

161 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

NextEra Energy Transmission New York, Inc.

Docket Nos. ER16-2719-000
ER16-2719-001
ER16-2719-002

ORDER ACCEPTING, SUBJECT TO CONDITION, AND SUSPENDING
FORMULA RATE, ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES, AND GRANTING INCENTIVE RATES

(Issued November 3, 2017)

1. On September 30, 2016, as amended on November 4 and December 21, 2016, NextEra Energy Transmission New York, Inc. (NEET NY), pursuant to section 205 of the Federal Power Act (FPA),¹ Part 35 of the Commission's regulations,² and Order No. 679,³ submitted: (1) a proposed formula rate template (Template) and implementation protocols (Protocols) (together, Formula Rate) to determine and recover the costs of NEET NY's investment in transmission facilities located in the New York Independent System Operator, Inc. (NYISO) region; and (2) a request for NEET NY to utilize certain incentive rate treatments. On February 16, 2017, pursuant to the authority delegated by the Commission's February 3, 2017 Order Delegating Further Authority to Staff in Absence of Quorum,⁴ NEET NY's submittal was accepted for filing, suspended for a nominal period, to be effective November 30, 2016, as requested, subject to refund and further Commission order.⁵

¹ 16 U.S.C. § 824d (2012).

² 18 C.F.R. Part 35 (2017).

³ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43,294 (Jul. 31, 2006), FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, 72 Fed. Reg. 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007); *see also Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (2012 Policy Statement).

⁴ *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017).

2. As discussed below, in this further order, we accept NEET NY's filing, subject to condition, effective November 30, 2016. We accept the Formula Rate, subject to a compliance filing, to be effective once the Template and Protocols are filed with the Commission to become part of NYISO's Open Access Transmission Tariff (Tariff), consistent with the effective date established in that future proceeding.⁶ In addition, we establish hearing and settlement judge procedures for NEET NY's proposed base return on equity (ROE). We grant a 50 basis point ROE adder for Regional Transmission Organization/Independent System Operator participation (RTO/ISO Participation Adder), subject to the resulting ROE being within the zone of reasonableness established for NEET NY. We grant NEET NY's request for authorization to establish a regulatory asset account for its prudently incurred pre-commercial and formation costs for later recovery, with carrying charges accruing beginning on November 30, 2016, as requested, and its request to use a hypothetical capital structure of 60 percent equity and 40 percent debt, to remain in effect until the first transmission project is placed in service.

I. Background

3. In Order No. 1000,⁷ the Commission required public utility transmission providers to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.⁸ In addition, the Commission required public utility transmission providers to

⁵ *NextEra Energy Transmission New York, Inc.*, Docket Nos. ER16-2719-000, *et al.* (Feb. 16, 2017) (delegated letter order).

⁶ NEET NY filed tariff provisions proposing a November 30, 2016 effective date. Because these provisions will not become effective until NEET NY has become a member of NYISO, we will reset the effective date in eTariff to an indeterminate effective date. *See* Office of the Secretary, Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings, at 10 (November 14, 2016) (establishing 12/31/9998 as the date for filings with indeterminate effective dates). We further require NEET NY to make an eTariff filing to cancel the tariff accepted in this proceeding when its filing to become part of NYISO's Tariff becomes effective.

⁷ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g and 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).

⁸ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313.

revise their Tariffs to, among other things: (1) establish qualification criteria to determine whether an entity is eligible to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation;⁹ (2) identify information a prospective transmission developer must submit in support of a transmission project proposed for selection;¹⁰ and (3) describe a transparent and not unduly discriminatory process for evaluating proposals for selection in the regional transmission plan for purposes of cost allocation.¹¹ The Commission noted that, although not mandatory, public utility transmission providers in a transmission planning region could use, for example, a sponsorship model as one method to comply with the requirements of Order No. 1000.¹² In response to the requirements of Order No. 1000, NYISO has established Order No. 1000 transmission planning processes.¹³

4. NEET NY states that it was formed to develop, construct, finance, own, operate, and maintain high-voltage electric transmission facilities in the NYISO region. NEET NY expects to become a transmission-owning member of NYISO as soon as the NYISO Tariff and governing documents permit.¹⁴ NEET NY states that it has been pre-qualified as a qualified developer under the NYISO Tariff, and is thus eligible to be designated to construct and own transmission projects within NYISO as a result of NYISO's Order No. 1000 processes.¹⁵ NEET NY states that, in the NYISO transmission planning process, nonincumbent developers may submit: (1) competitive transmission solutions to address reliability needs; (2) economic projects in response to congestion identified in the Congestion Assessment and Resource Integration Study; and (3) projects in response to transmission needs driven by public policy needs.¹⁶

⁹ *Id.* PP 225, 323.

¹⁰ *Id.* PP 325-326.

¹¹ *Id.* P 328, *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 452.

¹² Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 336.

¹³ *See, e.g., N.Y. Indep. Sys. Operator, Inc.* 143 FERC ¶ 61,059 (2013); *order on reh'g and compliance*, 148 FERC ¶ 61,044 (2014); *order on reh'g and compliance*, 151 FERC ¶ 61,040 (2015).

¹⁴ NEET NY September 30 Filing at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 3 n.5.

5. NEET NY states that it is a wholly-owned direct subsidiary of NextEra Energy Transmission, LLC (NEET Transmission), which was formed in 2007 to apply NextEra Energy, Inc.'s (NextEra) experience and resources in developing, owning, and operating transmission facilities to transmission projects across the United States and Canada. NEET NY states that NEET Transmission is an indirect wholly-owned subsidiary of NextEra Energy Capital Holdings, LLC (NEECH), which provides funding for the NextEra operating subsidiaries other than Florida Power & Light Company and its subsidiaries. NEECH is a wholly-owned direct subsidiary of NextEra.

II. Overview of NEET NY Filing

6. NEET NY states that the Formula Rate includes a cost of service Template and Protocols that have been modeled after formula rate templates and protocols recently accepted by the Commission.¹⁷ NEET NY states that the Formula Rate will be used by NEET NY to determine its annual transmission revenue requirements (ATRR) to be received under the NYISO Tariff, and is designed to be incorporated into the NYISO Tariff.¹⁸ NEET NY states that to calculate the ATRR, NEET NY will project the values that will populate the Template for each calendar year (Rate Year), and calculate a true-up of the projected values after the actual data becomes available on the FERC Form No. 1, the year after the Rate Year.¹⁹

7. NEET NY states that the Template provides for recovery of a return on rate base, taxes, depreciation and amortization expense, operation and maintenance (O&M) expense, and administrative and general (A&G) expense, less any revenue credits. NEET NY also seeks approval of its stated depreciation rates for transmission and general plant, and it seeks to adopt the depreciation rates of its Texas affiliate, Lone Star Transmission, LLC (Lone Star). NEET NY states that it is a taxable corporation, and, as such, the Template provides for an income tax allowance. NEET NY states that the Template also includes stated values for Post-Employment Benefits other than Pensions (PBOP), consistent with Commission policy requiring certain components of a formula rate to be stated components.²⁰

8. For the Template, NEET NY requests a base ROE of 10.5 percent and the use of a 50 basis point RTO/ISO Participation Adder. NEET NY also requests that the Commission approve two incentive rate treatments for transmission projects developed

¹⁷ *Id.* at 5 & n. 9.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 6.

by NEET NY through NYISO's Order No. 1000 transmission planning processes. First, NEET NY requests a regulatory asset accounting that would allow deferral of all prudently-incurred, pre-commercial costs not capitalized and authorization to accrue carrying charges, including expenses incurred prior to the filing of the application and prior to the time costs first flow through FERC Account 182.3 to customers. Once the filing incorporating the Template in the NYISO Tariff is approved by the Commission, NEET NY will amortize the regulatory asset to expense in rates over five years for cost recovery purposes (Regulatory Asset Incentive). Second, NEET NY requests use of a hypothetical capital structure of 60 percent equity and 40 percent debt until NEET NY's first project achieves commercial operation (Hypothetical Capital Structure Incentive).²¹

9. NEET NY states that the proposed Template provides a means to reflect competitive bid concessions offered for a transmission project, which would reduce the ATRR. NEET NY also describes the Protocols, and states that they are transparent and consistent with the Commission's latest guidance on protocols for forward-looking formula rates.²²

10. NEET NY filed its proposed Formula Rate in NEET NY's eTariff database. NEET NY requests an effective date of November 30, 2016, although it recognizes that no costs will flow through the Template until a filing incorporating the Template in the NYISO Tariff is approved by the Commission.²³

11. On November 4, 2016, after consultation with NYISO, NEET NY amended its Protocols to clarify NYISO's ministerial responsibilities under the Protocols.

12. On November 29, 2016, Commission staff issued a deficiency letter advising NEET NY that its September 30, 2016 filing was deficient and requiring additional information to evaluate its Formula Rate filing.²⁴ On December 21, 2016, NEET NY filed a response to the Commission's Deficiency Letter, which amended its Formula Rate filing.

²¹ *Id.* at 4, 12-17.

²² *Id.* at 9-10.

²³ *Id.* at 12.

²⁴ *NextEra Transmission New York, Inc.*, Deficiency Letter, Docket No. ER16-2719-000 and ER16-2719-001, at 2 (Nov. 29, 2016) (Deficiency Letter).

III. Notice of Filing and Responsive Pleadings

13. Notice of NEET NY's September 30, 2016 filing was published in the *Federal Register*, 81 Fed. Reg. 69,519 (2016), with interventions and protests due on or before October 21, 2016. Timely motions to intervene were filed by Avangrid Networks, Inc., New York Transco, LLC and New York Transmission Owners.²⁵ Notice of NEET NY's November 4, 2016 amended filing was published in the *Federal Register*, 81 Fed. Reg. 79,470 (2016), with interventions and protests due on or before November 9, 2016. Timely motions to intervene were filed by NYISO, New York State Department of State Utility Intervention Unit (Utility Intervention Unit) and New York Association of Public Power. The New York Public Service Commission (New York Commission) filed a notice of intervention and protest. On November 21, 2016, NEET NY filed an answer.

14. Notice of NEET NY's December 21, 2016 response to the Deficiency Letter was published in the *Federal Register*, 81 Fed. Reg. 95,578 (2016), with interventions and protests due on or before January 11, 2017. A timely motion to intervene was filed by Municipal Electric Utilities Association of New York. On December 14, 2016, Utility Intervention Unit filed a protest. On December 29, 2016, NEET NY filed an answer.

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2017), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NEET NY's answers because they have provided information that assisted us in the decision-making process.

²⁵ New York Transmission Owners include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Power Supply Long Island, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

B. Substantive Matters**1. Requests for Incentives**

17. In the Energy Policy Act of 2005, Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments to promote capital investment in electric transmission infrastructure.²⁶ The Commission subsequently issued Order No. 679, which sets forth processes by which a public utility may seek transmission rate incentives pursuant to section 219, including the incentives requested here by NEET NY.²⁷

18. Pursuant to section 219, an applicant must show that “the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion.”²⁸ Also, as part of this demonstration, “section 219(d) provides that all rates approved under the Rule are subject to the requirements of sections 205 and 206, which require that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.”²⁹

19. In addition to satisfying the section 219 requirement of ensuring reliability and/or reducing the cost of delivered power by reducing congestion, Order No. 679 requires an applicant to demonstrate that there is a nexus between the incentive sought and the investment being made.³⁰ In Order No. 679-A, the Commission clarified that the nexus test is met when an applicant demonstrates that the total package of incentives requested is “tailored to address the demonstrable risks or challenges faced by the applicant.”³¹ Additionally, in November 2012, the Commission issued a transmission incentives policy statement providing additional guidance regarding its evaluation of applications for transmission rate incentives under section 219 and Order No. 679.³²

²⁶ Pub. L. No. 109-58, §§ 1261, 1241, 119 Stat. 594 (2005).

²⁷ 16 U.S.C. § 824.

²⁸ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 76.

²⁹ *Id.* P 8 (citing 16 U.S.C. §§ 824(d)-(e)).

³⁰ *Id.* P 48.

³¹ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 40.

³² *See* 2012 Policy Statement, 141 FERC ¶ 61,129.

20. NEET NY requests the Regulatory Asset Incentive and Hypothetical Capital Structure Incentive under section 205 of the FPA. The Commission previously has held that the regulations under section 219 require a project-specific demonstration of the nexus between the requested incentives and the risks and challenges of the projects, a demonstration that cannot be met when, as here, the requesting entity has not identified specific projects.³³ However, incentives available under Order No. 679 can also be granted under the Commission's section 205 authority under certain circumstances, such as to promote important public policy goals.³⁴ The Commission has exercised its section 205 authority to grant certain incentives to nonincumbent transmission developers participating in the Order No. 1000 transmission planning processes, just as NEET NY seeks to do here.³⁵ Consistent with the Commission's determination in *South Central MCN*,³⁶ we find that granting the requested Regulatory Asset Incentive and Hypothetical Capital Structure Incentive in this instance furthers the policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 transmission planning processes, thereby encouraging competition,³⁷ as described below.

a. Request for Regulatory Asset Incentive

i. Proposal

21. NEET NY requests authorization to recover all prudently-incurred pre-commercial costs not capitalized prior to its Formula Rate taking effect.³⁸ NEET NY states that these

³³ *Transource Wisconsin, LLC*, 149 FERC ¶ 61,180, at P 15 (2014), *order on reh'g and compliance*, 154 FERC ¶ 61,010 (2016) (*Transource Wisconsin*).

³⁴ *See Pacific Gas and Elec. Co.*, 123 FERC ¶ 61,067 (2008); *So. Cal. Edison Co.*, 133 FERC ¶ 61,107, *order on reh'g*, 133 FERC ¶ 61,255 (2010).

³⁵ *See Xcel Energy Sw. Transmission Co., LLC*, 149 FERC ¶ 61,182 (2014) (*XEST*); *Xcel Energy Transmission Dev. Co., LLC*, 149 FERC ¶ 61,181 (2014) (*XETD*); *Transource Wisconsin*, 149 FERC ¶ 61,180; *Transource Kansas, LLC*, 151 FERC ¶ 61,010 (2015); *order on reh'g and compliance*, 154 FERC ¶ 61,011 (2016) (*Transource Kansas*); *South Central MCN LLC*, 153 FERC ¶ 61,099 (2015), *order on reh'g*, 154 FERC ¶ 61,271 (2016) (*South Central MCN*).

³⁶ *South Central MCN*, 153 FERC ¶ 61,099 at PP 24, 37.

³⁷ *See, e.g.*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 87 (“[T]he Commission seeks to make it possible for nonincumbent transmission developers to compete in the proposal of more efficient or cost-effective transmission solutions.”)).

³⁸ NEET NY September 30 Filing at 13.

costs could include, for example, formation costs and costs to support planning and bid development activities, including engineering and consultant fees, legal fees, administrative expenses, travel expenses, and development surveys. NEET NY requests authorization to establish a regulatory asset that will include all such expenses, including expenses incurred prior to the filing of this application and expenses incurred prior to the time such costs first flow through to customers.³⁹

22. NEET NY requests authorization to amortize the regulatory asset over five years beginning in the first year that costs are charged to customers under the Formula Rate. Also, NEET NY requests permission to accrue monthly carrying charges, compounded semi-annually, on the regulatory asset balance beginning on the effective date of the Commission's approval of this incentive until the regulatory asset is included in rate base. According to its proposal, once such costs can be recovered under NEET NY's Formula Rate under the NYISO Tariff as a current expense, it will discontinue the practice of booking charges to the regulatory asset and instead will record such charges as O&M or A&G expenses to be recovered through the Formula Rate as they are incurred.⁴⁰

23. NEET NY states that the ability to recover pre-commercial costs, and the ability to book such costs into a regulatory asset prior to NEET NY's costs being recovered as current expenses, will provide up-front regulatory certainty, improve cash flow during construction, improve coverage ratios used by agencies to determine credit quality, and reduce interest expense. In addition, NEET NY contends that granting its request for the Regulatory Asset Incentive will help level the playing field with incumbents in developing new projects.⁴¹

ii. Protest

24. The New York Commission argues that applying a carrying charge on the pre-commercial regulatory assets based on NEET NY's weighted cost of capital is inconsistent with the Commission's precedent.⁴² The New York Commission contends that NEET NY should instead accrue carrying charges at a rate equal to its allowance for

³⁹ *Id.* The Template provides that "[r]ecovery of a [r]egulatory [a]sset...is subject to FERC approval before the amortization of the [r]egulatory [a]sset can be included in rates." *Id.*, Appendix A, at 5, Note K.

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 14-15.

⁴² New York Commission Protest at 8 & n.6 (citing *TransCanyon DCR LLC*, 152 FERC ¶ 61,017, at P 32 (2015) (*TransCanyon*); and *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009, at P 33 (2016) (*NEET West*)).

funds used during construction (AFUDC) on the unamortized balance of the regulatory asset for the pre-commercial and formation costs beginning on the date the Commission authorizes the creation of the regulatory asset accounting treatment and continuing until the pre-commercial regulatory asset begins to be recovered in rate base, at which point NEET NY should be allowed to use its weighted cost of capital.⁴³ The New York Commission asserts that this ratemaking treatment would also obviate the need for an assumed equity ratio greater than 47 percent, and it notes that establishment of a formula rate that will be updated annually will eliminate NEET NY's risk of sustained under-earnings.

iii. Answer

25. NEET NY states that the New York Commission misinterprets Commission precedent by claiming that a utility should use an AFUDC rate instead of the weighted cost of capital. NEET NY asserts that the Commission allows, as an incentive rate treatment, a nonincumbent developer to accrue carrying charges on its regulatory asset based upon its weighted costs of capital.⁴⁴ NEET NY explains that the Commission has required developers using this incentive rate treatment to ensure that their carrying charge accruals are not compounded more frequently than semiannually, which is a restriction on the compounding of AFUDC.⁴⁵ NEET NY further explains that this is not an issue in its proposal because NEET NY proposes that its regulatory asset will be compounded semi-annually, consistent with the Commission's precedent. NEET NY further states that it would not object to use its AFUDC rate instead of its weighted cost of capital when accruing carrying charges for the requested regulatory asset, if the Commission were to condition acceptance of NEET NY's incentive proposal on the use of the AFUDC rate.⁴⁶

iv. Commission Determination

26. We find that it is appropriate to grant NEET NY's request for the Regulatory Asset Incentive. The Commission has held that this incentive can be granted under the Commission's section 205 authority if the incentive furthers a public policy goal.⁴⁷ We

⁴³ *Id.* at 8-9.

⁴⁴ NEET NY November 21, 2016 Answer at 13 & n.40 (citing, e.g., *NEET West*, 154 FERC ¶ 61,009 at P 33; *South Central MCN*, 153 FERC ¶ 61,099 at P 24).

⁴⁵ *Id.* at 12 & n.41 (citing, e.g., *NEET West*, 154 FERC ¶ 61,009 at P 33; *Transcanyon*, 152 FERC ¶ 61,017 at P 32).

⁴⁶ *Id.* at 13.

find that NEET NY's request for the regulatory asset incentive under section 205 furthers the Commission's policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 transmission planning processes, thereby encouraging competition.⁴⁸ Nonincumbent transmission developers wishing participate in NYISO's Order No. 1000 transmission planning process must incur early pre-commercial and formation costs, but because they do not have a plant in service and/or rates in effect, they do not have a mechanism to recover these costs as they are incurred, as do incumbent transmission owners whose transmission planning-related costs are expensed to transmission operations and maintenance accounts that are typically included in transmission formula rates. Consistent with the Commission's policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 transmission planning processes, thereby encouraging competition, NEET NY may only apply the Regulatory Asset Incentive approved in this proceeding to transmission projects that are developed through NYISO's Order No. 1000 transmission planning processes. We also grant NEET NY's request to amortize the regulatory asset and to accrue monthly carrying charges using its weighted cost of capital, compounded semi-annually over five years for cost recovery purposes, effective November 30, 2016.

27. We disagree with the New York Commission's assertion that the Commission's policy requires NEET NY to apply a carrying charge on the pre-commercial regulatory assets using NEET NY's AFUDC rate, rather than NEET NY's weighted cost of capital. The Commission's policy allows a nonincumbent developer to accrue carrying charges on its regulatory asset based upon its weighted cost of capital.⁴⁹ As we explained in *NEET West* and *Transcanyon*, the Commission has required developers using this incentive rate treatment to ensure that their carrying charge accruals, based on the weighted cost of capital, are not compounded more frequently than semiannually, which is similar to the Commission's restriction on the compounding of the AFUDC rate.⁵⁰

⁴⁷ See *Pacific Gas and Elec. Co.*, 123 FERC ¶ 61,067 at P 33; *So. Cal. Edison Co.*, 133 FERC ¶ 61,107 at P 62; *XEST*, 149 FERC ¶ 61,182 at P 33; *XETD*, 149 FERC ¶ 61,181 at P 18; *Transource Wisconsin*, 149 FERC ¶ 61,180 at P 16; *Transource Kansas*, 151 FERC ¶ 61,010 at P 19; *Kanstar Transmission, LLC*, 152 FERC ¶ 61,209, at P 22 (2015); *order on reh'g*, 155 FERC ¶ 61,167 (2016) (*Kanstar*).

⁴⁸ See, e.g., *South Central MCN*, 153 FERC ¶ 61,099 at P 24 & n.39 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 87).

⁴⁹ See, e.g., *DATC Midwest Holdings, LLC*, 139 FERC ¶ 61,224, at PP 66, 71 (2012).

⁵⁰ *NEET West*, 154 FERC ¶ 61,009 at P 33; *Transcanyon*, 152 FERC ¶ 61,017 at P 32.

28. While we will allow NEET NY to record its prudently incurred costs as a regulatory asset, NEET NY must make a section 205 filing under the FPA to demonstrate that the pre-commercial and formation costs are just and reasonable before it includes them in rates.⁵¹ In that filing, NEET NY must establish that the costs included in the regulatory asset are costs that would otherwise have been chargeable to expense in the period incurred but were deferred consistent with the authorization granted herein, and entities will be able to challenge the reasonableness of costs at that time. Until NEET NY is issued a notice to construct by NYISO, rendering it eligible to recover costs through the NYISO Tariff, it is unclear whether NEET NY will have any customers from which to recover its regulatory asset.

b. Request for Hypothetical Capital Structure Incentive

i. Proposal

29. NEET NY requests authority to use a hypothetical capital structure of 60 percent equity and 40 percent debt until its first project is placed in service.⁵² NEET NY states that use of a hypothetical capital structure until NEET NY's first project is placed into service is appropriate to offset risks and to improve NEET NY's access to capital. NEET NY states that it intends to operate with capital infusions from its parent company at first but, as construction of the first project progresses, it will require additional capital contributions. NEET NY states that the precise debt-to-equity ratio thus will fluctuate as new debt and equity is invested.⁵³

30. NEET NY states that the Commission has found that the: (1) use of a stable debt-to-equity ratio for ratemaking purposes during construction provides certainty and improves access to capital;⁵⁴ (2) use of a hypothetical capital structure during construction will result in lower debt costs for the company, while also permitting it to vary its financing vehicles to the needs of the construction process, including such issues as timing of expenditures, regulatory developments, and changes in financial market conditions;⁵⁵ and (3) the hypothetical capital structure approach during construction is a

⁵¹ 16 U.S.C. § 824d; 18 C.F.R. §§ 35.13 and 35.35(g).

⁵² NEET NY September 30 Filing at 15.

⁵³ *Id.*

⁵⁴ *Id.* (citing *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248, at P 68 (2008), *order on reh'g*, 150 FERC ¶ 61,224, at PP 46-52 (2015)).

⁵⁵ *Id.* at 15-16 (citing *Potomac-Appalachian Transmission Interstate Line Co.*, 122 FERC ¶ 61,188, at P 55 (2008), *order on reh'g*, 133 FERC ¶ 61,152 (2010) (*PATH*)).

pragmatic approach to address fluctuating capital structure at the outset of a project's development.⁵⁶ NEET NY further states that granting the requested Hypothetical Capital Structure Incentive will help level the playing field with incumbents in competing for new transmission projects.

31. NEET NY states that its requested Hypothetical Capital Structure Incentive would be in use only until NEET NY's first project enters into service. At that time, NEET NY will begin to use its actual capital structure.⁵⁷ In support of its requested equity/debt ratio, NEET NY states that the Commission has approved the use of a Hypothetical Capital Structure Incentive of 60 percent equity and 40 percent debt for other new entrant transmission developers.⁵⁸

ii. Protest

32. The New York Commission argues that NEET NY's Hypothetical Capital Structure Incentive is excessive, and that a common equity ratio of no more than 47 percent is reasonable and would allow NEET NY to attract sufficient capital. The New York Commission states that, based on its review of its proxy group of 26 transmission and distribution companies, the average common equity ratio of the proxy group (as of second quarter of 2016) was 47 percent.⁵⁹ The New York Commission states that this common equity ratio was adequate to support a Moody's average bond rating of "Baal" and an S&P rating of "BBB+."⁶⁰ The New York Commission points out that NEET NY's ultimate parent company, NextEra, currently has an average Moody's bond rating of "Baal" and an average S&P rating of "A-". The New York Commission states that these bond ratings are supported by a common equity ratio of just under 43 percent, based on June 30, 2016 of financial data.⁶¹ Therefore, the New York Commission argues that a common equity ratio of no higher than 47 percent, based on the New York Commission's proxy group's average common equity ratio of 47 percent, is conservative and reasonable.

⁵⁶ *Id.* at 16 (citing *PATH*, 122 FERC ¶ 61,188 at P 55).

⁵⁷ The Template (*id.* at Appendix A at 5, Note Q), provides that once NEET NY's first project is in service, NEET NY will use its actual capital structure.

⁵⁸ NEET NY September 30 Filing at 16 (citing, *e.g.*, *Midwest Power Transmission Arkansas, LLC*, 152 FERC ¶ 61,210, at P 20 (2015)).

⁵⁹ New York Commission Protest at 7; Appendix A at 2.

⁶⁰ *Id.*

⁶¹ New York Commission Protest at 7.

iii. Answer

33. NEET NY argues that the New York Commission's proposed hypothetical capital structure with a common equity ratio of 47 percent is contrary to Commission precedent and should be rejected. NEET NY explains that the New York Commission derived its proposed hypothetical capital structure from a calculation of an average common equity ratio of companies in a proxy group. NEET NY explains that, for incumbent utilities, the Commission's policy is to use the actual capital structure of a public utility for ratemaking purposes, except in limited circumstances.⁶² NEET NY states that, in the context of a hypothetical capital structure as an incentive rate, the Commission will allow the nonincumbent transmission developer to use a particular hypothetical capital structure if it is within the range of prior approved hypothetical capital structures,⁶³ and NEET NY's 60 percent equity/40 percent debt hypothetical capitalization ratio is within the range of prior approved hypothetical capitalization ratios.⁶⁴ With respect to the New York Commission's reference to NextEra's capital structure, NEET NY asserts that the Commission has previously explained that it will not require a nonincumbent transmission developer to use its parent's capital structure until the developer has its own capital structure,⁶⁵ and therefore NextEra's capital structure is irrelevant to consideration of NEET NY's proposed hypothetical capital structure.

iv. Commission Determination

34. We grant NEET NY's request to use a hypothetical capital structure consisting of up to 60 percent equity and 40 percent debt prior to its first transmission project going into service. We therefore reject the New York Commission's proposal that NEET NY use a hypothetical capital structure with a common equity ratio of 47 percent. The Commission will allow a nonincumbent transmission developer to use a particular hypothetical capital structure if it is within the range of prior approved hypothetical capital structures for nonincumbent transmission developers,⁶⁶ and NEET NY has

⁶² NEET NY November 21, 2016 Answer at 11 & n.32.

⁶³ *Id.* at 11 & n.35 (citing *Atlantic Grid Operations A-E LLC*, 135 FERC ¶ 61,144, at P 122 (2011)).

⁶⁴ *Id.* at 11 & n.36 (citing, e.g., *South Central MNC*, 153 FERC ¶ 61,099 at P 37; *Transource Missouri, LLC*, 141 FERC ¶ 61,075, at P 166 (2012) (*Transource Missouri*)).

⁶⁵ *Id.* at 11-12 & n.37 (citing *Green Power Express LP*, 127 FERC ¶ 61,031, at P 76 (2009), *order on reh'g*, 135 FERC ¶ 61,141 (2011); *Ameren Services Co.*, 135 FERC ¶ 61,142, at P 71 (2009)).

⁶⁶ *Atlantic Grid Operations A-E LLC*, 135 FERC ¶ 61,144 at P 122.

demonstrated that its proposed 60 percent equity/40 percent debt hypothetical capitalization ratio is within the range of prior approved hypothetical capitalization ratios for nonincumbent transmission developers.⁶⁷ As the Commission held in *XEST* and *XETD*, and as noted by NEET NY, nonincumbent transmission developers have a particular need for the Hypothetical Capital Structure Incentive because it establishes certain financial principles that incumbent transmission owners currently have in place but that remain undetermined for nonincumbent transmission developers.⁶⁸ We grant this request because we find that granting the requested Hypothetical Capital Structure Incentive furthers the policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 transmission planning processes, thereby encouraging competition.⁶⁹ Because the requested Hypothetical Capital Structure Incentive is intended solely for participation in Order No. 1000 transmission planning processes, NEET NY may only apply the Hypothetical Capital Structure Incentive approved in this proceeding to transmission projects that are developed through NYISO's Order No. 1000 transmission planning processes.⁷⁰

2. Base ROE and RTO/ISO Participation Adder Incentive

a. Proposal

35. NEET NY requests a base ROE of 10.5 percent and a 50 basis point RTO/ISO Participation Adder. NEET NY states that it calculated this ROE according to the standards adopted by the Commission in Opinion No. 531.⁷¹ NEET NY's base ROE request is supported by analysis and testimony of NEET NY's ROE witness, Mr. Adrien M. McKenzie.⁷² NEET NY states that Mr. McKenzie estimates NEET NY's

⁶⁷ *NEET NY November 21, 2016 Answer* at 11 & n.36 (citing, e.g., *South Central MNC*, 153 FERC ¶ 61,099 at P 37; *Transource Missouri*, 141 FERC ¶ 61,075 at P 166).

⁶⁸ *XEST*, 149 FERC ¶ 61,182 at P 22; *XETD*, 149 FERC ¶ 61,181 at P 13.

⁶⁹ *See, e.g., South Central MCN*, 153 FERC ¶ 61,099 at P 37 & n.60 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 87).

⁷⁰ The Template, Appendix A at 5, Note G provides that once NEET NY's first project is in service, NEET NY will use its actual capital structure.

⁷¹ NEET New York September 30 Filing at 7-8 (citing *Coakley v. Bangor-Hydro Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *reh'g denied*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), *appeals docketed*, *Emera Me. v. FERC*, No. 15-1118 (D.C. Cir. Apr. 30, 2015), *Braintree Elec. Light Dep't v. FERC*, No. 15-1119 (D.C. Cir. 2015), *Massachusetts v. FERC*, No. 15-1121 (D.C. Cir. 2015)).

cost of equity by examining current capital market conditions and applying the Commission's two-step discounted cash flow (DCF) methodology to estimate the current cost of equity for a proxy group of other electric utilities with comparable investment risks as adopted in Opinion No. 531.⁷³ NEET NY states that Mr. McKenzie also evaluates the cost of equity for NEET NY using the risk premium approach, the Capital Asset Pricing Model, and the expected earnings approach. NEET NY argues that the base ROE for NEET NY of 10.5 percent is justified because the anomalous capital market conditions that prompted the Commission to approve an ROE within the top half of the DCF zone in Opinion No. 531 persist, and that the alternative benchmarks, as described in Mr. McKenzie's analysis demonstrate that the median values resulting from the two-step DCF method are far below investors' required return.⁷⁴

36. NEET NY also requests authorization to apply a 50 basis point RTO/ISO Participation Adder, which would result in a total ROE of 11 percent.⁷⁵ NEET NY notes that its request for an RTO/ISO Participation Adder is consistent with section 219(c) of the FPA, Order No. 679, and Commission precedent. NEET NY states that the Commission has recognized that the RTO/ISO Participation Adder continues to provide an important incentive for newly established transmission developers to participate in an RTO or ISO,⁷⁶ and the Commission has repeatedly rejected requests to eliminate the continued application of the 50 basis point RTO/ISO participation adder.⁷⁷ NEET NY explains that it will become a member of NYISO, transfer functional control of its transmission facilities to NYISO once placed into service, and will recover the costs of the transmission projects from NYISO customers through the inclusion of NEET NY's Formula Rate in the NYISO Tariff. NEET NY requests that the Commission authorize the RTO/ISO Participation Adder, subject to the ROE being within the zone of reasonableness.⁷⁸

⁷² NEET New York September 30 Filing, Exhibit No. NNY-300, Direct Testimony of Adrien M. McKenzie at 1-2 (McKenzie Test.).

⁷³ *Id.* at 6-8.

⁷⁴ *Id.* at 9-11.

⁷⁵ *Id.* at 9.

⁷⁶ NEET NY September 30 Filing at 9 (citing, e.g., *NEET West*, 154 FERC ¶ 61,009 at P 39).

⁷⁷ *Id.* at 9 (citing, e.g., *Pac. Gas & Elec. Co.*, 144 FERC ¶ 61,227, at P 20 (2013)).

⁷⁸ *Id.*

b. Protests

37. The New York Commission argues that the Commission should conduct a hearing concerning NEET NY's requested ROE because it raises issues of fact that warrant further examination, and it would result in unjust and unreasonable rates.

38. The New York Commission and Utility Intervention Unit assert that NEET NY's inclusion of Avangrid does not meet the Commission's proxy group selection criteria.⁷⁹ Specifically, the New York Commission asserts that, in Opinion No. 531, the Commission affirmed the use of the Value Line Electric Utility Industry group as the appropriate source for developing a proxy group, and Avangrid was not included in that group.⁸⁰ The New York Commission states that the inclusion of Avangrid is inappropriate since it upwardly biases NEET NY's DCF results.⁸¹ Utility Intervention Unit argues that Avangrid differs from the Value Line Electric Utility Industry group by its relatively short trading history, which contributes to greater volatility and uncertainty in analysts' outlooks for the new company. Utility Intervention Unit states that using NEET NY's proxy group (including Avangrid) with updated Institutional Brokers Estimate System (IBES) growth projections as of November 15, 2016 and dividend yields for the period from May through October 2016 results in a DCF range of reasonableness from 7.1 percent to 11.01 percent, with an upper half midpoint of 9.85 percent, and only 2 of the 26 proxy companies have indicated cost of equity exceeding 9.85 percent.⁸² It asserts that removing Avangrid from the proxy group in NEET NY's IBES growth DCF model reduces the upper limit of the range of reasonableness from 11.97 to 10.46 percent, the median from 8.59 to 8.53 percent, and the midpoint of the upper half of the range from 10.28 to 9.49 percent.⁸³ It asserts that only 4 of the 25 remaining proxy companies have estimated costs of equity above 9.49 percent, which is the midpoint of the upper half of the revised range of reasonableness, and this indicates that the midpoint of the upper half is near the top 84th percentile of the range of reasonableness. The New York Commission argues that, in the event that the Commission finds that Avangrid should be included in the proxy group, the Commission should recognize that it may not be necessary to include any ROE incentive adder to an already enhanced base ROE.⁸⁴

⁷⁹ New York Commission Protest at 4; Utility Intervention Unit Protest, Affidavit of Marc. D. Montalvo and Daniel K. Koehler (Affidavit) at PP 9-10.

⁸⁰ New York Commission Protest at 4.

⁸¹ *Id.*

⁸² Utility Intervention Unit Protest, Affidavit at P 10.

⁸³ *Id.*

39. In addition, Utility Intervention Unit argues that NEET NY's Value Line growth DCF is skewed by Pacific Gas and Electric Company (PG&E), which has a Value Line growth DCF cost of equity of 12.81 percent. It states that removing PG&E from the proxy group reduces the midpoint of the upper half of the range by 79 basis points from 10.63 to 9.84 percent.⁸⁵ It asserts that, while PG&E's growth estimate (12 percent) and indicated cost of equity (12.81 percent) do not exceed the thresholds for high end outliers cited in prior Commission opinions, the Commission should more closely scrutinize the outsized impact of this single proxy company on the ROE value.⁸⁶ It notes that Value Line and IBES have very different outlooks for PG&E, and Value Line's high growth rates are based on PG&E's anomalous costs due to the San Bruno gas pipeline explosion.⁸⁷ Utility Intervention Unit therefore argues that, at a minimum, PG&E should be excluded from NEET NY's Value Line growth DCF analysis, which results in a range of reasonableness from 6.66 to 11.28 percent, a median of 8.42 percent, and a midpoint of the upper half of the range of 9.85 percent.⁸⁸ It states that using NEET NY's DCF analysis (excluding PG&E) with updated Value Line growth projection and dividend yields for the period from May through October 2016 results in a DCF range of reasonableness from 6.56 to 10.96 percent, with an upper half midpoint of 9.58 percent, and only two of the proxy companies having a cost of equity exceeding 9.85 percent.⁸⁹

40. The New York Commission argues that interested parties should have an opportunity to cross examine NEET NY's witness regarding his proposed IBES-based zone of reasonableness of 7.01 to 11.97 percent, and Value Line-based zone of reasonableness of 6.66 to 12.81 percent. The New York Commission states that its initial analysis, subject to update, suggests a lower range of approximately 5.44 to 10.58 percent, with a midpoint of 8.0 percent.⁹⁰ The New York Commission maintains that, given the current low interest rate environment and the relatively lower business risk associated with a typical transmission-only entity, as compared with the proxy group companies, the 8.0 percent ROE is reasonable. The New York Commission argues that, if the Commission decides otherwise, then a 9.30 percent ROE, which is halfway

⁸⁴ New York Commission Protest at 4.

⁸⁵ Utility Intervention Unit Protest, Affidavit at P 12.

⁸⁶ *Id.* (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 39).

⁸⁷ *Id.*, Affidavit at P 13-14.

⁸⁸ *Id.*, Affidavit at P 15.

⁸⁹ *Id.*, Affidavit at P 16.

⁹⁰ New York Commission Protest at 5; Appendix A at 1.

between the 8.0 percent midpoint of the zone of reasonableness and the 10.58 percent top of the zone, is reasonable and supported by the Commission's DCF methodology and criteria to establish the proxy group.⁹¹

41. The New York Commission opposes NEET NY's proposal for a 50 basis point ISO Participation Adder where NEET NY is selected to construct transmission facilities as a result of the NYISO transmission planning process and it receives rate-based treatment. The New York Commission argues that, under these circumstances, NEET NY will be required to turn over operation control of its transmission facilities to NYISO, and therefore the RTO/ISO Participation Adder is unwarranted and lacks a rational basis.⁹²

42. Utility Intervention Unit also argues that NEET NY's proposed base ROE fails several checks of reasonableness. In particular, it explains that the Public Utility Commission of Texas authorized a 9.6 percent ROE for the NextEra affiliate, Lone Star.⁹³ In addition, it points out that NEET NY's proposed 10.5 percent base ROE exceeds the 9.5 percent ROE (with incentives) of New York transmission owners.⁹⁴ Also, it states that, in the past eighteen months, five electric distribution companies in New York have had rate cases setting their allowed ROEs at 9.0 percent.⁹⁵ It argues that its recommended base ROE between 8.5-9.85 percent represents a 50 to 85 basis point premium for transmission investment relative to state-regulated distribution investment in New York, and this spread will attract investment in interstate electric transmission.

c. Answers

43. NEET NY argues that the New York Commission and Utility Intervention Unit do not identify issues of material fact that warrant a hearing concerning NEET NY's proposed base ROE, and their arguments are either inconsistent with Commission policy or misunderstand NEET NY's proposal and can be addressed based on the pleadings.

44. NEET NY asserts that it is unable to assess whether the New York Commission's analysis complies with the Commission's DCF criteria because the New York Commission failed to include any explanations, workpapers or other documentation supporting its base ROE analysis.⁹⁶ NEET NY also states that the New York

⁹¹ New York Commission Protest at 5-6.

⁹² *Id.* at 9.

⁹³ Utility Intervention Unit Protest, Affidavit at P 22.

⁹⁴ *Id.*, Affidavit at P 23.

⁹⁵ *Id.*, Affidavit at P 24.

Commission's inclusion of Eversource Energy Inc. in its proxy group is incorrect because it has an S&P rating of "A," which falls outside the "one notch above/one notch below" comparable risk band required by Commission precedent.⁹⁷

45. As to the New York Commission's and Utility Intervention Unit's arguments that Avangrid⁹⁸ is improperly included in NEET NY's proxy group used to derive its proposed base ROE, NEET NY argues that Avangrid has significant, well-known electric utility operations and investors would regard Avangrid as a comparable investment alternative that is relevant to an evaluation of the required rate of return for NEET NY.⁹⁹ NEET NY further states that, as of November 18, 2016, Avangrid is included in the Value Line Electric Utility group, which makes protesters' concerns about including Avangrid in the proxy group moot.¹⁰⁰ In response to Utility Intervention Unit's argument that Avangrid did not meet the Value Line selection criteria, NEET NY states that the Commission does not require the use of Value Line when determining proxy group members, and therefore Mr. McKenzie could choose to evaluate Avangrid in the proxy group where his analysis indicated that Avangrid should be included.¹⁰¹ With respect to Utility Intervention Unit's argument that Avangrid has a relatively short trading history that contributes to greater volatility and uncertainty in analysts' outlooks, NEET NY argues that a short trading history is not a basis to exclude a company from the proxy group under the Commission's policy, and Utility Intervention Unit offers no evidence of any volatility and uncertainty.¹⁰² NEET NY notes that Avangrid has now been trading as a public company for almost a year.¹⁰³ With respect to Utility Intervention Unit's

⁹⁶ NEET NY November 21, 2016 Answer at 6.

⁹⁷ *Id.*; McKenzie Test. at 22.

⁹⁸ NEET NY states that Avangrid's operating subsidiaries include Central Maine Power Company, New York State Electric & Gas Corporation, Rochester Gas & Electric Corporation, and The United Illuminating Company. *Id.* at 5.

⁹⁹ *Id.*

¹⁰⁰ *Id.* NEET NY points out that Mr. McKenzie explained that Avangrid was not yet in the Value Line Electric Utility group because there is a natural lag between the merger and formation of Avangrid in 2015, and Valueline's reporting on Avangrid. *Id.*; McKenzie Test. at 23-24.

¹⁰¹ NEET NY December 29, 2016 Answer at 3.

¹⁰² *Id.* at 4.

¹⁰³ *Id.*

argument that Avangrid's dividend yields and IBES growth projections have fallen since Mr. McKenzie conducted his analysis, NEET NY states that capital market data constantly changes, and the fact that certain inputs to Mr. McKenzie's analysis have changed does not provide sufficient justification to call into question Mr. McKenzie's conclusions from his comprehensive analysis.¹⁰⁴ NEET NY notes that Utility Intervention Unit did not provide a comprehensive analysis, selectively updated certain methods, and failed to test its results against the Commission's tests of reasonableness.¹⁰⁵

46. Regarding Utility Intervention Unit's contention that NEET NY's Value Line analysis is skewed because Value Line's growth rate estimates for PG&E are higher than the IBES growth rate estimates for PG&E, NEET NY explains that these differences in analysts' estimated growth rates are precisely the reason to reference more than one source of data. NEET NY explains that there is no source of analysts' estimated growth rates that is superior and this is why the Commission explained, in Order No. 531, that there may be more than one valid source of growth rate estimates.¹⁰⁶ NEET NY maintains that the fact that the Value Line and IBES growth rate estimates for PG&E are not equal is no basis to exclude PG&E's high-end growth estimate from the Value Line-based DCF results. With respect to Utility Intervention Unit's challenge of the Value Line growth rates for PG&E because growth rates incorporate PG&E's anomalous costs due to the San Bruno gas pipeline explosion, NEET NY argues that Utility Intervention Unit is second-guessing the projections of securities analysts, which the Commission relies on as an impartial guide to investors' expectations.¹⁰⁷

47. NEET NY also argues that the New York Commission's analysis fails to consider the Commission's Opinion No. 531 precedent on setting a public utility's base ROE where the evidence indicates that capital market conditions are anomalous. NEET NY asserts that the New York Commission does not present any arguments or facts concerning capital market conditions, and does not challenge Mr. McKenzie's evidence, findings or conclusions on capital market conditions.¹⁰⁸ NEET NY explains that, where there is evidence of anomalous capital market conditions, as there is here, the Commission does not rely on a mechanical use of its DCF methodology, but instead considers additional evidence of ROE methodologies.¹⁰⁹ The New York Commission

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 6 (citing Opinion No. 531, 147 FERC ¶ 61,243 at P 90).

¹⁰⁷ *Id.* at 7.

¹⁰⁸ NEET NY November 21, 2016 Answer at 7.

states that the New York Commission has not challenged Mr. McKenzie's evidence on alternative ROE methodologies.¹¹⁰ NEET NY further argues that the New York Commission's claim - that its proposed base ROE of 8.0 percent is reasonable due to the current low interest rate environment - is erroneous. NEET NY maintains that low interest rates indicate anomalous capital market conditions that warrant consideration of further evidence to set the base ROE.¹¹¹ NEET NY also asserts that the Commission has rejected the New York Commission's view that there is lower business risk for a typical transmission-only entity, like NEET NY.¹¹²

48. Additionally, NEET NY argues that protesters' recommended ROEs would violate *Hope*¹¹³ and *Bluefield*¹¹⁴ standards and Commission precedent because their proposed ROEs are too low as compared to the range of state-authorized ROEs in the Value Line Electric Utility group. NEET NY asserts that the Commission has explained that a discrepancy between state commission-authorized ROEs and a proposed transmission ROE produced by the DCF methodology serves as an indicator that an upward adjustment to the proposed transmission ROE is necessary.¹¹⁵ NEET NY asserts that the New York Commission's proposed base ROE of 8.0 percent is below every state-commission authorized ROE that was studied by Mr. McKenzie over the study period for both "integrated electric utilities" and the proxy group.¹¹⁶ NEET NY similarly argues that Utility Intervention Unit's proposed ROE range of 9.5-9.85 percent is lower than a comparable range of state-authorized ROEs extending up to 10.2 percent.¹¹⁷ NEET NY also argues that the New York Commission's proposed base ROE of 9.3 percent is

¹⁰⁹ *Id.* at 7-8.

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.* at 9.

¹¹² *Id.* (citing Opinion No. 531, 147 FERC ¶ 61,243 at P 148).

¹¹³ *FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944) (*Hope*).

¹¹⁴ *Bluefield Waterworks & Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) (*Bluefield*).

¹¹⁵ NEET NY November 21, 2016 Answer at 8 (citing Opinion No. 531, 147 FERC ¶ 61,243 at P 148).

¹¹⁶ *Id.* at 8; Exhibit No. NNY-308, at 1, 3.

¹¹⁷ NEET NY December 29, 2016 Answer at 10.

equivalent to or below the ROEs rejected by the Commission in Opinion Nos. 531 and 551 as insufficient to meet regulatory standards.¹¹⁸

49. NEET NY argues that Unit Intervention Unit fails to support its proposed ROE range of 9.5-9.85 percent with the established benchmark evidence that the Commission approved in Order No. 531. For this reason, NEET NY therefore states that Unit Intervention Unit's evidence about Lone Star's ROE, New York Transco's ROE, and the ROEs of five New York distribution companies is not relevant under Commission precedent.¹¹⁹

50. NEET NY states that it is entitled to an RTO/ISO Participation Adder, consistent with Commission precedent. NEET NY contends that the New York Commission's arguments that NEET NY should not receive an RTO/ISO Participation Adder are merely a collateral attack on the Commission's policy regarding the RTO and ISO participation adder, and do not present a disputed issue of material fact. NEET NY states, however, that its entitlement to the RTO/ISO Participation Adder is contingent upon NEET NY becoming a transmission owner in the NYISO and transferring functional control of a transmission project it develops to the NYISO.¹²⁰ NEET NY asserts that, beyond these requirements, the Commission does not require additional justification for the RTO/ISO Participation Adder. NEET NY also argues that the Commission has rejected arguments that the RTO/ISO Participation Adder should be denied where a transmission developer becomes a member of an RTO or ISO as a consequence of bidding to build a transmission project,¹²¹ or where the transmission developer building the project is simply doing something that it is already required to do under existing obligations.¹²²

¹¹⁸ NEET NY November 21, 2016 Answer at 9 (citing Opinion No. 531, 147 FERC ¶ 61,243 at PP 142-52 (rejecting 9.39 percent base ROE for ISO New England Transmission Owners); *Association of Businesses Advocating Tariff Equity Coalition of MISO Transmission Customers*, Opinion No. 551, 156 FERC ¶ 61,234, at PP 135-36, 275-81 (2016) (rejecting 9.29% based ROE for the MISO Transmission Owners)).

¹¹⁹ NEET NY December 29, 2016 Answer at 8-9.

¹²⁰ NEET NY November 21, 2016 Answer at 13-15.

¹²¹ *Id.* at 14 & n.47 (citing *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,097, at P 95 (2016), *order on reh'g and compliance*, 158 FERC ¶ 61,060 (2017)).

¹²² *Id.* at 14 & n.48 (citing *Pac. Gas & Elec. Co.*, 154 FERC ¶ 61,118, at PP 7, 9-11 (2016)).

d. Commission Determination

51. Our preliminary analysis indicates that NEET NY's proposed base ROE of 10.5 percent has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we accept NEET NY's proposed ROE for filing and set it for hearing and settlement judge procedures.

52. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹²³ If the parties desire, they may, by mutual agreement, request a specific judge as the Settlement Judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. Pursuant to Rule 503, the Chief Judge may also consolidate this proceeding and Docket Nos. ER16-2716-000, ER16-2716-001, ER16-2720-000, and ER16-2720-001 for purposes of hearing and settlement judge procedures if the Chief Judge determines that there are common issues fact among the three proceedings.¹²⁴

53. Consistent with previous Commission orders,¹²⁵ we grant NEET NY's request for a 50 basis point RTO/ISO Participation Adder in NYISO, subject to the ROE being within the zone of reasonableness. We reject the New York Commission's argument that we reconsider our policies with respect to this incentive as outside the scope of this proceeding and inapposite to the basis used by the Commission to consider this incentive. The Commission's regulations clearly define RTO/ISO participation,¹²⁶ and require that applicants must propose that operational control of the applicant's transmission system

¹²³ 18 C.F.R. § 385.603.

¹²⁴ *Id.* § 385.503.

¹²⁵ See, e.g., *MidAm. Cent. Cal. Transco*, 147 FERC ¶ 61,179, at P 45 (2014); *Transource Missouri*, 141 FERC ¶ 61,075 at P 75; *XEST*, 149 FERC ¶ 61,182 at P 64; *Transource Kansas*, 151 FERC ¶ 61,010 at P 46.

¹²⁶ 18 C.F.R. § 35.34.

will be transferred to the RTO/ISO.¹²⁷ A utility is presumed eligible for an incentive for RTO/ISO participation “if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization, and that its membership is ongoing,” and it need not provide additional justification as to the necessity or benefits of the incentive.¹²⁸ Our approval of this incentive is conditioned on NEET NY’s commitment to become a member of NYISO and to transfer operational control of the transmission projects to NYISO once the transmission projects have been placed in service.¹²⁹

3. Depreciation Rates

a. Proposal

54. NEET NY states that its proposed Template includes stated depreciation rates for transmission and general plant. NEET NY explains that because it is a new entity with no assets yet in service, it lacks an operating history upon which to base a depreciation study. NEET NY asserts that the Commission has found that it is appropriate to use the depreciation rates of an affiliate as a proxy for the new entity to adopt in determining its proposed depreciation rates.¹³⁰ NEET NY proposes to adopt the depreciation rates of Lone Star, a transmission service provider in the Electric Reliability Council of Texas, Inc. (ERCOT), which awarded its first transmission project in ERCOT and the Public Utility Commission of Texas Competitive Renewable Energy Zone process.¹³¹ NEET NY asserts that when it places a new transmission project in service, it will be similar to Lone Star, because it is expected to own exclusively new transmission facilities, rather than a mix of old and new transmission facilities like other transmission-owning entities in the NextEra corporate family. NEET NY therefore maintains that it is appropriate to use Lone Star’s depreciation rates as a proxy for its depreciation rates. NEET NY

¹²⁷ *Id.* § 35.34(i).

¹²⁸ *See Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,004, at P41, *order on reh’g*, 151 FERC ¶ 61,269 (2015).

¹²⁹ 18 C.F.R. § 35.34.

¹³⁰ NEET NY Filing at 7 & n.16 (citing, e.g., *NEET West*, 154 FERC ¶ 61,009 at P 103).

¹³¹ *Id.* at 7; Exhibit No. NNY-200, Direct Testimony of Alan C. Heintz at 14 (Heintz Test.) *See id.*, Appendix C, Exhibit No. NNY-203, which includes the testimony and depreciation study for Lone Star in PUCT Docket No. 42469, and Exhibit No. NNY-204, which includes the PUCT order approving a stipulation and settlement that included Lone Star’s proposed depreciation rates, as presented in the testimony and depreciation.

commits to file revised depreciation rates reflecting the depreciation of its actual facilities within five years after NEET NY places an asset in service.¹³²

b. Commission Determination

55. We accept NEET NY's proposed depreciation rates. We recognize that, because NEET NY's transmission facilities have yet to be identified, there is no historical data to support a depreciation study. In the past, the Commission has accepted formula rates that use a corporate affiliate's Commission-approved depreciation rates for a transmission start-up, and we do so here.¹³³ We find that Lone Star's depreciation rates would be an appropriate proxy for NEET NY to adopt in determining its proposed depreciation rates.

56. We accept NEET NY's commitment to file revised depreciation rates reflecting the depreciation of its actual facilities within five years after NEET NY places an asset in service.¹³⁴

4. Formula Rate

a. Proposal

57. NEET NY states that its proposed formula rate is forward-looking, and is similar to formula rates the Commission has recently accepted for other competitive transmission developers.¹³⁵ To calculate the ATRR, NEET NY will project the values that will populate the Template for each Rate Year, and calculate a true-up of the projected values after the actual data becomes available on the FERC Form No. 1 the year after the Rate Year. Any difference between the projected ATRR and actual ATRR for the previous Rate Year will be reflected in an appropriate adjustment to the following year's ATRR.¹³⁶

58. NEET NY also states that the proposed Template provides for the recovery of a return on rate base, taxes, depreciation and amortization expense, O&M expense, A&G

¹³² NEET NY Application, Heintz Test., Ex. NNY 200 at 14.

¹³³ See *XEST*, 149 FERC ¶ 61,182 at P 124.

¹³⁴ NEET NY Application, Heintz Test., Ex. NNY 200 at 14.

¹³⁵ NEET NY September 30 Filing at 5 (citing, e.g., *Transource West Virginia, LLC*, 152 FERC ¶ 61,180 (2015); *Transource Kansas*, 151 FERC ¶ 61,010; *Kanstar*, 152 FERC ¶ 61,209; *XEST*, 149 FERC ¶ 61,182; *XETD*, 149 FERC ¶ 61,181; *Transource Wisconsin*, 149 FERC ¶ 61,180).

¹³⁶ *Id.*

expense, less any revenue credits.¹³⁷ NEET NY states that the proposed Template includes stated values for PBOP expense, depreciation rates and ROE. According to NEET NY, these values may only be changed pursuant to a filing pursuant to section 205 of the FPA.¹³⁸

59. NEET NY states that the proposed Protocols govern the specific procedures for notice, requests for information, and review and challenges related to NEET NY's annual true-up and projected net revenue requirement.¹³⁹ It maintains that the proposed Protocols are transparent, are consistent with the Commission's guidance on protocols for forward-looking formula rates, and will provide NEET NY's customers with sufficient information and procedural safeguards to facilitate the annual review of the inputs to the template. NEET NY also notes that its proposed Protocols are consistent with the Protocols submitted by Midcontinent Independent System Operator, Inc. (MISO) and MISO Transmission Owners and accepted by the Commission in 2015.¹⁴⁰

b. Deficiency Response

60. In response to Commission staff's Deficiency Letter, NEET NY submitted an Excel spreadsheet and template, additional information concerning interest rates, unfunded reserves, PBOPs, the methodologies for computing the regulatory asset carrying charge, affiliate cost allocation, Accumulated Deferred Income Taxes (ADIT) allocator, and several corrections made to items in the Template.

61. Regarding the unfunded reserves, NEET NY states that it followed Commission precedent, in *Transource Wisconsin*, by establishing a mechanism to reduce rate base for any cost-free form of financial capital from customers.¹⁴¹ NEET NY proposes to add a footnote to its Template to clarify what amounts are included in unfunded reserves and that NEET NY will not establish any reserves in accounts 228.1 through 228.4 without prior authorization.¹⁴²

¹³⁷ *Id.* at 5-6; Heintz Test. at 9, 13-14.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 10.

¹⁴¹ NEET New York Deficiency Response at 5 (citing *Transource Wisconsin*, 149 FERC ¶ 61,180 at P 43).

¹⁴² *Id.* at 5-6.

62. Regarding PBOPs, NEET NY proposes to eliminate the recovery of any PBOP expense because its originally proposed stated value would result in very small amounts of PBOPs collected through the Template and the administrative requirements of maintaining an external trust account would be significant in comparison. NEET NY states that if it seeks to recover a non-zero PBOP value in its Template in the future, it will make a limited section 205 filing under the FPA, supported by an actuarial study to establish the amount of PBOP recovery.¹⁴³

63. Regarding interest rates, NEET NY states that it will recover a return on rate base that reflects its actual cost of debt once it has a debt facility in place, whether that financing is construction financing or the issuance of long-term debt. NEET NY states that, prior to a transmission project award, NEET NY does not anticipate having a debt facility in place. If it is awarded a project, NEET NY states that it may finance the transmission project with either construction financing or when in-service, depending on the amount of capital required. Regarding the true-up of debt, NEET NY states that it “would true-up its cost of debt if it had an actual debt facility in place, meaning that if a rate period utilized an estimated cost of debt and during that period an actual debt facility was put in place, Attachment 3 of the Template would reflect the use of the actual debt facility for the months it was in place and the actual revenue requirement for that rate period and resulting true-up adjustment would reflect the actual cost of debt.”¹⁴⁴

64. Finally, as to its proposed ADIT allocator, NEET NY states that its Formula Rate contains ADIT which is allocated based on the Transmission Plant (TP) allocator. It states that Mr. Heintz’s Testimony states, however, that ADIT is allocated based on the Net Plant (NP) allocator. NEET NY states that the TP allocator is correct, while the reference in Mr. Heintz’s testimony to the NP allocator is a mistake.¹⁴⁵

c. Commission Determination

65. We accept the Formula Rate, subject to condition, to be effective once the Template and Protocols are filed with the Commission to become part of NYISO’s Tariff, consistent with the effective date established in that future proceeding, subject to a compliance filing to be made within 30 days of the date of this order that addresses the matters discussed herein.¹⁴⁶ While the Template generally conforms to other

¹⁴³ *Id.* at 6-7.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.* at 14.

¹⁴⁶ The United States Court of Appeals for the District of Columbia Circuit has held that, in certain circumstances, the Commission has "authority to propose

Commission-accepted formula rate templates, there are variances that NEET NY has not explained, as well as errors that NEET NY must correct. Additionally, we find that NEET NY's Protocols meet the standards set forth in Commission precedent;¹⁴⁷ however, certain items in the Protocols are unjust and unreasonable and must be removed. We therefore direct NEET NY to modify its Formula Rate and to provide further explanation, as described below.

i. Formula Rate Template Correction

66. Appendix A, Note G states that prior to obtaining long-term debt, the cost of debt will be LIBOR plus 1.5 percent; once NEET NY obtains long-term debt, it will use its actual cost of long-term debt as determined in Attachment 3. In its response to the Deficiency Letter, NEET NY clarifies that it will recover a return on rate base that reflects its actual cost of debt as calculated in Attachment 3 once it has a debt facility in place, whether that financing is construction financing or the issuance of long-term debt. However, we find that NEET NY's proposal, as clarified in its response to the Deficiency Letter, to calculate its cost of debt using Attachment 3 once it has *any* debt facility in place, whether that financing is construction financing or the issuance of long-term debt, may not result in an accurate reflection of NEET NY's debt costs in its formula rate. Specifically, it is unclear whether Attachment 3 will accurately reflect the components of NEET NY's cost of debt during any period that NEET NY utilizes construction financing prior to issuing long-term debt. Attachment 3 references line items in the FERC Form No. 1 to calculate interest expense¹⁴⁸ associated with long-term debt and balance of long-term debt¹⁴⁹ that may not reflect the interest expense and balance of debt associated with

modifications to a utility's [FPA section 205] proposal *if the utility consents to the modifications.*" *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114-15 (D.C. Cir. 2017).

¹⁴⁷ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127 (2012), *order on investigation*, 143 FERC ¶ 61,149 (2013), *order on reh'g*, 146 FERC ¶ 61,209 (2014), *order on compliance*, 146 FERC ¶ 61,212 (2014), *order on compliance*, 150 FERC ¶ 61,025 (2015); *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,097, at P 127 (2016).

¹⁴⁸ Interest on Long-Term Debt (Account 427), Amortization of Debt Discount and Expense (Account 428), Amortization of Loss on Required Debt (Account 428.1), Amortization of Premium on Debt-Credit (Account 429), Amortization of Gain on Required Debt-Credit (Account 429.1), Interest on Debt to Assoc. Companies (Account 430).

¹⁴⁹ Bonds (Account 221), Reacquired Bonds (Account 222), Advances from

construction financing, since it is typical to utilize short-term debt for construction financing.¹⁵⁰ Accordingly, we direct NEET NY, in a compliance filing to be made within 30 days of the date of this order, to either demonstrate that in the determination of the cost of debt in Attachment 3 in the Template, and the FERC Form No. 1 references used therein, will accurately reflect its actual cost of debt during any periods of construction financing, or, alternatively, revise the Template to provide for the determination of the cost of debt in the return on rate base reflecting its actual cost of debt during any period that NEET NY utilizes construction financing prior to issuing long-term debt.

67. NEET NY states that “[w]hen [NEET NY] is selected to develop a transmission project for the first time, a filing will be made to incorporate the Formula Rate into the NYISO Tariff. Such a filing would be ministerial in nature.”¹⁵¹ We clarify that our approval here does not waive provisions of the NYISO Tariff which NEET NY may be required to comply with in order for its Formula Rate to be incorporated into the NYISO Tariff.

ii. Formula Rate Protocols Corrections

68. We reject NEET NY’s proposed section IV.K, which attempts to define the scope of various section 205 filings under the FPA. The Commission has found that provisions in formula rate protocols that attempt to define the scope of future section 205 filings are inappropriate.¹⁵² In *ATX Southwest*, the Commission rejected such a provision, stating

Associated Companies (Account 223), Other Long-Term Debt (Account 224).

¹⁵⁰ The Commission has previously accepted certain formula rate provisions to determine the actual cost of construction financing used prior to issuance of long-term debt. *See, e.g., Kanstar*, 152 FERC ¶ 61,209 at P 28; *Midwest Power Transmission Arkansas, LLC*, 152 FERC ¶ 61,210 (2015); *South Central MCN*, 153 FERC ¶ 61,099. *See also* 18 C.F.R. pt. 101, Electric Plant Instruction No. 3(a)(17) (2017). The Commission’s Electric (Gas) Plant Instruction no. 3(a)(17) provides a formula for computing rates used to capitalize allowances for funds used during construction (AFUDC), which attributes short-term debt first toward such construction financing, and then other sources of capital secondarily to the extent that CWIP balances exceed the balance of short term debt.

¹⁵¹ NEET NY September 30 Filing at 12.

¹⁵² *ATX Southwest, LLC*, 152 FERC ¶ 61,193, at P 85 (2015) (*ATX Southwest*). The provision rejected in *ATX Southwest*, similar to the provision in NEET NY’s protocols, stated, in part, that ATX Southwest may, “at its discretion and at a time of its choosing, make a limited filing pursuant to Section 205 to modify stated values in the

that the scope of any future section 205 filing will be addressed when such a filing is made. We direct NEET NY to revise this section accordingly.

The Commission orders:

(A) NEET NY's request for a Regulatory Asset Incentive is hereby granted effective November 30, 2016, as discussed in the body of this order.

Formula Rate . . .,” and that the sole issue of that proceeding would be whether the proposed change is just and reasonable.

(B) NEET NY's request for a Hypothetical Capital Structure Incentive is hereby granted effective November 30, 2016, as discussed in the body of this order.

(C) NEET NY's proposed Formula Rate is hereby accepted for filing, subject to a compliance filing to be made within 30 days of the date of this order, as discussed in the body of this order. NEET NY's proposed Formula Rate will take effect once filed with the Commission to become part of NYISO's Tariff, consistent with the effective date established in that future proceeding.

(D) NEET NY's proposed ROE is hereby accepted for filing and subject to the hearing procedures ordered below. NEET NY's proposed RTO/ISO Participation Adder is hereby granted subject to the conditions above, as discussed in the body of this order.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning the NEET NY's proposed base ROE. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (F) and (G) below.

(F) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2017), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(G) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(H) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing

conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.