

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.
New York Transco, LLC
Central Hudson Gas & Elec. Corp.,
Consolidated Edison Co. of New York, Inc.
Niagara Mohawk Power Co., d/b/a National Grid,
New York State Elec. & Gas Corp.,
Orange and Rockland Utilities, Inc.,
Rochester Gas and Electric Corp.

Docket Nos. ER15-572-000
ER15-572-006

CERTIFICATION OF UNCONTESTED SETTLEMENT

(Issued September 14, 2017)

TO THE COMMISSION:

1. On August 21, 2017, New York Transco, LLC (NY Transco) submitted an Offer of Settlement (Settlement). The Settlement represents a resolution of all issues in the proceeding and includes:

- a. The Settlement;
- b. A transmittal letter;
- c. An Explanatory Statement describing the terms of the Settlement as required by Rule 602(c)(1)(ii);
- d. Attachments A through D; and
- e. A certificate of service.

2. On September 11, 2017, Commission Trial Staff (Trial Staff) and the New York State Public Service Commission (NYPSC) separately submitted initial comments in support of the Settlement. No other comments were filed. Because no participant filed comments opposing the Settlement, it stands uncontested.

I. Background

3. On December 4, 2014, NY Transco submitted a filing requesting that the Commission: (1) approve certain incentive rate treatments pursuant to Section 219 of the Federal Power Act (FPA) and Order No. 679 for their investment in five high-voltage transmission projects in New York; (2) accept NY Transco's transmission formula rate, which included a formula rate template and protocols, to be effective on April 3, 2015; (3) approve NY Transco's requested return on equity (ROE); (4) accept NY Transco's cost allocation method to recover its revenue requirement; and (5) accept NY Transco's proposed revisions to the NYISO Open Access Transmission Tariff (OATT) to include a proposed Transco Facilities Charge as Schedule 13 (Section 6.13) of the OATT and the proposed cost allocation and formula rate as Attachment DD (Section 36) of the OATT.

4. On April 2, 2015, the Commission issued an order: (1) granting the request for certain pre-commercial cost recovery incentives,¹ request for a 50 basis point adder for NY Transco's membership in a regional transmission organization (RTO),² and request for a 50 basis point adder for the risks and challenges associated with developing the Edic to Pleasant Valley Project,³ including the NY Transco's cost estimate risk sharing proposal associated with the ROE adders;⁴ (2) accepting, for filing, NY Transco's proposed formula rate and protocols, including a proposed base ROE and the methodology and procedures for tracking the pre-commercial cost recovery incentives granted by the Commission, but suspending them for a nominal period, subject to refund, and setting them for hearing and settlement judge procedures;⁵ (3) declining the NYPSC's request for cost recovery to be limited to the preliminary cost estimate identified by the NYPSC in a New York State proceeding;⁶ (4) denying the proposed hypothetical capital structure prior to securing financing for the projects;⁷ (5) denying the request for a 50 basis point adder for risks and challenges associated with developing the Transmission Owner Transmission Solution (TOTS) Projects, request for a risks and

¹ *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,004, at PP 76-78, 85 (2015) (Hearing Order).

² *Id.* at P 88.

³ *Id.* at P 93.

⁴ *Id.* at PP 99, 111.

⁵ *Id.* at PP 140-141.

⁶ *Id.* at P 111.

⁷ *Id.* at P 84.

challenges adder for the Oakdale to Fraser Project, and a request for a 50 basis point adder for being a Transco;⁸ and (6) denying the proposed cost allocation provisions.⁹

5. NY Transco, NYPSC, and New York Power Authority (NYPA) filed requests for rehearing of the Hearing Order. NY Transco requested rehearing of the Commission's cost allocation ruling, the Commission's denial of NY Transco's proposed hypothetical capital structure incentive during the construction phase of its projects until long-term financing is secured, the Commission's denial of additional ROE incentive adders based both on the risks and challenges associated with developing the projects and for being a "Transco," as defined in the Commission's regulations, and the Commission's denial of NY Transco's request for waivers of certain accounting regulations.¹⁰ NYPA sought rehearing of the Commission's rejection of NY Transco's proposed cost allocation.¹¹ The NYPSC's request for rehearing argued that the Commission should establish a cost recovery mechanism that includes certain cost containment measures, and should reconsider the Commission's grant of a 50 basis point adder for RTO participation.¹² No other Settling Party filed a request for rehearing of the Hearing Order.

6. By order dated April 9, 2015, the Chief Judge Administrative Law Judge (Chief Judge) designated the undersigned as Settlement Judge.¹³ The Settling Parties engaged in settlement discussions, and on November 5, 2015, NY Transco filed an Offer of Partial Settlement resolving all issues set for hearing with respect to NY Transco's proposed TOTS Projects. While the offer of partial settlement did not resolve any outstanding issues with respect to the AC Transmission Projects,¹⁴ Section 2.5 therein provided that

⁸ *Id.* at PP 92-93. Note that NY Transco is no longer proposing to develop the Oakdale to Fraser Project.

⁹ *Id.* at PP 185-188.

¹⁰ Request for Expedited Rehearing of the Applicants, Docket No. ER15-572-002, (May 4, 2015).

¹¹ Request for Clarification, or in the Alternative, Rehearing of New York Power Authority, Docket No. ER15-572-002, (May 4, 2015).

¹² Request for Rehearing of the New York State Public Service Commission, Docket No. ER15-572-002, (May 4, 2015).

¹³ Order of Chief Judge Designating Settlement Judge and Scheduling Settlement Conference (Apr. 9, 2015).

¹⁴ The AC Transmission Projects consist of two segments: "Segment A" includes the Edic/Marcy to New Scotland segment and the Princetown to Rotterdam segment and "Segment B" includes the Knickerbocker to Pleasant Valley segment.

this docket should remain open but held in abeyance until such time as the NYISO issues a “Viability and Sufficiency Assessment” with respect to the AC Transmission Projects pursuant to Section 31.4.6.5 of Attachment Y of the NYISO OATT.

7. On January 27, 2016, the Chief Judge issued an order holding the proceeding in abeyance until NYISO made the Validity and Sufficiency Assessment.¹⁵ On March 17, 2016, the Commission approved the partial settlement.¹⁶

8. On October 27, 2016, the NYISO issued its final Viability and Sufficiency Assessment, which confirmed the NY Transco project submissions as viable and sufficient and able to proceed to the next step in the NYISO process, and the Chief Judge subsequently issued an order on November 2, 2016, terminating the abeyance and reinstating settlement procedures with respect to the AC Transmission Projects before Judge Sterner.¹⁷

9. The undersigned convened settlement conferences on December 12, 2016, March 8, 2017, April 5, 2017, May 15, 2017, June 8, 2017, and July 11, 2017. The Settling Parties engaged in numerous settlement discussions and settlement conference calls between December 2016 and July 2017 that have resulted in the Settlement. The Settlement reflects the agreement of the Settling Parties to resolve all outstanding issues associated with the AC Transmission Projects.

II. Offer of Settlement

10. Article I sets forth the procedural history.

11. Article II describes the scope of the Settlement. Article 2.1 provides that, if approved by the Commission, the Settlement would resolve all issues set for hearing and pending on rehearing in Docket No. ER15-572-000 associated with the AC Transmission Projects. This consists of two segments. “Segment A” includes the Edic/Marcy to New Scotland segment and the Princetown to Rotterdam segment, and “Segment B” includes the Knickerbocker to Pleasant Valley segment. In addition, the scope of the Settlement includes “Segment B Additions,” which are lower voltage projects required to be built as part of the development of Segment B. Article 2.2 clarifies that the financial terms of the Settlement shall apply only if NY Transco becomes the selected developer of any one of the segments of the AC Transmission Projects.

¹⁵ Order of Chief Judge Holding Proceeding in Abeyance (Jan. 27, 2016).

¹⁶ *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,196 (2016).

¹⁷ Order of Chief Judge Terminating Abeyance and Reinstating Settlement Judge Procedures (Nov. 2, 2016).

12. Article 2.3 clarifies that certain financial terms set forth in the Settlement (i.e., the base ROE, the cost of debt, and the capital structure) will apply to the AC Transmission Projects, the Segment B Additions, as well as Future AC Investments, which include capital repairs, like-kind replacements or additional investments to the facilities, and Future Projects, which are new NY Transco transmission projects selected and approved by the NYISO for inclusion in its transmission plan and are under the operational control of the NYISO or otherwise subject to FERC jurisdiction.

13. Article 2.4 describes the expected benefits that will result from the AC Transmission Projects identified by the NYPSC.

14. Article III sets forth the terms and conditions of the Settlement. Article 3.2(a) establishes that a base ROE of 9.65% will apply to the costs of the AC Transmission Projects and will remain in effect for a period commencing on January 1, 2018, and continuing for a period of four years thereafter unless or until modified by FERC pursuant to Section 205 or 206 of the FPA. Article 3.2(b) allows a 100 basis point adder for AC Transmission Project investments incurred up to a cost cap. Article 3.2(c) requires NY Transco to separately request FERC ROE incentives for Future Projects on a project-by-project basis. Article 3.2(d) allows all actual costs incurred based upon long-term debt outstanding to be recoverable through the formula rate. Article 3.2(e) allows for the actual capital structure of NY Transco, up to 53% equity, to apply to costs associated with the AC Transmission Projects and this capital structure will remain in effect for a four-year period commencing on January 1, 2018, and continuing thereafter unless or until modified by FERC pursuant to Section 205 or 206 of the FPA. Article 3.2(f) clarifies when construction work in progress will be included in rate base and Article 3.2(g) provides that to the extent the AC Transmission Projects or Segment B Additions, or any portion thereof, are abandoned for reasons beyond the control of NY Transco, all costs incurred prior to such abandonment that are the responsibility of NY Transco will be recoverable through rates in accordance with the terms of the Hearing Order. Finally, Article 3.2(h) establishes that the depreciation rates applicable to all classifications of capital assets associated with the AC Transmission Projects are the stated rates set forth in Attachment A of the Settlement, and that NY Transco will submit to FERC a limited Section 205 filing to implement any modification to the depreciation rates as a result of a depreciation study in 2026.

15. Articles 3.3 and 3.4 establish a mechanism for calculating a “Cost Cap” and for applying a “Cost Containment Mechanism.” Article 3.3(a) lists the components included in the Cost Cap. Article 3.3(b) states that the Settling Parties recognize Unforeseeable Costs, defined as costs and savings that, with the exercise of commercially reasonable due diligence, could not have been anticipated at the time that the Capital Cost Bid was submitted to the NYISO on April 29, 2016, and provides a list of Unforeseeable Costs. Article 3.3(c) provides that all prudently incurred costs below the Cost Cap are fully recoverable, including the Base ROE, ROE Incentive Adders, depreciation, and debt

costs. Article 3.3(d) states that Unforeseeable Costs in an aggregate amount up to 5 percent of the Cost Cap will be considered project costs that are part of the 18 percent contingency described in Article 3.3(a)(ii), and are subject to the Cost Containment Mechanism set forth in Article 3.4(a). Unforeseeable Costs that are more than 5% of the amount of the Cost Cap are not subject to the Cost Cap or Cost Containment Mechanism and are recoverable in the formula rate using the financial parameters in Article 3.2.

16. Article 3.4(a) provides that under the Cost Containment Mechanism, 20% of certain costs above the Cost Cap will not receive an equity return, but NY Transco will be allowed to recover the associated depreciation and debt cost, while 80% of these costs above the Cost Cap will be allowed to earn the base ROE, associated depreciation, and debt, but will not be allowed to earn any ROE incentive adders. Article 3.4(b) of the Settlement sets forth a mechanism whereby NY Transco will earn an additional ROE adder on prudently incurred costs that are below an Adjusted Cost Cap. Article 3.4(c) states that NY Transco will receive an additional ROE adder, as set forth in Table A of the Settlement, when the AC Transmission Project costs, inclusive of Unforeseeable Costs in an amount up to 5% of the Adjusted Cost Cap, are less than the Adjusted Cost Cap.

17. Article 3.5 states that the cost allocation for the revenue requirement of the AC Transmission Projects, Segment B Additions, and Future AC Investments will be allocated as set forth in Table B of the Settlement.

18. Article 3.6 clarifies that the cost containment and cost allocation provisions of this Settlement shall not be affected by any decision of the Commission in Docket No. ER17-1310-000, which is pending before the Commission.

19. In Article 3.7, the Settling Parties agree either to support or not to oppose the Settlement before the Commission and not to take any position adverse to the express terms of the Settlement in any proceedings before the Commission or the NYPSC, except that the Settlement cannot bind the NYPSC with respect to any NYPSC proceedings, and the Settlement does not restrict Settling Parties' ability to question the application of NY Transco's formula rate template or protocols in response to NY Transco's annual updates.

20. Article 3.8 limits the ability of the Settling Parties to make any filings pursuant to Sections 205 or 206 of the FPA that relate to the Settlement and NY Transco that are inconsistent with the terms agreed to in the Settlement.

21. Article 3.9 requires the Settling Parties to withdraw their pending requests for rehearing in Docket No. ER15-572-000.

22. Article 3.10 requires NY Transco to make a compliance filing with the Commission to implement the Settlement within 30 days of the date that the NYISO selects a developer with respect to the AC Transmission Projects. The compliance filing will include revisions to Schedule 13 (Section 6.13) and Attachment DD (Section 36) of the NYISO OATT to implement this Settlement.

23. Article 3.11 provides that to the extent the Commission does not approve all aspects of this Settlement, the Settling Parties will have 30 days to withdraw their support for the Settlement.

24. Article IV states that the Settlement shall be effective upon Commission approval.

25. Article V provides that the Commission's approval of this Settlement shall not constitute precedent nor be used to prejudice any otherwise available rights or arguments of any Settling Party in a future proceeding, other than to enforce the terms of this Settlement.

26. Article VI states that the standard of review for any change to the Settlement proposed by a Settling Party will be the "public interest" standard for review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) as clarified in *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n.*, 558 U.S. 165 (2010). The ordinary just and reasonable standard of review, rather than the public interest standard, applies to any changes to the Settlement sought by the Commission acting *sua sponte* or at the request of a non-Settling Party or a non-party to this proceeding.

27. Article VII includes certain miscellaneous provisions and reservations of rights.

III. Comments

28. On September 11, 2017, Trial Staff filed initial comments in support of the Settlement.¹⁸ Trial Staff states that it believes the Settlement resolves all issues set for hearing in this proceeding in a fair and equitable manner. Trial Staff notes that the Settlement provides for satisfactory closure without the need for protracted litigation and that prompt acceptance of the Settlement is in the public interest.

29. NYPSC filed initial comments supporting the Settlement on September 11, 2017.¹⁹ NYPSC asserts that the Settlement resolves all issues in this proceeding and should be

¹⁸ Initial Comments of Commission Trial Staff in Support of Offer of Settlement (Sept. 11, 2017).

approved by the Commission. NYPSC notes that the Settlement includes a provision for a Cost Containment Mechanism where certain costs incurred above a defined cost cap will be limited in either receiving an equity return or in earning an ROE that includes incentive adders. NYPSC states that this provision reasonably balances that interest of the developer and ratepayers under the circumstances. Nonetheless, NYPSC states that other potential developers are encouraged to limit cost recovery above their bids relied upon by NYISO as part of the competitive planning process.

IV. Explanatory Statement

30. In answering the four questions that the explanatory statement of each settlement agreement filed with the Commission must answer,²⁰ the Settling Parties make the following representations:

A. Does the settlement affect other pending cases?

31. The Settlement does not affect other pending cases. The Settlement limits the applicability of any Commission order in pending Docket No. ER17-1310-000 to ensure that the terms of this Settlement are unaffected by that proceeding.

B. Does the settlement involve issues of first impression?

32. The Settlement does not involve any issues of first impression.

C. Does the settlement depart from Commission precedent?

33. The Settlement does not depart from Commission precedent.

D. Does the settlement seek to impose a standard of review other than the ordinary just and reasonable standard with respect to any changes to the settlement that might be sought by either a third party or the Commission acting *sua sponte*?

34. The Settlement provides that any changes sought by a third party or the Commission acting *sua sponte* are subject to the ordinary just and reasonable standard of review.

¹⁹ Comments of the New York State Public Service Commission in Support of Settlement (Sept. 11, 2017).

²⁰ Amended Notice to the Public on Information to be Provided with Settlements and Guidance on the Role of Settlement Judges (issued Dec. 15, 2016).

V. Discussion

35. The Settlement reasonably resolves all issues set for hearing in this proceeding, and presents no issues that are of first impression, or on which the Commission previously has reversed its position. In accordance with 18 C.F.R. § 385.602(g)(1), the undersigned certifies that the Settlement is uncontested. In accordance with 18 C.F.R. § 385.602(g)(3), the undersigned finds that the settlement appears to be fair and reasonable and in the public interest.

Steven L. Sterner
Settlement Judge