate an ~~adjusted value for Included~~ Capital Costs as part of its quantitative analysis;⁶⁹ request

⁶³ LS Power Comments at 6-7.

⁶⁴ NYISO Filing at 8; NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.5.1.8.1.1(i)-(iii) (19.0.0).

⁶⁵ NYISO Filing at 9; NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.5.1.8.2 (19.0.0).

⁶⁶ NYISO Filing at 14; NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.8.2.1 (19.0.0).

⁶⁷ See NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.5.1.8.1.1 (19.0.0) (describing what Included Capital Costs means regarding the requirement to include "reasonably expected environmental site remediation and environmental mitigation costs").

⁶⁸ See NYISO, NYISO Tariffs, OATT, Attach. Y, § 31.4.8.2.2(iii) (19.0.0) (identifying criteria on which NYISO will evaluate on a qualitative basis a Developer's proposed Cost Cap for Included Capital Costs, including "[t]he magnitude of the difference between the Cost Cap and the independent consultant's cost estimate").

additional technical and financial capability information from the Developer to better assess the risk of under-estimation to project completion; and give the Cost Cap a relatively lower qualitative ranking to the extent the Developer's Cost Cap is unrealistically low.⁷⁰ We find this independent estimation and quantitative and qualitative analyses by NYISO to be an appropriate mechanism to address any potential concerns of gaming related to Developers omitting anticipated environmental remediation and mitigation costs from their Included Capital Costs.

The Commission orders:

NYISO's proposed tariff revisions are hereby accepted, effective February 16, 2020, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁹ NYISO Filing at 14.

⁷⁰ *Id.* at 15-16.