

162 FERC ¶ 61,107  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

New York Independent System Operator, Inc.

Docket Nos. ER13-102-009  
ER13-102-010  
ER13-102-011

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS  
AND REQUIRING FURTHER COMPLIANCE

(Issued February 15, 2018)

1. On March 22, 2016, the New York Independent System Operator, Inc. (NYISO) submitted revisions to its Open Access Transmission Tariff (OATT) to comply with Order No. 1000<sup>1</sup> and the Commission's Fourth Compliance Order in this proceeding.<sup>2</sup> On September 13, 2016, NYISO submitted further revisions to its OATT and to its Market Administration and Control Area Services Tariff (Services Tariff) to comply with those orders.<sup>3</sup> In this order, we conditionally accept the Fifth and Sixth Compliance Filings, effective April 1, 2016, as requested, subject to further compliance.

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<sup>1</sup> *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, *order on reh'g*, 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).

<sup>2</sup> *N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,341 (2015) (Fourth Compliance Order). NYISO's March 22, 2016 Compliance Filing will be referred to herein as the Fifth Compliance Filing.

<sup>3</sup> NYISO's September 13, 2016 Compliance Filing will be referred to herein as the Sixth Compliance Filing.

## **I. Background**

2. On May 18, 2015, NYISO and the New York Transmission Owners (NYTO)<sup>4</sup> (together, the Filing Parties) jointly submitted revisions to Attachment Y of the NYISO OATT and filed a *pro forma* development agreement for NYISO's reliability transmission planning process (Reliability Development Agreement) in response to the Third Compliance Order (Fourth Compliance Filing).<sup>5</sup> On December 23, 2015, the Commission issued the Fourth Compliance Order, accepting, subject to further compliance, the Filing Parties' Fourth Compliance Filing.<sup>6</sup> In particular, the Commission directed the Filing Parties to: (1) submit a *pro forma* development agreement for NYISO's public policy transmission planning process; (2) revise the Reliability Development Agreement; (3) revise NYISO's proposed interconnection process for transmission projects selected pursuant to NYISO's regional transmission planning process; (4) submit a comparable operating agreement to the NYISO Transmission Owners Agreement;<sup>7</sup> and (5) submit additional tariff revisions.<sup>8</sup> In response, NYISO submitted the Fifth and Sixth Compliance Filings presently before the Commission.<sup>9</sup>

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<sup>4</sup> NYTOs consist of: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Lighting Company; New York Power Authority (NYPA); New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Rochester Gas & Electric Corporation; and Orange & Rockland Utilities, Inc.

<sup>5</sup> *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,040, at P 3 (2015) (Third Compliance Order).

<sup>6</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 1.

<sup>7</sup> The NYISO Transmission Owners Agreement is a multi-party agreement executed by NYISO and the incumbent Transmission Owners that originally transferred operational control of their facilities to NYISO at NYISO's formation. *See* NYISO, Agreement Between NYISO and TOs (1999), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/nyiso\\_to\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/nyiso_to_agreement.pdf).

<sup>8</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at PP 19–20, 67, 73, 76, 79, 94, 117. On March 23, 2016, the Commission granted NYISO's request for a partial extension of its deadline to comply with the Fourth Compliance Order to allow NYISO to complete a comprehensive review of tariff references to "Transmission Owners" to ensure clarity in the rights and responsibilities of new transmission owners that execute the *pro forma* operating agreement discussed herein. *N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. ER13-102-007 (Mar. 23, 2016).

<sup>9</sup> NYISO explains that, due to the nature of the matters addressed in the Fifth and Sixth Compliance Filings, NYISO submits the present filings on its own, with the

## **II. Notice of Filing and Responsive Pleadings**

3. Notice of NYISO's Fifth Compliance Filing in Docket No. ER13-102-009 was published in the *Federal Register*, 81 Fed. Reg. 18,622 (2016), with protests and interventions due on or before April 12, 2016. LS Power Transmission, LLC and LSP Transmission Holdings, LLC (collectively, LS Power) filed timely comments and a protest, and New York Transco, LLC (NY Transco) filed timely comments. On April 27, 2016, NYISO filed an answer to the protest and comments.

4. On May 24, 2016, NYISO filed, in Docket No. ER13-102-010, an errata to its Fifth Compliance Filing. Notice of NYISO's errata filing was published in the *Federal Register*, 81 Fed. Reg. 35,007 (2016), with protests and interventions due on or before June 14, 2016. None was filed.

5. Notice of NYISO's Sixth Compliance Filing in Docket No. ER13-102-011 was published in the *Federal Register*, 81 Fed. Reg. 64,891 (2016), with protests and interventions due on or before October 4, 2016. NYTOs and NY Transco filed timely protests. On October 18, 2016, NextEra Energy Resources, LLC (NextEra) filed an answer to the protests. On October 19, 2016, NYISO and LS Power filed answers to the protests. On October 28, 2016, NYTOs filed an answer to NYISO's answer.

## **III. Procedural Matters**

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>10</sup> prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept NYISO's, NextEra's, LS Power's, and NYTOs' answers because they have provided information that assisted us in our decision-making process.

## **IV. Substantive Matters**

7. We find that NYISO has partially complied with the directives in the Fourth Compliance Order. Accordingly, we conditionally accept the Fifth and Sixth Compliance Filings, effective April 1, 2016, as requested, subject to further compliance. We direct NYISO to submit, within 30 days of the date of issuance of this order, a further compliance filing, as discussed below.

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understanding that NYTOs and other interested parties may file separate comments. NYISO March 22, 2016 Transmittal Letter at 1 n.1.

<sup>10</sup> 18 C.F.R. § 385.213(a)(2) (2017).

**A. Pro Forma Development Agreements**

**1. Fourth Compliance Order**

8. In the Fourth Compliance Order, the Commission directed the Filing Parties to submit “either a *pro forma* development agreement for the public policy transmission planning process, or tariff revisions clarifying that NYISO will not require a development agreement for the public policy transmission planning process.”<sup>11</sup>

9. In addition, the Commission directed the Filing Parties to revise the NYISO OATT and the Reliability Development Agreement “to require that Responsible Transmission Owners<sup>[12]</sup> sponsoring regulated backstop solutions sign the [Reliability] Development Agreement if the regulated backstop solution is selected as the more efficient or cost-effective solution to a Reliability Need<sup>[13]</sup> or is triggered to proceed in parallel with the alternative regulated transmission solution.”<sup>14</sup>

10. With regard to the terms of the Reliability Development Agreement, the Commission required a series of revisions. Specifically, the Commission directed the Filing Parties to revise: (1) the definition of Force Majeure in Article 1 “to include examples of events to more closely match that of NYISO’s *pro forma* [Large Generator Interconnection Agreement],”<sup>15</sup> and Article 8.1 to include language similar to PJM Interconnection, L.L.C.’s (PJM) Designated Entity Agreement, which “excuses non-performance for the duration of a Force Majeure event and while the developer exercises reasonable efforts to alleviate such event;”<sup>16</sup> (2) the definition of Connecting

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<sup>11</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 19.

<sup>12</sup> Responsible Transmission Owners are: “The Transmission Owner or Transmission Owners designated by the ISO: (i), pursuant to Section 31.2.4.3, to prepare a proposal for a regulated backstop solution to a Reliability Need or to proceed with a regulated solution to a Reliability Need, or (ii) pursuant to Section 31.2.11.3, to prepare a Gap Solution and a conceptual permanent solution to a Reliability Need. The Responsible Transmission Owner will normally be the Transmission Owner in whose Transmission District the ISO identifies a Reliability Need.” NYISO, OATT, Attachment Y, § 31.1.1 (15.0.0).

<sup>13</sup> A Reliability Need is: “A condition identified by the ISO as a violation or potential violation of one or more Reliability Criteria and, for purposes of administering the Gap Solution process in Section 31.2.11, applicable local criteria.” *Id.*

<sup>14</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 45.

<sup>15</sup> *Id.* P 51.

Transmission Owner in Article 1 and elsewhere in NYISO's tariffs to resolve the ambiguity that the "term 'Standard Large Interconnection Agreement' does not appear anywhere in NYISO's tariffs other than the definition of 'Connecting Transmission Owner,'"<sup>17</sup> (3) Article 3.3.3 "to change the language from requiring a developer to notify NYISO 'whether it will' meet a Critical Path Milestone to requiring a developer to notify NYISO 'whether, to the best of its knowledge, it expects' to meet that milestone;"<sup>18</sup> (4) Article 4 to incorporate interconnection milestones controlled by incumbent Transmission Owners only as Advisory Milestones;<sup>19</sup> (5) Articles 7.1 and 8.1 "to excuse nonperformance due to delays of a Connecting Transmission Owner, or of an operator or owner of an Affected System;"<sup>20</sup> (6) "Article 8.1 to state that cost recovery may be permitted as determined by the Commission in the event of termination caused by the developer's inability to complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event, or by NYISO declaring a default pursuant to the default provisions;"<sup>21</sup> (7) "Article 7.2 to state that NYISO will not unreasonably withhold, condition, or delay consent to a longer cure period if it would not threaten the ability of the developer to complete the Transmission Project by the Required Project In-Service Date;"<sup>22</sup> (8) the liability provisions in Article 9.1 to make the "terms mutual and to revise the language 'in any way associated with this Agreement' to state 'under this Agreement,'"<sup>23</sup> and (9) the indemnity provisions in Article 9.2 to make the terms mutual, "to remove the 'or associated with' language, and to remove the modifier 'gross' before negligence."<sup>24</sup> As discussed further below in subsection IV.B, the Commission also directed the Filing Parties to revise the interconnection provisions contained in Article 4 of the Reliability Development Agreement.<sup>25</sup>

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<sup>16</sup> *Id.* P 90.

<sup>17</sup> *Id.* P 52.

<sup>18</sup> *Id.* P 57.

<sup>19</sup> *Id.* P 67.

<sup>20</sup> *Id.* P 91.

<sup>21</sup> *Id.* P 94.

<sup>22</sup> *Id.* P 98.

<sup>23</sup> *Id.* P 100.

<sup>24</sup> *Id.* P 103.

<sup>25</sup> *Id.* P 67.

## 2. Fifth Compliance Filing

11. NYISO proposes a *pro forma* development agreement for its public policy transmission planning process (Public Policy Development Agreement) to replace Appendix D, section 31.7, of Attachment Y of the NYISO OATT, along with revisions to section 31.4 of Attachment Y to establish requirements for entering into a Public Policy Development Agreement and the consequences of terminating that Agreement.<sup>26</sup> NYISO states that the Public Policy Development Agreement and the proposed requirements are generally consistent with the modifications the Commission required for the Reliability Development Agreement.<sup>27</sup>

12. NYISO also proposes revisions to Attachment Y to require that any Developer—whether a Responsible Transmission Owner sponsoring a regulated backstop solution, or a nonincumbent transmission developer or incumbent Transmission Owner developing an alternative regulated transmission solution—execute a Reliability Development Agreement if its solution is selected as the more efficient or cost-effective solution to a Reliability Need. In addition, NYISO submits revisions to require a Responsible Transmission Owner sponsoring a regulated backstop solution to execute a Reliability Development Agreement if NYISO triggers that solution to proceed in parallel with the alternative regulated transmission solution or the Responsible Transmission Owner agrees to step in to complete the selected alternative regulated transmission solution.<sup>28</sup>

13. Furthermore, NYISO proposes additional revisions to its Reliability Development Agreement in response to the Commission’s directives in the Fourth Compliance Order.<sup>29</sup> With regard to the Commission’s directive to revise Article 8.1 “to state that cost recovery may be permitted as determined by the Commission” in the event of termination of the Reliability Development Agreement under certain circumstances,<sup>30</sup> NYISO proposes to state that “cost recovery may be permitted as determined by FERC,” and also add the following: “*provided, however*, that if the Developer is the Responsible Transmission Owner, it may also recover costs to the extent permitted under the NYISO/TO Reliability Agreement.”<sup>31</sup> NYISO proposes similar language in other parts

<sup>26</sup> Proposed NYISO OATT, Attachment D, § 31.7; Proposed NYISO OATT, Attachment Y, § 31.4.

<sup>27</sup> NYISO March 22, 2016 Transmittal Letter at 40–44.

<sup>28</sup> Proposed NYISO OATT, Attachment Y, § 31.2.8.1.6; NYISO March 22 Transmittal Letter at 31–33.

<sup>29</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Articles 1, 3.3.1, 3.3.3, 4, 7.1, 7.2, 7.3, 8.1, 9.1, 9.2, and 15.5.

<sup>30</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 94.

of the Reliability Development Agreement and OATT.<sup>32</sup> NYISO explains that this additional language is necessary because “the Responsible Transmission Owner’s obligation to submit a regulated backstop solution is subject to its ability to recover its project proposal, development, construction, operation and maintenance costs under the NYISO/TO Reliability Agreement.”<sup>33</sup>

### **3. Comments and Protests**

14. LS Power argues that the “provided, however” clause in Article 8.1 is overly broad, inappropriately placed, and should be struck. LS Power contends that NYISO does not justify why the language “cost recovery may be permitted as determined by FERC” is not sufficient for Responsible Transmission Owners, or why the added language is necessary only where NYISO terminates the Reliability Development Agreement due to the Responsible Transmission Owner’s inability to complete the project by the Required Project In-Service Date or due to NYISO declaring a default. LS Power asserts that the Commission will take into account the NYISO/TO Reliability Agreement in determining cost recovery.<sup>34</sup>

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<sup>31</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 8.1 (emphasis in original). The NYISO/TO Reliability Agreement is an agreement between NYISO and the incumbent Transmission Owners that requires incumbent Transmission Owners designated as Responsible Transmission Owners to, among other obligations, develop and construct regulated backstop solutions. *See* NYISO, Agreement Between NYISO and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs (June 10, 2010), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/Comprehensive\\_Planning\\_Process\\_for\\_Reliability\\_Needs\\_Agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/Comprehensive_Planning_Process_for_Reliability_Needs_Agreement.pdf) (NYISO/TO Reliability Agreement).

<sup>32</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 15.3 (“The Developer may recover the costs of the Transmission Project in accordance with the cost recovery requirements in the ISO Tariffs and, if the Developer is the Responsible Transmission Owner, the ISO Tariffs and the NYISO/TO Reliability Agreement.”); Proposed NYISO OATT, Attachment Y, § 31.2.10.1.2 (providing that NYISO may revoke its selection of a transmission project and the eligibility of the project developer “to recover its costs pursuant to the ISO’s regional cost allocation mechanism,” except that the project developer may recover its costs pursuant to certain OATT provisions “or as otherwise determined by the Commission” and “if the Developer is the Responsible Transmission Owner, it may also recover costs to the extent permitted under the ISO/TO Reliability Agreement”).

<sup>33</sup> NYISO March 22, 2016 Transmittal Letter at 34–35.

<sup>34</sup> LS Power April 12, 2016 Protest at 6–7.

#### 4. Answers

15. NYISO answers that Responsible Transmission Owners are required to submit regulated backstop solutions, subject to their eligibility for cost recovery, which the Commission has previously approved. According to NYISO, its revisions to Article 8.1 do not create new rights, but simply reflect existing rights.<sup>35</sup>

#### 5. Commission Determination

16. We find that NYISO has partially complied with the Commission's directives to file the Public Policy Development Agreement and to revise the terms of the Reliability Development Agreement. We conditionally accept the Public Policy Development Agreement and Reliability Development Agreement, effective April 1, 2016, and require NYISO to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions directed below to Article 8.1 of the Reliability Development Agreement and section 31.2.10.1.2 of Attachment Y of the OATT. We find that the aspects of the Public Policy Development Agreement and Reliability Development Agreement not otherwise discussed below are consistent with the Commission's prior directives, and we accept them without further discussion.

17. We find that LS Power raises valid concerns regarding NYISO's proposed revisions to Article 8.1 of the Reliability Development Agreement. NYISO proposes the same language in section 31.2.10.1.2 of Attachment Y of the OATT. In the First Compliance Order, the Commission recognized Responsible Transmission Owners' right "to recover costs that it prudently incurred to meet its obligation" to sponsor regulated backstop solutions "since only the Responsible Transmission Owner is required to provide the regulated backstop solution for a reliability transmission need."<sup>36</sup> Nothing has changed a Responsible Transmission Owner's rights under the NYISO/TO Reliability Agreement.<sup>37</sup>

18. Nevertheless, in the Second Compliance Order, the Commission explained that the NYISO/TO Reliability Agreement and the OATT "contain provisions requiring the Responsible Transmission Owner to make a section 205 filing 'consistent with FERC regulations' before including the cost of a regulated backstop solution in its revenue requirement, and, thus, the Responsible Transmission Owners must make such filings consistent with the Commission's regulations."<sup>38</sup> Therefore, we require NYISO to

<sup>35</sup> NYISO April 27, 2016 Answer at 11–12.

<sup>36</sup> *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 326 (2013) (First Compliance Order).

<sup>37</sup> See NYISO/TO Reliability Agreement, Articles 3.01–3.04 (explaining the cost recovery rights of Responsible Transmission Owners).



include in the compliance filing ordered herein revisions to Article 8.1 of the Reliability Development Agreement and section 31.2.10.1.2 of Attachment Y of the OATT to remove the “provided, however” clause because it does not reflect the Commission’s directives in the Second Compliance Order. Specifically, it does not reflect the requirement that a Responsible Transmission Owner must make a section 205 filing with the Commission to recover the costs of a regulated backstop solution and include in that filing project specific data.<sup>39</sup> Consistent with this precedent, a Responsible Transmission Owner may seek cost recovery “as determined by FERC,” the same as a nonincumbent transmission developer.<sup>40</sup>

19. With regard to the Commission’s directives to revise Article 9.2 of the Reliability Development Agreement, which addresses indemnification, we note that the Commission grants rehearing of this determination and directs NYISO to submit a further compliance filing in a concurrently-issued order in Docket Nos. ER15-2059-002 and ER13-102-008.<sup>41</sup>

## **B. Transmission Interconnection Procedures**

### **1. Fourth Compliance Order**

20. In the Fourth Compliance Order, the Commission determined that the proposal to require nonincumbent transmission developers to use the interconnection procedures in Attachments X and S of the OATT while incumbent Transmission Owners use the interconnection procedures in sections 3.7 and 4.5 of the OATT was unjust and unreasonable and unduly discriminatory and preferential.<sup>42</sup> The Commission reasoned

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<sup>38</sup> *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at P 76 (2014) (Second Compliance Order) (citing NYISO/TO Reliability Agreement, Articles 3.03, 3.06; NYISO, OATT, § 6.10).

<sup>39</sup> *Id.* (detailing the project specific data the Commission requires be filed as part of a proceeding initiated by a Responsible Transmission Owner seeking cost recovery for a regulated backstop solution).

<sup>40</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 94 (directing NYISO to revise Article 8.1 of the Reliability Development Agreement “to state that cost recovery may be permitted as determined by the Commission in the event of termination caused by the developer’s inability to complete the Transmission Project by the Required Project In-Service Date for any reason . . . or by NYISO declaring a default”).

<sup>41</sup> *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124 (20187).

<sup>42</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 68. “Attachment X sets forth NYISO’s generation and ‘Merchant Transmission Facilities’ interconnection process. Attachment S contains the related cost requirements for that interconnection process,

that “requiring all Order No. 1000 projects to go through the same interconnection process in NYISO is necessary to ensure that all sponsors of transmission projects selected in the regional transmission plan for purposes of cost allocation are treated in a not unduly discriminatory or preferential manner.”<sup>43</sup> Accordingly, the Commission required the Filing Parties to revise Article 4 of the Reliability Development Agreement to clarify that all alternative regulated transmission solutions and regulated backstop solutions “will be evaluated for interconnection under Attachments X and S of the NYISO OATT, regardless of whether the entity developing the solution is a Transmission Owner signatory to the NYISO Transmission Owners Agreement or a nonincumbent transmission developer.”<sup>44</sup> The Commission noted that requiring regulated backstop solutions developed by Responsible Transmission Owners to use the Attachments X and S interconnection processes “does not alter or otherwise affect Transmission Owners’ ability to propose expansions and upgrades to their own system for transmission projects that are planned outside of NYISO’s regional transmission planning process . . . through the process in sections 3.7 and 4.5 of the NYISO OATT.”<sup>45</sup>

21. Although the Commission required the Filing Parties to modify their proposal so that all Order No. 1000 projects in NYISO go through the same interconnection process, the Commission recognized that “placing all Order No. 1000 projects into the interconnection queue raises two potential concerns: (1) the interconnection queue may become backlogged, delaying project development; and (2) NYISO may be unable to accurately study the impact of new proposed projects on the system if the interconnection queue includes multiple Order No. 1000 project proposals, only one of which will be selected and built.”<sup>46</sup> Therefore, the Commission stated that the Filing Parties could “propose a not unduly discriminatory or preferential process other than the process in Attachments X and S for conducting the interconnection studies necessary for NYISO to select the more efficient or cost-effective transmission solution in the regional transmission plan for purposes of cost allocation, and for that selected transmission project to interconnect to NYISO’s system.”<sup>47</sup>

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including the facilities cost allocation procedures.” *Id.* P 67 n.157. Sections 3.7 and 4.5 of the OATT set forth the transmission expansion process, which is more limited and flexible than the interconnection process in Attachment X. *Id.* P 69.

<sup>43</sup> *Id.* P 68.

<sup>44</sup> *Id.* P 67.

<sup>45</sup> *Id.* P 70.

<sup>46</sup> *Id.* P 73.

<sup>47</sup> *Id.*

22. The Commission also required the Filing Parties to revise the definition of “Merchant Transmission Facilities” in Attachment X of the NYISO OATT to be consistent with the definition in Order No. 1000, which “defined merchant transmission facilities ‘as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.’”<sup>48</sup> To further ensure clarity with regard to which transmission projects are subject to the interconnection process contained in Attachment X, the Commission required the Filing Parties to revise the NYISO OATT to clarify that “Attachment X applies to Merchant Transmission Facilities (as defined consistent with Order No. 1000), transmission facilities developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements (whether Merchant Transmission Facilities or not), and Order No. 1000 transmission projects (whether sponsored by incumbent Transmission Owners or nonincumbent transmission developers . . .).”<sup>49</sup>

## **2. Fifth Compliance Filing**

23. NYISO proposes a new interconnection process for transmission projects, referred to as the Transmission Interconnection Procedures, located in Attachment P of the NYISO OATT. NYISO states that it will apply the Transmission Interconnection Procedures “broadly to any entity—whether an incumbent Transmission Owner or a non-incumbent Developer—that is proposing a new transmission facility or upgrade to the New York State Transmission System” with two exceptions.<sup>50</sup> First, NYISO will not apply the Transmission Interconnection Procedures to new transmission facilities or upgrades proposed by Transmission Owners in their Local Transmission Owner Plan or NYPA transmission plan that are not subject to NYISO’s regional transmission planning process and for which the Transmission Owner is not seeking cost allocation under the NYISO OATT. Those projects will continue to be evaluated under the transmission expansion process in section 3.7 of the NYISO OATT. Second, NYISO also will not apply the Transmission Interconnection Procedures to controllable transmission lines for which the proposing entity is seeking Capacity Resource Interconnection Service to receive Unforced Capacity Deliverability Rights. Those projects will continue to be evaluated in the interconnection process in Attachments X and S of the NYISO OATT the same as any other project seeking Capacity Resource Interconnection Service. NYISO also proposes to revise the Reliability Development Agreement to align its provisions with these new interconnection requirements.<sup>51</sup>

<sup>48</sup> *Id.* PP 67, 76 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119).

<sup>49</sup> *Id.* P 76.

<sup>50</sup> NYISO March 22, 2016 Transmittal Letter at 11.

<sup>51</sup> *Id.* at 37–38 (proposing clarifying revisions to Articles 1, 3.4, 4.1, 4.2, and 5 of the Reliability Development Agreement).

24. A transmission developer will initiate the Transmission Interconnection Procedures by submitting a valid transmission interconnection application accompanied by a non-refundable application fee.<sup>52</sup> NYISO will then assign the transmission developer a position in a single interconnection queue, which includes generation and other types of transmission facilities, based on when NYISO receives the transmission interconnection application. NYISO contends that using a single interconnection queue will not delay the interconnection of competitive transmission projects because its interconnection queue is not a “hard” queue, meaning that a project’s progression through the queue is “largely driven by its own project development and not the progress, or lack thereof, of other projects” because NYISO allows non-competing projects to proceed through the study process in parallel, not sequentially or serially.<sup>53</sup> NYISO also proposes to establish transition rules for projects that have already begun using the existing interconnection procedures. Those rules allow a transmission developer to complete any studies for which the relevant study agreement has already been executed, but require that the developer use the proposed Transmission Interconnection Procedures where the relevant agreement has not yet been executed. In addition, NYISO’s proposed transition rules allow a transmission developer to retain an existing position within the interconnection queue and, where appropriate, consolidate multiple queue positions that are associated with a single transmission project.<sup>54</sup>

25. The proposed Transmission Interconnection Procedures provide for NYISO to perform three studies: (1) an optional Feasibility Study; (2) a System Impact Study; and (3) a Facilities Study.<sup>55</sup> NYISO states that an incumbent Transmission Owner is not required to undergo a Feasibility Study for expansions of its system under OATT sections 3.7 and 4.5 and, therefore, it proposes to make the Feasibility Study optional for all developers using the Transmission Interconnection Procedures. As soon as practicable after the transmission developer elects to proceed with the System Impact Study or when the results of the Feasibility Study are delivered, NYISO will tender the System Impact Study Agreement to the transmission developer and the Connecting Transmission Owner.<sup>56</sup> NYISO proposes to require transmission developers to

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.* at 13.

<sup>55</sup> *Id.* at 14-15.

<sup>56</sup> A Connecting Transmission Owner is “the New York public utility or authority (or its designated agent) that (i) owns facilities used for the transmission of Energy in interstate commerce and provides Transmission Service under the Tariff, or (ii) owns, leases or otherwise possesses an interest in the portion of the New York State Transmission System at the Point of Interconnection.” Proposed NYISO OATT, Attachment P, § 22.1.

demonstrate that they have an executed System Impact Study Agreement before NYISO will evaluate the proposed transmission solution in the regional transmission planning process.<sup>57</sup> A transmission project will trigger a Network Upgrade Facility if needed to mitigate the adverse impacts of the project on existing facilities or if the project degrades the pre-project transfer limits of any NYISO planning interface by more than 25 MW. The System Impact Study will list any required upgrades as well as a good-faith estimate of the cost and time to construct those upgrades. The Facilities Study will update and refine the estimates for the Network Upgrades identified in the System Impact Study. NYISO states that it will provide “due consideration” to the results of any completed System Impact Study when evaluating required system upgrades as part of its regional transmission planning process.<sup>58</sup>

26. NYISO also proposes to revise the definition of “Merchant Transmission Facility” in Attachment X of the OATT to provide that only controllable transmission lines seeking Capacity Resource Interconnection Service and Unforced Capacity Deliverability Rights are subject to Attachments X and S, and to be consistent with the definition in Order No. 1000.<sup>59</sup> NYISO also proposes to revise sections 3 and 4.5 of the NYISO OATT to clarify what projects remain subject to the transmission expansion procedures.<sup>60</sup> Likewise, NYISO proposes to revise Attachments X, S, and Z of the NYISO OATT “to provide a mechanism through which it can distinguish transmission projects evaluated in the new Transmission Interconnection Procedures (‘Transmission Projects’) from Merchant Transmission Facilities and through which it can recognize Transmission Projects in base cases used for interconnection studies under Attachments S, X and Z.”<sup>61</sup>

### **3. Comments and Protests**

27. LS Power protests the proposed Transmission Interconnection Procedures, arguing that they fail to coordinate the requirements of transmission interconnection with the selection of the more efficient or cost-effective transmission solution in NYISO’s

<sup>57</sup> Proposed NYISO OATT, Attachment Y, §§ 31.2.6.1 (regarding the reliability transmission planning process), 31.4.6.6 (regarding the public policy transmission planning process).

<sup>58</sup> NYISO March 22, 2016 Transmittal Letter at 30; Proposed NYISO OATT, Attachment Y, § 31.2.6.3 (“As part of this evaluation, the ISO shall give due consideration to the results of any completed System Impact Study or System Reliability Impact Study, as applicable.”).

<sup>59</sup> NYISO March 22, 2016 Transmittal Letter at 26-27.

<sup>60</sup> *Id.* at 21-22.

<sup>61</sup> *Id.* at 26-27.

regional transmission planning process. LS Power states that NYISO's proposed requirement that a transmission developer submit a transmission interconnection application at the same time that it submits its project proposal in the regional transmission planning process "set[s] up a confusing process" that does not help NYISO determine the more efficient or cost-effective solution.<sup>62</sup>

28. In addition, LS Power points to NYISO's statement that it will give "due consideration" to any completed System Impact Studies when evaluating project proposals in its regional transmission planning process.<sup>63</sup> LS Power contends that "the results of the System Impact Study in the Transmission Interconnection Process will not necessarily align with the competitive process" because, for example, the System Impact Study will not consider Network Upgrades that result from changes in the transfer capacity of the system and because the System Impact Study may use different base case assumptions than the studies performed as part of the regional transmission planning process.<sup>64</sup> LS Power contends that NYISO's proposal to give due consideration in its competitive selection process to any *completed* studies performed as part of the Transmission Interconnection Procedures will make the timing and outcome of the System Impact Study a competitive endeavor over which the transmission developer has little control.

29. LS Power contrasts NYISO's proposal with the process in PJM, where, according to LS Power, PJM identifies and estimates the cost of required system upgrades as part of its evaluation of project proposals in its regional transmission planning process. LS Power argues that NYISO cannot properly determine which project proposal represents the more efficient or cost-effective transmission solution without considering system upgrade costs in its regional transmission planning process and therefore urges the Commission to require NYISO to adopt a process similar to PJM's.<sup>65</sup>

30. Consistent with the foregoing, LS Power also requests that the Commission require NYISO to revise Article 4.1 of the Reliability Development Agreement to strike the references to the Transmission Interconnection Procedures and the transition rules for a project that would be required to use the Transmission Interconnection Procedures, but that has already begun using the interconnection procedures laid out in sections 3.7 or 4.5 of the OATT or in Attachment X of the OATT.<sup>66</sup>

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<sup>62</sup> LS Power April 12, 2016 Protest at 2.

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 4-5.

<sup>66</sup> *Id.* at 5-6.

#### 4. Answers

31. NYISO responds that nothing in Order Nos. 890 or 1000 requires that NYISO identify system upgrades as part of the regional transmission planning process, as LS Power requests. NYISO notes that the Commission has allowed considerable variation among transmission planning regions regarding their compliance with Order No. 1000's planning principles and, therefore, PJM's practices are irrelevant. In addition, NYISO notes that, in the Fourth Compliance Order, the Commission required only that NYISO propose tariff revisions providing that Order No. 1000 projects proposed by incumbent Transmission Owners and nonincumbent transmission developers alike are subject to the same interconnection procedures.<sup>67</sup>

32. NYISO further notes that the system impact analyses performed as part of the Transmission Interconnection Procedures and as part of the regional transmission planning process "are distinct and necessarily so due to their specific aims."<sup>68</sup> According to NYISO, the System Impact Study performed as part of the Transmission Interconnection Procedures evaluates whether and how the proposed project can connect to the transmission system without adversely impacting reliability. NYISO states that the system impact analyses performed as part of the regional transmission planning process, by contrast, assess whether the proposal can more efficiently and cost-effectively satisfy the transmission need that is the subject of that process.

33. NYISO disagrees with LS Power that NYISO's proposal makes the completion of the System Impact Study a competitive endeavor beyond the transmission developer's control. NYISO contends that the submission of a transmission interconnection application is entirely within the transmission developer's control and that the execution of the System Impact Study Agreement is almost entirely within the developer's control, with the only exception being NYISO's tendering of the System Impact Study Agreement, which NYISO suggests would not be unreasonably withheld.<sup>69</sup>

34. NYISO also urges the Commission to reject LS Power's protest of Article 4.1 of the Reliability Development Agreement. As noted, Article 4.1 requires the transmission developer to utilize the Transmission Interconnection Procedures laid in out in Attachment P of the OATT, including transition rules listed in section 22.3.3 of that Attachment for projects that have already begun the interconnection procedures in sections 3.7 and 4.5 of the OATT or in Attachment X of the OATT.<sup>70</sup> NYISO states that

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<sup>67</sup> NYISO April 27, 2016 Answer at 5.

<sup>68</sup> *Id.* at 7-8.

<sup>69</sup> *Id.* at 9.

<sup>70</sup> NYISO March 22, 2016 Transmittal Letter at 37-38.

Article 4.1 of the Reliability Development Agreement accurately describes the Transmission Interconnection Procedures as well as the associated transition rules, which, NYISO argues, LS Power has not protested.

## **5. Commission Determination**

35. We conditionally accept NYISO's proposed Transmission Interconnection Procedures, effective April 1, 2016, and require NYISO to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions directed below. We find that NYISO has complied with the directive in the Fourth Compliance Order that all Order No. 1000 projects go through the same interconnection process.<sup>71</sup> The proposed Transmission Interconnection Procedures apply to project proposals submitted as part of NYISO's regional transmission planning process by incumbent and nonincumbent transmission developers alike. However, we find that certain aspects of NYISO's proposed Transmission Interconnection Procedures are unjust and unreasonable and do not fully comply with Order No. 1000 and the Fourth Compliance Order, and therefore require revision, as discussed further below.

36. We are not persuaded by LS Power's protest that the Commission should reject NYISO's proposed Transmission Interconnection Procedures and require NYISO to identify and estimate the cost of required system upgrades as part of its evaluation of project proposals in its regional transmission planning process. Neither Order No. 1000 nor the Fourth Compliance Order required public utility transmission providers in transmission planning regions to perform a study for the purpose of identifying and estimating the cost of required system upgrades as part of the regional transmission planning process. Similarly, neither of those orders prohibited a public utility transmission provider in a transmission planning region from requiring that transmission developers complete a System Impact Study as part of its regional transmission planning process. As such, we find that NYISO has complied with the Commission's directive in the Fourth Compliance Order that all Order No. 1000 projects go through the same interconnection process.

37. In addition, we find that the present record does not support LS Power's contention that the Transmission Interconnection Procedures turn the completion of System Impact Studies into competitive endeavors over which nonincumbent transmission developers have no control. As NYISO explains, the submission of a valid transmission interconnection application and the execution of a System Impact Study Agreement are events within the transmission developer's control and, in any case, are requirements that apply equally to incumbent and nonincumbent transmission developers. Further, should the Connecting Transmission Owner fail to execute the System Impact Study Agreement within 30 days, as required by the OATT,<sup>72</sup> the transmission developer

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<sup>71</sup> Fourth Compliance Order, 143 FERC ¶ 61,059 at P 67.



may, among other things, report the failure to NYISO, invoke the dispute resolution procedures in the OATT,<sup>73</sup> seek assistance from the Commission's Office of Enforcement,<sup>74</sup> or file a complaint with the Commission pursuant to section 206 of the Federal Power Act (FPA).<sup>75</sup> Moreover, we note that proposed section 22.8.1 of Attachment P of the OATT provides that a project developer may pay a reduced fee for the System Impact Study and perform the analytical portion of the Study itself, an option that we find further mitigates concerns regarding the prompt completion of the required studies.

38. Similarly, we accept Article 4.1 of the Reliability Development Agreement. We find that Article 4.1, as revised in the Fifth Compliance Filing, accurately recites the Transmission Interconnection Procedures accepted in the previous paragraphs, including the transition procedures outlined in section 22.3.3 of Attachment P. In addition, we find that the proposed transition procedures provide an appropriate means of moving projects that have already begun using sections 3.7 or 4.5 or Attachment X of the OATT to the new Transmission Interconnection Procedures in Attachment P of the OATT and that they are otherwise consistent with the Commission's directives in the Fourth Compliance Order.

39. In addition, as discussed in the following paragraphs, we conclude that certain aspects of the proposed Transmission Interconnection Procedures are unjust and unreasonable and do not fully comply with Order No. 1000 and the Fourth Compliance Order, and therefore require revision. Specifically, we require NYISO to include in the compliance filing ordered herein: (1) tariff revisions to clarify that NYISO will not forward the transmission interconnection application to the Connecting Transmission Owner before the close of the proposal window; (2) an explanation as to whether Attachment P of the OATT applies to incumbent Transmission Owners' market-based project proposals; (3) tariff revisions to define a Merchant Transmission Facility as a transmission facility that recovers its costs through negotiated rather than cost-based

<sup>72</sup> Proposed NYISO OATT, Attachment P, § 22.8.2.

<sup>73</sup> NYISO, OATT, § 30.13.5 (2.0.0); Proposed NYISO OATT § 22.13.5 (stating that disputes that arise "out of or in connection with" the Transmission Interconnection Procedures shall proceed under the dispute resolution procedures in OATT section 30.13.5).

<sup>74</sup> See 18 C.F.R. § 1b.21 (2017) (describing the Commission's Enforcement Hotline); *Californians for Renewable Energy, Inc. v. Williams Nw. Pipeline*, 133 FERC ¶ 61,194, at P 33 (2010) (explaining the role played by the Commission's Enforcement Hotline in resolving disputes as well as potential violations of Commission statutes, rules, regulations, and orders).

<sup>75</sup> 16 U.S.C. § 824e (2012).

rates; (4) revisions to section 3.7 of the OATT to refer to both System Impact Studies and Transmission System Studies, or an explanation as to why such revisions are not required; and (5) revisions to section 22.3.1.2 of the OATT to correct the reference to section 31.3.1.3 of the OATT, or an explanation as to why such a correction is not necessary.

40. As an initial matter, we require NYISO to include in the compliance filing ordered herein tariff revisions to clarify that NYISO will not forward a transmission interconnection application to the Connecting Transmission Owner before the close of the proposal window. NYISO's proposed revisions to section 31.2.5.1 of Attachment Y of the OATT require project developers to submit a valid transmission interconnection application at the same time that they submit a project proposal in the regional transmission planning process. Proposed OATT section 22.4.2.3 provides that NYISO will not consider a transmission interconnection application to be "valid" until all relevant aspects of the application have been submitted and that NYISO will advise the transmission developer within five business days of receiving the application if the application is invalid. That means that, to ensure that the transmission application is in fact valid by the close of the proposal window, transmission developers will need to submit a transmission interconnection application at least five business days before the close of the proposal window. However, proposed OATT section 22.4.2.2 provides that, within five business days of receipt of a transmission interconnection application, NYISO will forward a transmission interconnection application to the Connecting Transmission Owner. Accordingly, if a nonincumbent transmission developer submits its transmission interconnection application five or more days before the close of the proposal window, section 22.4.2.2 would require NYISO to forward that application to the Connecting Transmission Owner before the close of the proposal window. If the Connecting Transmission Owner is also submitting a project proposal in the same proposal window as the nonincumbent transmission developer, the opportunity to view the nonincumbent transmission developer's transmission interconnection application before the close of the proposal window could provide the Connecting Transmission Owner an unduly discriminatory or preferential competitive advantage. Accordingly, we require NYISO to revise proposed OATT section 22.4.2.2 to clarify that NYISO will not forward the transmission interconnection application to the Connecting Transmission Owner before the close of the proposal window.

41. We also require NYISO to include in the compliance filing ordered herein an explanation as to whether Attachment P applies to incumbent Transmission Owners' market-based project proposals. NYISO's proposed revisions to OATT section 3.7 provide that an incumbent Transmission Owner must submit a transmission interconnection application and proceed under Attachment P for any alternative regulated transmission solutions that it submits in NYISO's regional transmission planning process. The proposed revisions to OATT section 3.7 are silent, however, regarding whether Attachment P applies to a market-based solution proposed by an incumbent Transmission

Owner. Accordingly, we require NYISO to explain whether the Transmission Interconnection Procedures apply to those proposals.

42. In addition, we require NYISO to include in the compliance filing ordered herein tariff revisions to define a Merchant Transmission Facility as a transmission facility that recovers its costs through negotiated rather than cost-based rates, and to make any further revisions to its OATT or Services Tariff that are required to implement that change. In the Fourth Compliance Order, the Commission required NYISO to revise the definition of Merchant Transmission Facility “to be consistent with the definition in Order No. 1000.”<sup>76</sup> Order No. 1000 defines merchant transmission projects “as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated instead of cost-based rates.”<sup>77</sup> NYISO’s proposed definition does not follow that distinction: NYISO defines a Merchant Transmission Facility as one that is eligible to request and does request Capacity Resource Interconnection Service, not by reference to its use of negotiated rather than cost-based rates.<sup>78</sup> We therefore conclude that NYISO’s definition remains inconsistent with Order No. 1000 and the Fourth Compliance Order and direct further revisions.

43. We likewise require NYISO to include in the compliance filing ordered herein revisions to OATT section 3.7 to refer to both System Impact Studies and Transmission System Studies, or an explanation as to why such revisions are not required. NYISO states that it revised OATT section 3.7 to provide that it applies to both System Impact Studies and also to Transmission Service Studies, which are studies conducted in response to certain customers’ requests to conceptually evaluate a transmission project, rather than studies of particular proposals.<sup>79</sup> It appears, however, that a number of provisions within that section still refer only to System Impact Studies without an obvious reason why that reference should be so limited.

44. Finally, we note that, in defining Transmission Project, proposed OATT section 22.3.1.2 refers to exceptions listed in OATT section 31.3.1.3, which refers to the preparation of the Congestion Assessment and Resource Integration Study for economic planning. The intended reference appears to be to proposed OATT section 22.3.1.3. Accordingly, we require NYISO to include in the compliance filing ordered herein revisions to OATT section 22.3.1.2 to correct that reference or an explanation as to why such a correction is not necessary.

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<sup>76</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 76.

<sup>77</sup> Order No 1000, FERC Stats. & Regs. ¶ 31,323 at P 119.

<sup>78</sup> Proposed NYISO OATT, Attachment X, § 30.1.

<sup>79</sup> NYISO March 22, 2016 Transmittal Letter at 22–23.

## **C. Comparable Operating Agreement**

### **1. Fourth Compliance Order**

45. Order No. 1000 required public utility transmission providers in each transmission planning region to have a clear enrollment process that defines how entities become part of the transmission planning region and, thus, become eligible for regional cost allocation.<sup>80</sup> The Commission accepted NYISO's proposed enrollment process in the Second Compliance Order.<sup>81</sup> Pursuant to section 31.1.7 of Attachment Y of the NYISO OATT, an owner of transmission in New York may become a Transmission Owner, as defined by the OATT, by (1) "satisfying the definition of a Transmission Owner in Article 1 of the ISO Agreement"<sup>82</sup> and (2) executing the NYISO Transmission Owners Agreement "or an agreement with the ISO under terms comparable" to the NYISO Transmission Owners Agreement "and turning over operational control of its transmission facilities to the ISO."<sup>83</sup>

46. In the Fourth Compliance Order, the Commission required the Filing Parties to submit the "comparable operating agreement" referenced in section 31.1.7 of Attachment Y of the NYISO OATT and to "demonstrate that such agreement is not unduly discriminatory or preferential and how it is comparable to the NYISO Transmission Owners Agreement."<sup>84</sup> The Commission explained that Article 5 of the Reliability Development Agreement requires nonincumbent transmission developers to execute an operating agreement, which could be either the NYISO Transmission Owners Agreement or a comparable operating agreement, but the Filing Parties did not provide a comparable operating agreement for Commission review and approval. The Commission required that, "to the extent that the Filing Parties propose to require a transmission developer to execute a comparable operating agreement to the NYISO Transmission Owners Agreement," that agreement must be submitted for Commission review and approval.<sup>85</sup>

<sup>80</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 275–277.

<sup>81</sup> Second Compliance Order, 148 FERC ¶ 61,044 at P 38.

<sup>82</sup> The ISO Agreement provides for, among other provisions, the organizational and governing structure of NYISO and NYISO's duties. *See* NYISO, ISO Agreement (1999), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/iso\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/iso_agreement.pdf).

<sup>83</sup> NYISO, OATT, Attachment Y, § 31.1.7 (16.0.0).

<sup>84</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 20.

<sup>85</sup> *Id.* P 79.

## 2. Fifth and Sixth Compliance Filings

47. NYISO submitted a *pro forma* operating agreement (Operating Agreement) for Nonincumbent Transmission Owners. NYISO proposes to define a Nonincumbent Transmission Owner as a Transmission Owner for purposes of the Operating Agreement, the OATT, and the Services Tariff, notwithstanding the definition of Transmission Owner in the ISO Agreement. Article 1 of the ISO Agreement requires that a Transmission Owner “must own, individually or jointly, at least 100 circuit miles of 115 kV or above in New York State and . . . become a signatory to the ISO/TO Agreement.”<sup>86</sup> Accordingly, NYISO proposes to revise section 31.1.7 of Attachment Y of the NYISO OATT to remove the requirement that a Transmission Owner must “satisfy[] the definition of a Transmission Owner in Article 1 of the ISO Agreement.” NYISO also proposes to remove the requirement in section 31.1.7 of Attachment Y of the NYISO OATT that a Transmission Owner must “turn[] over operational control of its transmission facilities to the ISO” because, according to NYISO, certain transmission owners may be required to execute an Operating Agreement even though they will retain operational control of their transmission facilities (e.g., Local Area Transmission System Facilities).<sup>87</sup>

48. NYISO states that Nonincumbent Transmission Owners must execute the Operating Agreement, rather than the NYISO Transmission Owners Agreement, because the NYISO Transmission Owners Agreement includes terms that were relevant at NYISO’s start up and address issues unique to incumbent Transmission Owners that are not applicable to the operation of new transmission facilities. NYISO states that the Operating Agreement is largely consistent with the terms of the NYISO Transmission Owners Agreement, but that NYISO did not carry over all of the terms of the NYISO Transmission Owners Agreement to the Operating Agreement. Nevertheless, NYISO contends that the differences between the NYISO Transmission Owners Agreement and the Operating Agreement are reasonable and not unduly discriminatory or preferential.<sup>88</sup>

49. The proposed Operating Agreement includes the following provisions. Article 1.0 incorporates by reference the definitions of capitalized terms contained in the ISO Agreement, except for the definition of Transmission Owner noted above.

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<sup>86</sup> Proposed NYISO OATT, Attachment Y, § 31.11 (Appendix H – Form of Operating Agreement, Article 1.01); NYISO, ISO Agreement, Article 1 (1999), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/iso\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/iso_agreement.pdf).

<sup>87</sup> NYISO March 22, 2016 Transmittal Letter at 46–47.

<sup>88</sup> *Id.* at 45–46.

50. Article 2.0 sets forth the responsibilities of the Nonincumbent Transmission Owner under the Operating Agreement. Article 2.01 identifies the transmission facilities covered by the Operating Agreement.

51. Article 2.02 requires Nonincumbent Transmission Owners to ensure that all actions related to the operation, maintenance, and modification of the relevant transmission facilities are performed in accordance with the Operating Agreement, reliability rules, operating instructions, the OATT, the Services Tariff, NYISO's manuals, and relevant transmission interconnection agreements. NYISO states that it did not include the language from Article 2.02 of the NYISO Transmission Owners Agreement regarding development by the NYISO Operating Committee of certain emergency operating procedures. NYISO explains that these operating procedures have been developed and are contained in NYISO's tariffs and manuals, such that the requirements are covered by the term "ISO Procedures" used in Article 2.02.<sup>89</sup>

52. Article 2.03 concerns Local Area Transmission System Facilities, which are under the Nonincumbent Transmission Owner's operational control. It requires Nonincumbent Transmission Owners to "promptly comply to the extent practicable with a request" from NYISO or the Transmission Owner to which the Nonincumbent Transmission Owner's facilities are interconnected (Interconnecting Transmission Owner) "to take action with respect to coordination of the operation of its Local Area Transmission System Facilities." NYISO states that, although it does not operate Local Area Transmission System Facilities, it will maintain a list of these facilities in Appendix A-3 of the Operating Agreement.<sup>90</sup>

53. Article 2.04 allows Nonincumbent Transmission Owners to take operational actions necessary to maintain safe operations.

54. Article 2.05 requires the Nonincumbent Transmission Owner to operate a local control center. Article 2.06 requires coordination with the Interconnecting Transmission Owner regarding commitment of additional generators. NYISO states that these provisions differ from the NYISO Transmission Owners Agreement because incumbent Transmission Owners have Transmission Districts,<sup>91</sup> and associated obligations to maintain local reliability, which Nonincumbent Transmission Owners are unlikely to have.<sup>92</sup>

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<sup>89</sup> *Id.* at 48.

<sup>90</sup> *Id.* at 48–49.

<sup>91</sup> A Transmission District is "[t]he geographic area served by the Investor-Owned Transmission Owners and [Long Island Lighting Company], as well as the customers directly interconnected with the transmission facilities of the Power Authority of the State of New York." NYISO, OATT, § 1.20 (7.0.0).

55. Article 2.07 requires the Nonincumbent Transmission Owner to comply with reliability rules, NYISO procedures, local reliability rules and planning criteria of the Interconnecting Transmission Owner, and Good Utility Practice in designing, maintaining, and rating the capabilities of the transmission facilities.

56. Article 2.08 concerns maintenance scheduling and requires the Nonincumbent Transmission Owner to provide notification of maintenance schedules to NYISO and the Interconnecting Transmission Owner.

57. Article 2.09 requires the Nonincumbent Transmission Owner to register with the North American Electric Reliability Corporation (NERC) for all required NERC functions. NYISO states that this provision was not included in the NYISO Transmission Owners Agreement because that Agreement was developed prior to the adoption of mandatory reliability requirements.<sup>93</sup>

58. Article 2.10 requires the Nonincumbent Transmission Owner to conduct investigations of equipment malfunctions and failures and forced transmission outages and to provide the results to the New York State Reliability Council (NYSRC), NYISO, the Interconnecting Transmission Owner, and other affected Transmission Owners.

59. Article 2.11 obligates the Nonincumbent Transmission Owner and NYISO to share the necessary information and support services to comply with the Operating Agreement.

60. Article 2.12 provides that the Nonincumbent Transmission Owner may arrange for third parties to perform its responsibilities under the Operating Agreement. NYISO states that it included this provision because it is uncertain whether Nonincumbent Transmission Owners will perform certain operational functions.<sup>94</sup>

61. Article 2.13 provides that NYISO may designate a Nonincumbent Transmission Owner as a Responsible Transmission Owner pursuant to section 31.2.4.3 of the OATT to propose and develop a regulated backstop solution to a Reliability Need related to its transmission facilities, subject to full cost recovery. NYISO states that Article 2.13 is comparable to the requirements imposed on incumbent Transmission Owners in the NYISO/TO Reliability Agreement.<sup>95</sup> NYISO contends that, absent a legal obligation comparable to the one contained in the NYISO/TO Reliability Agreement, nothing

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<sup>92</sup> NYISO March 22, 2016 Transmittal Letter at 48.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 47.

<sup>95</sup> NYISO September 13, 2016 Transmittal Letter 20–22.

clearly requires a Nonincumbent Transmission Owner that does not have a Transmission District to provide a regulated backstop solution to address a Reliability Need related to its transmission facilities. To fully incorporate Nonincumbent Transmission Owners into the reliability transmission planning process, NYISO asserts that it needs to be able to designate a Nonincumbent Transmission Owner to provide a regulated backstop solution to a Reliability Need that arises on the Nonincumbent Transmission Owner's facilities, in the event that market-based or alternative regulated transmission solutions are not available. NYISO argues that this approach is appropriate because NERC Transmission System Planning Performance Requirements obligate Transmission Owners to plan their systems to operate reliably within NERC's standards. Specifically, NYISO states that, under NERC's standards, Transmission Owners must prepare an annual planning assessment, which can be satisfied, in part, through the identification of a regulated backstop solution in response to a request by NYISO.<sup>96</sup>

62. Article 3.0 sets forth the responsibilities of NYISO under the Operating Agreement. Article 3.01 requires NYISO to direct the operation, maintenance scheduling, and coordination of the New York State Power System, including coordinating with the Nonincumbent Transmission Owner's control center, in accordance with applicable reliability rules.

63. Article 3.02 provides that NYISO must administer the OATT, Services Tariff, and ISO Agreement and comply with the Operating Agreement, the NYISO Transmission Owners Agreement, the NYSRC Agreement, and the ISO/NYSRC Agreement.

64. Article 3.03 states that the Nonincumbent Transmission Owner grants NYISO the responsibilities set forth in Article 3.0 of the Operating Agreement so long as NYISO satisfies the conditions provided in Article 3.03. NYISO explains that it omitted certain conditions that are included in the NYISO Transmission Owners Agreement because they duplicate requirements in the ISO Agreement or are specific to one or more incumbent Transmission Owner.<sup>97</sup>

65. Article 3.04 requires NYISO to facilitate and/or perform billing and collection of revenues from services NYISO performs under the OATT and Services Tariff.

66. Article 3.05 obligates NYISO to evaluate the impact of any proposed material modification to the New York State Power System, including to the Nonincumbent Transmission Owner's facilities. NYISO notes that the NYISO Transmission Owners Agreement states that NYISO will establish procedures to evaluate the impact of material modifications, but explains that NYISO has since established these procedures.<sup>98</sup>

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<sup>96</sup> *Id.* at 19–20 (citing NERC, Transmission System Planning Performance Requirements, No. TPL-001-04 at R2).

<sup>97</sup> NYISO March 22, 2016 Transmittal Letter at 50.



67. Article 3.06 states that NYISO will maintain the Open Access Same-Time Information System for the New York Control Area.

68. To the extent any of the Nonincumbent Transmission Owner's facilities are NERC jurisdictional, Article 3.07 requires NYISO to register for certain NERC functions. NYISO states that it added this provision because, as noted above, the NYISO Transmission Owners Agreement was developed prior to the adoption of mandatory reliability requirements.<sup>99</sup>

69. Article 3.08 sets forth the Nonincumbent Transmission Owner's reserved rights, including the right to make a filing with the Commission pursuant to section 205 of the FPA<sup>100</sup> to recover, in accordance with Attachment Y and/or another applicable rate schedule of the OATT, "all of its reasonably incurred costs, including a reasonable return on investment related to the development, construction, operation and maintenance of its transmission facilities and any applicable regulatory incentives." NYISO contends that this provision clarifies the Nonincumbent Transmission Owner's section 205 filing rights.<sup>101</sup>

70. Article 3.09 provides that other rights and responsibilities of the Nonincumbent Transmission Owner not specifically transferred to NYISO under the Operating Agreement will remain with the Nonincumbent Transmission Owner.

71. Article 4.0 governs assignment of the Operating Agreement. Article 4.01 provides that either party may assign the Operating Agreement.

72. Article 5.0 contains the limitation of liability and indemnity provisions. Article 5.01 provides that, except as otherwise provided under the OATT, both parties' liability is limited to liability for their acts of gross negligence or intentional misconduct. Article 5.02 further limits both parties' liability, except as otherwise provided under the OATT.

73. Article 5.03 governs indemnification. It provides that each party must indemnify the other when the relevant acts or omissions are either pursuant to or consistent with NYISO's procedures or direction, or are in any way related to the Nonincumbent Transmission Owner's or NYISO's performance under the OATT, Services Tariff, ISO Agreement, ISO/NYSRC Agreement, NYSRC Agreement, or Operating Agreement. However, the Nonincumbent Transmission Owner does not have to indemnify NYISO

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<sup>98</sup> *Id.* at 49.

<sup>99</sup> *Id.*

<sup>100</sup> 16 U.S.C. § 824d (2012).

<sup>101</sup> NYISO March 22, 2016 Transmittal Letter at 49.

for NYISO's acts of gross negligence or intentional misconduct, and NYISO only has to indemnify the Nonincumbent Transmission Owner for losses that result from NYISO's acts of gross negligence or intentional misconduct.

74. NYISO contends that the limitation of liability and indemnification provisions represent a reasonable allocation of risk between NYISO and the Nonincumbent Transmission Owner. NYISO points to the Commission's directives in the Fourth Compliance Order to make the limitation of liability and indemnity provisions in the Reliability Development Agreement reciprocal.<sup>102</sup>

75. Article 5.04 provides that neither party will be in default or breach for its failure to satisfy the requirements of the Operating Agreement due to Force Majeure events.

76. Article 5.05 requires each party to be responsible for workers' compensation claims and to obtain the insurance coverage necessary to meet its obligations under the Operating Agreement. NYISO states that it has not included further language from the NYISO Transmission Owners Agreement because it is duplicative of the clear requirement that each party have sufficient insurance to meet its obligations.<sup>103</sup>

77. Article 5.06 provides that the provisions of Article 5.0 will survive termination or expiration of the Operating Agreement or NYISO's tariffs.

78. Article 6.0 contains "Other Provisions." Article 6.01 governs the term of the Operating Agreement and its termination for cause, and Article 6.02 governs its termination by election. The Nonincumbent Transmission Owner may terminate the Operating Agreement, withdraw from the ISO Agreement and NYISO's tariffs, and withdraw its assets from NYISO's control if: (1) the Nonincumbent Transmission Owner determines that NYISO is not satisfying the conditions in Article 3.03; or (2) the Nonincumbent Transmission Owner wants to terminate the Operating Agreement and its termination and withdrawal is not contrary to the public interest. In either case, the Nonincumbent Transmission Owner must provide 90 days' prior written notice to NYISO and the Commission, "obtain[] all regulatory approvals for such termination and withdrawal," and have on file with the Commission an open access transmission tariff. NYISO states that, because the Operating Agreement is a two-party agreement, rather than a multi-party agreement like the NYISO Transmission Owners Agreement, a party may terminate the Operating Agreement, rather than withdraw.<sup>104</sup>

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<sup>102</sup> *Id.* at 50–51.

<sup>103</sup> *Id.* at 52.

<sup>104</sup> *Id.* at 51.

79. Article 6.03 provides each party's obligations after termination of the Operating Agreement. In particular, the parties remain liable for all obligations arising under the Operating Agreement prior to termination. Also, termination does not relieve the parties of their obligations under NYISO's tariffs or related agreements. And termination does not relieve the Nonincumbent Transmission Owner of its responsibility for the operation, maintenance, and modification of its transmission facilities in accordance with its own open access transmission tariff, reliability rules, and other requirements applicable to transmission facilities in the New York Control Area. NYISO contends that these requirements are important to ensure that the withdrawal of an entity's facilities from NYISO's operational control will not endanger system reliability in New York.<sup>105</sup>

80. Article 6.04 states that any provision of the Operating Agreement that comes into or remains in force following termination of the agreement survives such termination, including provisions necessary for winding up the agreement.

81. Article 6.05 provides the confidentiality rules surrounding information exchanged pursuant to the Operating Agreement.

82. Article 6.06 mandates that New York State law governs the interpretation and performance of the Operating Agreement and that federal or state courts in New York have exclusive jurisdiction over disputes arising from the Operating Agreement within their respective subject-matter jurisdiction.

83. Article 6.07 states that section headings are for convenience and reference only.

84. According to Article 6.08, nothing in the Operating Agreement limits the parties' ability to agree on action different from that provided for in the agreement.

85. In the case of a conflict between the express terms of the Operating Agreement and the terms of the ISO Agreement, Article 6.09 provides that the express terms of the Operating Agreement prevail. NYISO states that the NYISO Transmission Owners Agreement separately provides that its terms are superior to the NYISO tariffs and the NYISO/NYSRC Agreement. NYISO contends that it did not include this provision in the Operating Agreement because, unlike the NYISO Transmission Owners Agreement, the Operating Agreement does not serve as the key agreement for the transition from the New York Power Pool to NYISO.<sup>106</sup>

86. Article 6.10 establishes both parties' right to seek an injunction to prevent breach of the Operating Agreement or NYISO's tariffs, or specific performance to enforce terms of the Operating Agreement or NYISO's tariffs.

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 52.

87. Article 6.11 states that nothing in the Operating Agreement confers any rights or remedies to third parties.

88. Article 6.12 provides that the Operating Agreement does not make the parties partners or members of a joint venture, or render either party liable for debts or obligations of the other party.

89. Pursuant to Article 6.13, a waiver of the rights of either party as to default or failure to perform by the other party will not be deemed a waiver as to any subsequent default or failure to perform.

90. Article 6.14 governs modification of the Operating Agreement. It lists provisions that, absent mutual agreement of the parties and “to the maximum extent permitted by law,” can only be changed by “an express finding by the Commission that such change is required under the public interest standard under the Mobile-Sierra doctrine.” It goes on to state that “[a]ny other provision may be changed pursuant to a filing with [the Commission] under Section 206 of the Federal Power Act and a finding by the Commission that such change is just and reasonable.”

91. Article 6.15 provides that the Operating Agreement may be executed in counterparts, neither one of which needs to be executed by both parties for the agreement to be binding, and each of which will constitute an original.

92. NYISO also proposes a new section 31.1.7.3 of Attachment Y of the OATT to establish a process for entering into an Operating Agreement. Specifically, NYISO will tender a draft Operating Agreement containing the *pro forma* provisions. NYISO and the Nonincumbent Transmission Owner will then negotiate any disputed provisions and, if they reach an impasse, file an unexecuted Operating Agreement with the Commission. A Nonincumbent Transmission Owner must enter into an Operating Agreement prior to energizing its transmission facilities.

### **3. Comments and Protests**

93. Noting that nonincumbent transmission developers have not objected to executing the NYISO Transmission Owners Agreement, LS Power argues that, to the extent NYISO proposes to use an alternative operating agreement for Nonincumbent Transmission Owners, “the proposed agreement should be identical to the NYISO Transmission Owners Agreement except to the extent that a provision no longer reflects actual NYISO operations.”<sup>107</sup> LS Power argues that, so long as the NYISO Transmission Owners Agreement contains provisions that provide incumbent Transmission Owners with identified rights, Nonincumbent Transmission Owners “must be treated identically or they will be disadvantaged in the competitive process.”<sup>108</sup> NY Transco similarly

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<sup>107</sup> LS Power April 12, 2016 Protest at 9.

asserts that, to the maximum extent possible, NYISO should “retain the original language” from the NYISO Transmission Owners Agreement. NY Transco asks that the Commission reject any unnecessary changes as outside the scope of this proceeding, which is limited to submission of a *comparable* Operating Agreement to the NYISO Transmission Owners Agreement.<sup>109</sup>

94. NY Transco protests NYISO’s revision to the definition of “Transmission Owner” in Article 1.01 of the Operating Agreement. NY Transco argues that the Operating Agreement should not modify the definition of a Transmission Owner for purposes of NYISO’s tariffs; rather, the definition of a Transmission Owner should only be modified for purposes of the Operating Agreement. NY Transco asserts that any changes to NYISO’s tariffs should be part of NYISO’s Sixth Compliance Filing.<sup>110</sup>

95. LS Power argues that Article 2.02 of the Operating Agreement subjects a Nonincumbent Transmission Owner to “the transmission interconnection agreement(s) for its facilities,” but the NYISO Transmission Owners Agreement does not subject incumbent Transmission Owners to a similar obligation with respect to their interconnection with each other’s systems. LS Power contends that it is improper to subject only Nonincumbent Transmission Owners to this obligation and that NYISO has not identified any legitimate reason for the difference.<sup>111</sup> In addition, LS Power asserts that if NYISO removed the list of retained emergency rights contained in Article 2.02 of the NYISO Transmission Owners Agreement because the NYISO Operating Procedures have been updated to include those rights, Article 2.02 of the NYISO Transmission Owners Agreement and of the Operating Agreement should be updated to reference those Operating Procedures.<sup>112</sup>

96. LS Power also contends that the requirement in Article 2.03 of the Operating Agreement that Nonincumbent Transmission Owners comply, to the extent practicable, with a request from the Interconnecting Transmission Owner is improper because incumbent Transmission Owners have no similar obligation with respect to their interconnection with each other’s systems.<sup>113</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> NY Transco April 12, 2016 Protest at 3.

<sup>110</sup> *Id.* at 6.

<sup>111</sup> LS Power April 12, 2016 Protest at 9–10.

<sup>112</sup> *Id.* at 10.

<sup>113</sup> *Id.* at 11.

97. Similarly, LS Power argues that Article 2.07 of the Operating Agreement improperly imposes a requirement on Nonincumbent Transmission Owners to comply with Interconnecting Transmission Owners' local reliability rules and planning criteria that is not imposed on incumbent Transmission Owners with respect to their interconnection with each other's systems. LS Power states that, although the obligation may not be inherently objectionable, if Nonincumbent Transmission Owners were permitted to sign the NYISO Transmission Owners Agreement, they would not have this obligation.<sup>114</sup>

98. While LS Power does not object to the obligation in Article 2.08 of the Operating Agreement that Nonincumbent Transmission Owners provide notification of maintenance schedules to NYISO and the Interconnecting Transmission Owner, LS Power protests not also requiring Interconnecting Transmission Owners to provide notification of maintenance schedules to interconnected Nonincumbent Transmission Owners. LS Power asks that NYISO coordinate all maintenance schedules and provide notice to all necessary parties.<sup>115</sup>

99. Likewise, LS Power protests the requirement in Article 2.10 of the Operating Agreement that Nonincumbent Transmission Owners provide information regarding equipment failures to NYISO and the Interconnecting Transmission Owner because the Interconnecting Transmission Owner does not have to provide this information to the Nonincumbent Transmission Owner. LS Power also protests that incumbent Transmission Owners do not have to provide this information with respect to their interconnection with each other's systems.<sup>116</sup>

100. NY Transco and NYTOs protest Article 2.13, under which NYISO could designate a Nonincumbent Transmission Owner as a Responsible Transmission Owner. NY Transco argues that only Transmission Owners with Transmission Districts should be designated to provide regulated backstop solutions because Nonincumbent Transmission Owners are operating within an incumbent Transmission Owner's Transmission District. Therefore, according to NY Transco, if a regulated backstop solution is needed in an incumbent Transmission Owner's Transmission District, and that solution involves a Nonincumbent Transmission Owner's facilities, the Nonincumbent Transmission Owner should have the obligation to work with the incumbent Transmission Owner in providing a solution.<sup>117</sup> NY Transco and NYTOs assert that, to the extent an identified Reliability Need requires an upgrade of a Nonincumbent Transmission Owner's facilities, the

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 11–12.

<sup>117</sup> NY Transco October 4, 2016 Protest at 6–7.

Nonincumbent Transmission Owner has both the right and the obligation to upgrade its own transmission facilities.<sup>118</sup> NYTOs add that Nonincumbent Transmission Owners desiring to use the regulated cost recovery mechanism available under the reliability transmission planning process are already eligible to propose projects as alternative regulated transmission solutions and compete against other proposals.<sup>119</sup> NY Transco and NYTOs contend that the responsibility to provide a regulated backstop solution is ultimately with the incumbent Transmission Owner with a Transmission District because incumbent Transmission Owners have a statutory obligation to maintain reliability and a duty to provide service to retail electric customers in their respective Transmission Districts, which Nonincumbent Transmission Owners do not have.<sup>120</sup> NYTOs also argue that incumbent Transmission Owners have the financial strength to ensure that Reliability Needs will be addressed if the primary solution or its developer encounters unforeseen difficulties. Further, NYTOs assert that allowing Nonincumbent Transmission Owners to propose regulated backstop solutions will only interfere with the incumbent Transmission Owners' ability to fulfill their obligations and duties.<sup>121</sup> NY Transco also asks that the definition of Responsible Transmission Owner in the OATT be revised to remove the word "normally."<sup>122</sup> NYTOs ask that the Commission require NYISO to revise its OATT and Services Tariff to clearly state that a Nonincumbent Transmission Owner has the right and obligation to upgrade its own transmission facilities when necessary for reliability.<sup>123</sup> NY Transco states that it does not oppose similar language.<sup>124</sup>

101. NY Transco protests NYISO's right to assign the Operating Agreement pursuant to Article 4.01. NY Transco argues that NYISO cannot assign the NYISO Transmission Owners Agreement, which is appropriate because there is a difference between an owner of the assets and the operator of the transmission grid assigning their respective

<sup>118</sup> *Id.* at 7 (citing NYISO, OATT, Attachment Y, § 31.1.3); NYTOs October 4, 2016 Protest at 4.

<sup>119</sup> NYTOs October 4, 2016 Protest at 4.

<sup>120</sup> NY Transco October 4, 2016 Protest at 7 (citing N.Y. Pub. Serv. L. §§ 2(13), 65, 66(2)); NYTOs October 4, 2016 Protest at 4.

<sup>121</sup> NYTOs October 4, 2016 Protest at 4–5.

<sup>122</sup> NY Transco October 4, 2016 Protest at 8. The existing definition of Responsible Transmission Owner states that "[t]he Responsible Transmission Owner will normally be the Transmission Owner in whose Transmission District the ISO identifies a Reliability Need." NYISO, OATT, Attachment Y, § 31.1.1 (15.0.0).

<sup>123</sup> NYTOs October 4, 2016 Protest at 5.

<sup>124</sup> NY Transco October 4, 2016 Protest at 8.

responsibilities. NY Transco asserts that neither NYISO, nor any market operator, “should be able to abdicate its role as the transmission grid and/or market operator without the approval” of the Transmission Owners.<sup>125</sup> In contrast, NY Transco contends that Transmission Owners can assign their responsibilities in the ordinary course of business with no material impact on the operation of the transmission system.<sup>126</sup>

102. With regard to Articles 5.01 and 5.02 of the Operating Agreement limiting liability between NYISO and the Nonincumbent Transmission Owner, LS Power and NY Transco argue that the NYISO Transmission Owners Agreement limits only incumbent Transmission Owners’ liability to NYISO, and contains no similar limitation on NYISO’s liability.<sup>127</sup> LS Power states that it understands why the provision should be reciprocal. With that said, LS Power asserts that, until the NYISO Transmission Owners Agreement contains reciprocal language, it is improper to limit NYISO’s liability against Nonincumbent Transmission Owners other than as already limited in NYISO’s tariffs.<sup>128</sup> NY Transco argues that the non-mutuality of these provisions in the NYISO Transmission Owners Agreement is important because NYISO is operating the assets owned by the Transmission Owners for the benefit of all New York ratepayers, so NYISO should be liable for any damages it incurs in operating those facilities.<sup>129</sup> LS Power states that when it raised this issue in the stakeholder process, NYISO’s answer was that the Commission required reciprocal liability provisions in the Reliability Development Agreement. LS Power responds that, although this is true, the Commission did not require that the Reliability Development Agreement be comparable to an existing agreement. LS Power also argues that NYISO’s exclusion from the Operating Agreement of Article 5.02 of the NYISO Transmission Owners Agreement is improper because that provision is contained in the NYISO Transmission Owners Agreement.<sup>130</sup>

103. LS Power and NY Transco also protest the fact that Article 5.03 of the Operating Agreement places an indemnification obligation on Nonincumbent Transmission Owners that is not placed on incumbent Transmission Owners in the NYISO Transmission Owners Agreement.<sup>131</sup> The NYISO Transmission Owners Agreement only provides for

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<sup>125</sup> NY Transco April 12, 2016 Protest at 4.

<sup>126</sup> *Id.*

<sup>127</sup> LS Power April 12, 2016 Protest at 12–13; NY Transco April 12, 2016 Protest at 4–5.

<sup>128</sup> LS Power April 12, 2016 Protest at 12.

<sup>129</sup> NY Transco April 12, 2016 Protest at 4–5.

<sup>130</sup> LS Power April 12, 2016 Protest at 12–13.



NYISO to indemnify incumbent Transmission Owners, whereas the Operating Agreement provides a reciprocal indemnification requirement. LS Power argues that, until the NYISO Transmission Owners Agreement is updated to provide for reciprocal indemnification, the Operating Agreement should read exactly the same as the NYISO Transmission Owners Agreement.<sup>132</sup> NY Transco asserts that the lack of indemnification for NYISO in the NYISO Transmission Owners Agreement is reasonable because Transmission Owners, including Nonincumbent Transmission Owners, transfer operational control of their facilities to NYISO for the benefit of ratepayers, who will bear any costs resulting from NYISO's operation of those facilities. NY Transco states that, since "NYISO has no shareholders and is effectively indemnified by the ratepayers for whom . . . NYISO was created, there is no purpose served in indemnifying" NYISO.<sup>133</sup> At a minimum, NY Transco asks that the Commission place a reasonable cap on a Nonincumbent Transmission Owner's obligation to indemnify NYISO. NY Transco states that it is unreasonable to expect a Nonincumbent Transmission Owner to turn over operational control of its assets to NYISO without some limitation on its indemnification exposure.<sup>134</sup>

104. Regarding the insurance requirement in Article 5.05 of the Operating Agreement, LS Power argues that Nonincumbent Transmission Owners must provide insurance where incumbent Transmission Owners are not required to under the NYISO Transmission Owners Agreement. LS Power asks that the same one-sided insurance obligation be included in Article 5.05 of the Operating Agreement.<sup>135</sup>

105. LS Power further protests the changes to Articles 6.01, 6.02, and 6.03 of the Operating Agreement, which concern termination, from those provisions in the NYISO Transmission Owners Agreement. While LS Power does not object to the proposed provisions, LS Power contends that the NYISO Transmission Owners Agreement should be updated to address comparable obligations. LS Power notes that Article 6.03(c) is not even in the NYISO Transmission Owners Agreement.<sup>136</sup>

106. LS Power argues that Article 6.10 of the Operating Agreement improperly makes the adequacy of remedies provision in the NYISO Transmission Owners Agreement

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<sup>131</sup> *Id.* at 13; NY Transco April 12, 2016 Protest at 5.

<sup>132</sup> LS Power April 12, 2016 Protest at 13.

<sup>133</sup> NY Transco April 12, 2016 Protest at 5–6.

<sup>134</sup> *Id.* at 6.

<sup>135</sup> LS Power April 12, 2016 Protest at 13.

<sup>136</sup> *Id.* at 13–14.

reciprocal. LS Power requests that the Commission require an update to the NYISO Transmission Owners Agreement to make the provision reciprocal, or make the provision in the Operating Agreement one-sided, like in the NYISO Transmission Owners Agreement.<sup>137</sup>

#### 4. Answers

107. NYISO responds that “comparable” does not mean “identical,” contrary to LS Power’s and NY Transco’s arguments, and that Commission precedent does not support LS Power’s and NY Transco’s interpretation.<sup>138</sup>

108. With regard to the definition of Transmission Owner, NYISO explains that the term “Transmission Owner” as defined in the ISO Agreement for stakeholder governance purposes could be read to exclude a Nonincumbent Transmission Owner from being a Transmission Owner for purposes of the Operating Agreement and NYISO’s tariffs. Therefore, NYISO states that it indicated in Article 1.01 of the Operating Agreement that a Nonincumbent Transmission Owner will be a Transmission Owner for purposes of the Operating Agreement and NYISO’s tariffs notwithstanding the definition of Transmission Owner in the ISO Agreement. NYISO contends that Article 1.01, combined with NYISO’s proposed revisions to section 31.1.7 of the OATT, will allow Nonincumbent Transmission Owners executing the Operating Agreement to satisfy the enrollment requirements to become a Transmission Owner. NYISO also notes that Nonincumbent Transmission Owners will satisfy the definition of Transmission Owner in NYISO’s tariffs.<sup>139</sup>

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<sup>137</sup> *Id.* at 14.

<sup>138</sup> NYISO April 27, 2016 Answer at 14 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, at P 775, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 495, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 152 FERC ¶ 61,033 (2015); *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369, *order on reh’g*, 120 FERC ¶ 61,271 (2007)).

<sup>139</sup> *Id.* at 14–15.

109. NYISO responds to LS Power's protest of Article 2.02 of the Operating Agreement, arguing that the addition of the reference to the interconnection agreement reflects the present-day reality that any new transmission facility within the New York State Transmission System will have an interconnection agreement consistent with NYISO's processes. NYISO contends that incumbent Transmission Owners will have to comply with any interconnection agreement that they execute, notwithstanding the absence of this language in the NYISO Transmission Owners Agreement, based on principles of contract law. As for the emergency procedures list contained in Article 2.02 of the NYISO Transmission Owners Agreement, NYISO responds that it has incorporated and expanded on the emergency procedures described in the NYISO Transmission Owners Agreement in formulating NYISO's Emergency Operations Manual (Manual 15), which applies to all Transmission Owners.<sup>140</sup>

110. NYISO contends that the requirement in Article 2.03 that Nonincumbent Transmission Owners "promptly comply to the extent practicable with a request" from the Interconnecting Transmission Owner "to take action with respect to coordination of the operation of its Local Area Transmission System Facilities" is not unduly discriminatory or preferential, despite the absence of a related requirement in the NYISO Transmission Owners Agreement. NYISO explains that incumbent Transmission Owners have Transmission Districts and legal obligations under New York State law to ensure the reliable and safe operation of the transmission facilities in their Transmission Districts.<sup>141</sup> According to NYISO, Nonincumbent Transmission Owners likely will not be responsible for Transmission Districts or charged with the legal obligation to maintain the reliability of local systems serving end-use customers within which their transmission facilities are located. NYISO contends that, to the extent a Nonincumbent Transmission Owner's operation of its Local Area Transmission Facilities may affect the local reliability of the Transmission District in which they are located, it is reasonable and necessary to require the Nonincumbent Transmission Owner to comply with a request from the Interconnecting Transmission Owner to coordinate operation to maintain local reliability. NYISO states that, should a Nonincumbent Transmission Owner have a Transmission District and similar obligations under New York State law, it can enter into a nonconforming Operating Agreement to address that situation.<sup>142</sup>

111. NYISO similarly responds to LS Power's protest regarding the requirement in Article 2.07 of the Operating Agreement that Nonincumbent Transmission Owners comply with the local reliability rules and planning criteria of the Interconnecting Transmission Owner. NYISO reiterates that incumbent Transmission Owners have a ~~legal obligation to maintain~~ the reliability of their local transmission facilities within their

<sup>140</sup> *Id.* at 16–17.

<sup>141</sup> *Id.* at 17 (citing N.Y. Pub. Serv. Law § 65).

<sup>142</sup> *Id.* at 17–18.

Transmission Districts. NYISO asserts that this provision equally applies reliability rules to both incumbent Transmission Owners and Nonincumbent Transmission Owners, all of which must comply with the reliability rules of NERC, the Northeast Power Coordinating Council, Inc. (NPCC), and NYSRC, which include local reliability rules and any other local reliability rules and planning criteria applicable to a Transmission District.<sup>143</sup>

112. With regard to the requirements in Articles 2.08 and 2.10 that Nonincumbent Transmission Owners provide notification of maintenance schedules and information on equipment failures to Interconnecting Transmission Owners, NYISO responds that Nonincumbent Transmission Owners are not responsible for Transmission Districts and do not have a legal obligation to ensure the reliability of a local transmission system like incumbent Transmission Owners. NYISO contends that, without the legal obligation to serve a Transmission District or end-use customers, requiring Interconnecting Transmission Owners to provide maintenance and outage information to Nonincumbent Transmission Owners would have no practical effect. Should a Nonincumbent Transmission Owner have such obligations, NYISO asserts that it can enter into a nonconforming Operating Agreement to address that situation. In response to LS Power's assertion that incumbent Transmission Owners do not have the same requirements with respect to their interconnection with each other's systems, NYISO argues that Article 2.09 of the NYISO Transmission Owners Agreement expressly mandates that each incumbent Transmission Owner supply results of investigations to "other Transmission Owners," which means the other incumbent Transmission Owners.<sup>144</sup>

113. NYISO also responds to NY Transco's and NYTOs' protests regarding Article 2.13. Contrary to protesters' arguments, NYISO contends that the obligation to serve as a Responsible Transmission Owner and to provide safe and reliable service applies equally to all Transmission Owners. In particular, NYISO states that all Transmission Owners that provide service over their transmission facilities in the New York Control Area are required to provide safe and reliable service in accordance with, but not limited to, the OATT, the Services Tariff, and federal and state law and attendant regulations.<sup>145</sup> According to NYISO, wires-only Transmission Owners operate an "electric plant" under New York State law, and providing service over it qualifies those Transmission Owners as "electric corporations," subject to the same requirements as Transmission Owners with Transmission Districts.<sup>146</sup> Further, NYISO argues that

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<sup>143</sup> *Id.* at 18.

<sup>144</sup> *Id.* at 19–20.

<sup>145</sup> NYISO October 19, 2016 Answer at 4–6 (citing Article 2.02 of the Operating Agreement and of the NYISO Transmission Owners Agreement; NYISO, OATT, §§ 1.7, 4.1.2, 20.2.4.4; NYISO, Services Tariff, § 2.7; N.Y. Pub. Serv. L. § 65(1)).

there is no support for the assertion that the responsibility to provide a regulated backstop solution is rooted in the Transmission Owner's obligations to a Transmission District or to retail customers; rather, NYISO asserts that NYISO and NYTOs jointly proposed, and the Commission approved, language stating that the Responsible Transmission Owner "will *normally* be the Transmission Owner in whose Transmission District" the Reliability Need arises.<sup>147</sup> NYISO further responds that the obligation of Transmission Owners to plan for the reliability of their Transmission Districts and retail customers is covered by NYISO's local transmission planning process, which will not be affected by NYISO designating a Nonincumbent Transmission Owner as a Responsible Transmission Owner for Reliability Needs that arise on bulk power transmission facilities.<sup>148</sup>

114. Additionally, NYISO disagrees that incumbent Transmission Owners are better-positioned to provide a regulated backstop solution because all Transmission Owners are subject to the same qualification and enforcement mechanisms when proposing regulated backstop solutions and are equally able to upgrade their own transmission facilities. NYISO explains that all Transmission Owners are required to demonstrate that they are qualified under the OATT to propose a transmission project, and are subject to requalification every three years.<sup>149</sup> Moreover, NYISO continues, all Transmission Owners are subject to the same mechanisms to enforce their obligations, including, but not limited to, the provisions contained in the Reliability Development Agreement, the OATT, and the Services Tariff.<sup>150</sup> NYISO also argues that Transmission Owners should be responsible for providing a regulated backstop solution to NYISO, rather than having to work with the Interconnecting Transmission Owner to propose an upgrade to the Nonincumbent Transmission Owner's facilities. NYISO argues that having the Nonincumbent Transmission Owner go through the incumbent Transmission Owner would supplant NYISO's authority as the regional transmission planner and run contrary to Commission precedent in Order Nos. 1000 and 890.<sup>151</sup> NYISO adds that it has the

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<sup>146</sup> *Id.* at 6–7 & n.24 (citing N.Y. Pub. Serv. L. §§ 2(12), 2(13), 65(1); *Carr St. Generating Station, L.P.*, Case No. 98-E-1670, at 11 (N.Y. Pub. Serv. Comm'n Apr. 23, 1999); *Wallkill Generator Co. L.P.*, Case No. 91-E-0350, at 11 (N.Y. Pub. Serv. Comm'n Aug. 21, 1999); *AES Eastern Energy, L.P. & AES Creative Resources, L.P.*, Case No. 99-E-0148 (N.Y. Pub. Serv. Comm'n Apr. 23, 1999)).

<sup>147</sup> *Id.* at 7–8 (quoting NYISO, OATT, § 31.1.1 (emphasis added)).

<sup>148</sup> *Id.* at 8–9 (citing NYISO, OATT, § 31.2.1).

<sup>149</sup> *Id.* at 9–10 (citing NYISO, OATT, § 31.2.4; Proposed NYISO OATT § 31.2.8.1.6).

<sup>150</sup> *Id.* at 11.

<sup>151</sup> *Id.* at 11–12 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 99,

authority to, and will, designate both the incumbent Transmission Owner and the Nonincumbent Transmission Owner as Responsible Transmission Owners with the obligation to provide NYISO a regulated backstop solution if a Reliability Need requires both Transmission Owners' participation.<sup>152</sup>

115. NextEra and LS Power also respond to the protests to Article 2.13. NextEra argues that NY Transco and NYTOs offer no policy reason under Order No. 1000 for their opposition to NYISO's proposal to allow Nonincumbent Transmission Owners to be Responsible Transmission Owners. NextEra contends that it is irrelevant whether Nonincumbent Transmission Owners have other ways to propose transmission projects under NYISO's OATT and Services Tariff. NextEra explains that NYISO's proposal addresses the issue of which entity should prepare a mandatory regulated backstop solution, and not any particular entity's desire to submit a voluntary project proposal. With regard to NY Transco's and NYTOs' argument that incumbent Transmission Owners have statutory obligations under New York State law, NextEra argues that retail service obligations have never been an integral part of the obligations Transmission Owners have under Order No. 1000.<sup>153</sup> In fact, LS Power asserts that the Commission rejected in Order No. 1000 assertions that retail service providers have special obligations that make them specially placed for purposes of addressing reliability concerns.<sup>154</sup>

116. Moreover, NextEra and LS Power argue that Nonincumbent Transmission Owners will have obligations under NERC standards for reliable operations of their systems, which attach even if Nonincumbent Transmission Owners do not have Transmission Districts and do not have retail obligations under New York State law.<sup>155</sup> LS Power adds that some Nonincumbent Transmission Owners may have legal obligations under New York State law, including an LS Power affiliate that LS Power contends qualifies as an "electric corporation" under New York State law and that submitted a project proposal as part of NYISO's reliability transmission planning process.<sup>156</sup> LS Power further argues that NYISO makes clear in its filing that its concern is with Reliability Needs that arise

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146–165; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 438, 444–561).

<sup>152</sup> *Id.* at 12 (citing NYISO, OATT, § 31.1.1).

<sup>153</sup> NextEra October 18, 2016 Answer at 5–6.

<sup>154</sup> LS Power October 19, 2016 Protest at 6 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 428).

<sup>155</sup> NextEra October 18, 2016 Answer at 6; LS Power October 19, 2016 Answer at 5–6 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 342; Order No. 1000-A, 139 FERC ¶ 61,132 at P 444).

<sup>156</sup> LS Power October 19, 2016 Answer at 7.

on facilities owned by a Nonincumbent Transmission Owner and not on the broader Transmission District serving retail load.<sup>157</sup>

117. NextEra also asserts that NYTOs provide no evidence of a potential interference with incumbent Transmission Owners' ability to fulfill their obligations and duties by allowing Nonincumbent Transmission Owners to be Responsible Transmission Owners. In addition, NextEra contends that, under NY Transco's proposal, the incumbent Transmission Owner, as the Responsible Transmission Owner, would be able to offer NYISO self-serving solutions to Reliability Needs that would avoid or minimize any participation by the Nonincumbent Transmission Owner, even if the Nonincumbent Transmission Owner's facilities were most relevant as the potential backstop solution.<sup>158</sup> LS Power argues that a Nonincumbent Transmission Owner must be permitted to plan its own system rather than being relegated to building the upgrades that incumbent Transmission Owners propose to NYISO instead.<sup>159</sup> With regard to NYTOs' argument that incumbent Transmission Owners have "financial strength," NextEra responds that a Nonincumbent Transmission Owner will have already been through vetting as a qualified bidder for transmission projects in New York, prevailed in the competitive solicitation process, and built a project.<sup>160</sup> LS Power adds that the Commission already rejected similar arguments as part of Order No. 1000.<sup>161</sup>

118. NYTOs respond that they agree with NYISO, LS Power, and NextEra that all Transmission Owners in NYISO have all of the rights and obligations that role entails, including the federal right of first refusal to build upgrades to their transmission facilities.<sup>162</sup> NYTOs state that they also agree that NYISO can designate any Transmission Owner as the Responsible Transmission Owner when a Reliability Need arises on that Transmission Owner's facilities, and all other Transmission Owners can propose alternative regulated transmission solutions whether the proposals involve upgrades to their own facilities or not. NYTOs state that they spoke with NYISO and NYISO confirmed that the proposed tariff language is intended only to allow NYISO to designate a Nonincumbent Transmission Owner without a Transmission District as a Responsible

<sup>157</sup> *Id.* at 5.

<sup>158</sup> NextEra October 18, 2016 Answer at 6–7.

<sup>159</sup> LS Power October 19, 2016 Answer at 6.

<sup>160</sup> NextEra October 18, 2016 Answer at 5–8.

<sup>161</sup> LS Power October 19, 2016 Answer at 7–8 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 443).

<sup>162</sup> NYTOs October 28, 2016 Answer at 4 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 421).

Transmission Owner to the extent that a Reliability Need arises on a facility owned by that Transmission Owner. Based on this clarification, NYTOs state that they have no objection to the proposed tariff language.<sup>163</sup>

119. NYISO asks that the Commission reject NY Transco's request that NYISO not be able to assign the Operating Agreement under Article 4.01. NYISO argues that nothing in the assignment provision entails NYISO abdicating its responsibilities as the market and transmission grid operator; rather, NYISO continues, the provision would simply allow NYISO to assign its rights and responsibilities under the Operating Agreement, with Commission approval, if NYISO has a corporate successor entity to which the entirety of its rights and obligations would be assigned. NYISO asserts that reciprocal assignment rights are a standard commercial term that recognizes that entities bound to an agreement may restructure over time. NYISO notes that the absence of a reciprocal provision in the NYISO Transmission Owners Agreement was due to the circumstances at NYISO's formation—NYISO was a new not-for-profit corporation without any assets or proven track record.<sup>164</sup>

120. NYISO answers LS Power's and NY Transco's protests regarding the reciprocal limitations on liability and indemnity provisions in Articles 5.01, 5.02, and 5.03 of the Operating Agreement. NYISO states that, under the pre-NYISO environment in New York, the incumbent Transmission Owners not only owned transmission facilities, but were also responsible for the critical functions in operating those assets for the benefit of their native load customers. According to NYISO, the nonreciprocal limitations on liability and indemnity provisions sought to protect the incumbent Transmission Owners and their customers from "significant financial risks and burdens" in transferring operational control over to NYISO and addressed incumbent Transmission Owners' specific concerns at that time.<sup>165</sup> NYISO contends that it is now a well-established entity with multi-layer systems, procedures, and policies in place to protect market participants from financial risk due to NYISO's operations. NYISO asserts that the Operating Agreement appropriately reflects OATT section 2.11.3(b), which limits NYISO's liability. In addition, NYISO states that the Commission has consistently provided special liability protections to independent system operators and regional transmission organizations (ISOs/RTOs) to protect them from bankruptcy.<sup>166</sup> NYISO also argues that NY Transco is incorrect that NYISO is effectively indemnified by ratepayers.

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<sup>163</sup> *Id.* at 4–5 (citing Proposed NYISO OATT § 31.1).

<sup>164</sup> NYISO April 27, 2016 Answer at 20.

<sup>165</sup> *Id.* at 21–22 (quoting NYISO, Supplemental Filing to the Comprehensive Proposal to Restructure the New York Wholesale Electric Market, Docket Nos. ER97-1523-000, OA97-470-000, at 38–39 (filed Dec. 19, 1997)).

<sup>166</sup> *Id.* at 22 (citing NYISO, Request for Rehearing and Clarification, Docket



121. Lastly, NYISO responds to LS Power's arguments regarding Article 6.0 of the Operating Agreement. NYISO contends that all of the provisions in Article 6.0 are reasonable terms between contracting commercial parties. NYISO asserts that LS Power fails to explain how any Nonincumbent Transmission Owner would be treated in an unduly discriminatory or preferential manner and acknowledges that the provisions are unobjectionable.<sup>167</sup>

## **5. Commission Determination**

122. We conditionally accept NYISO's proposed Operating Agreement, effective April 1, 2016, and require NYISO to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions directed below. We accept NYISO's proposed revisions to section 31.1.7 of Attachment Y of the OATT regarding its enrollment process and the process for entering into an Operating Agreement. While we recognize that there are reasonable justifications for some of the differences between the NYISO Transmission Owners Agreement and the Operating Agreement, we find that other differences discriminate unduly against Nonincumbent Transmission Owners<sup>168</sup> and must be revised. We therefore find that NYISO partially complied with the Fourth Compliance Order by submitting the Operating Agreement and attempting to demonstrate how it is comparable to the NYISO Transmission Owners Agreement,<sup>169</sup> and direct further compliance, as discussed below.

123. In particular, we require NYISO to include in the compliance filing ordered herein: (1) revisions to Article 2.02 to remove the language that subjects a Nonincumbent Transmission Owner to "the transmission interconnection agreement(s) for its facilities;" (2) revisions to Article 2.07 to remove the requirement that Nonincumbent Transmission Owners comply with the local reliability rules and planning criteria of the Interconnecting Transmission Owner; (3) a new tariff provision requiring

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No. ER13-102-008, at 5–12 (filed Jan. 27, 2016)).

<sup>167</sup> *Id.* at 23.

<sup>168</sup> We use the term Nonincumbent Transmission Owner to refer to a nonincumbent transmission developer executing the Operating Agreement with NYISO. We note, however, that the Commission clarified in Order No. 1000-A that a nonincumbent transmission developer that energizes its transmission facility "will have a footprint" and "then become an incumbent transmission developer/provider for that energized transmission facility and will thereafter have all the rights and obligations that accrue to such entities under Order No. 1000, such as being able to maintain a federal right of first refusal for local transmission facilities and upgrades to those transmission facilities." Order No. 1000-A, 139 FERC ¶ 61,132 at P 421.

<sup>169</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 20.

all Transmission Owners to provide maintenance schedules to other Transmission Owners where those maintenance schedules would directly impact other Transmission Owners' facilities, and revisions to Article 2.08 of the Operating Agreement to refer to that new tariff provision; (4) a new tariff provision requiring all Transmission Owners to provide information regarding investigations of equipment malfunctions and failures and forced transmission outages to other Transmission Owners, and revisions to Article 2.10 of the Operating Agreement to refer to that new tariff provision; (5) revisions to Article 3.08 to make it comparable to the NYISO Transmission Owners Agreement or an explanation as to how Article 3.08 in the Operating Agreement is comparable to Article 3.10 of the NYISO Transmission Owners Agreement and not unduly discriminatory or preferential; (6) revisions to Article 4.01 of the Operating Agreement to remove NYISO's right to assign the Operating Agreement; (7) revisions to Articles 5.01 and 5.02 to limit NYISO's liability "as provided under the ISO OATT;" (8) revisions to Articles 6.01, 6.02, and 6.03 to remove the requirements that a Nonincumbent Transmission Owner "obtain[] all regulatory approvals . . . and hav[e] on file with FERC its own open access transmission tariff" before terminating the Operating Agreement, withdrawing from the ISO Agreement, the OATT, and Services Tariff, and withdrawing its assets from NYISO's control, and removing Article 6.03(c); and (9) revisions to Article 6.10 to remove NYISO's right to seek an injunction or specific performance. We accept all provisions of the Operating Agreement not otherwise discussed below.

124. At the outset, we clarify that the Commission's directive requiring NYISO to submit the "comparable operating agreement" referenced in section 31.1.7 of Attachment Y of the OATT did not mean that NYISO had to submit an operating agreement that is *identical* to the NYISO Transmission Owners Agreement.<sup>170</sup> We further note that NYISO and the Nonincumbent Transmission Owner may negotiate over disputed provisions of the Operating Agreement and may file an unexecuted Operating Agreement, at which point the Commission will resolve remaining disagreements, or may file an executed nonconforming Operating Agreement.<sup>171</sup>

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<sup>170</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 155 ("[W]e note that in Order Nos. 890 and 890-A . . . we have provided guidance regarding the requirements of the Order No. 890 comparability transmission planning principle. Specifically, public utility transmission providers are required to identify how they will evaluate and select from competing solutions and resources such that all types of resources are considered on a comparable basis."); Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 216 ("Treating similarly-situated resources on a comparable basis does not necessarily mean that the resources are treated the same."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 152 FERC ¶ 61,033 at P 17 n.21 ("Order No. 890 does not require identical treatment for all resources; it requires that transmission, generation, and demand solutions receive comparable treatment in the transmission planning process.").

125. We accept Article 1.01. NYISO proposes to incorporate the definitions from the ISO Agreement into the Operating Agreement, the same as the NYISO Transmission Owners Agreement incorporates those definitions. However, the definition of Transmission Owner in the ISO Agreement requires a Transmission Owner to own “at least 100 circuit miles of 115 kV or above in New York State and . . . become a signatory to the” NYISO Transmission Owners Agreement.<sup>172</sup> Some Nonincumbent Transmission Owners may not own enough circuit miles to satisfy that definition and Nonincumbent Transmission Owners will not become signatories to the NYISO Transmission Owners Agreement. NYISO therefore proposes in Article 1.01 of the Operating Agreement to state that a Nonincumbent Transmission Owner “shall be a Transmission Owner for purposes of the ISO Tariffs and this Agreement notwithstanding the definition of Transmission Owner contained in the ISO Agreement.” We find this clarification necessary to ensure Nonincumbent Transmission Owners may satisfy the enrollment requirements to become Transmission Owners in NYISO and participate in NYISO’s regional transmission planning process.<sup>173</sup> Contrary to NY Transco’s suggestion, NYISO does not need to revise the definition of Transmission Owner in the OATT or Services Tariff because both definitions do not include the additional requirements to own a certain number of circuit miles and to become a signatory to the NYISO Transmission Owners Agreement.<sup>174</sup>

126. We conditionally accept Article 2.02, subject to NYISO including in the compliance filing ordered herein revisions to Article 2.02 to remove the language that subjects a Nonincumbent Transmission Owner to “the transmission interconnection agreement(s) for its facilities.” LS Power correctly points out that the NYISO Transmission Owners Agreement does not contain a similar obligation.<sup>175</sup> NYISO seeks to justify this difference on the basis that the reference to interconnection agreements in the Operating Agreement merely reflects the fact that any new transmission facility will be subject to an interconnection agreement.<sup>176</sup> However, to the extent that an incumbent Transmission Owner has executed an interconnection agreement, it is subject to that interconnection agreement notwithstanding the absence of similar language in the NYISO

<sup>171</sup> Proposed NYISO OATT, Attachment Y, §§ 31.1.7.3–4.

<sup>172</sup> See NYISO, ISO Agreement, Article 1 (1999), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/iso\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/iso_agreement.pdf).

<sup>173</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at PP 275–277.

<sup>174</sup> NYISO, OATT, § 1.20 (7.0.0); NYISO, Services Tariff, § 2.20 (9.0.0).

<sup>175</sup> LS Power April 12, 2016 Protest at 9–10.

<sup>176</sup> NYISO April 27, 2016 Answer at 16.

Transmission Owners Agreement. We find that all Transmission Owners, incumbent and nonincumbent, are similarly situated with regard to their obligation to comply with interconnection agreements that they have executed and, therefore, that this difference in Articles 2.02 in the NYISO Transmission Owners Agreement and Operating Agreement is unduly discriminatory and preferential.

127. Nonetheless, we accept the remainder of Article 2.02 of the Operating Agreement. While LS Power asserts that Article 2.02 should contain the same list of retained emergency rights as in the NYISO Transmission Owners Agreement,<sup>177</sup> the NYISO Transmission Owners Agreement indicates that once the referenced emergency procedures have been promulgated, they control and not the list of retained emergency rights in the NYISO Transmission Owners Agreement.<sup>178</sup> As NYISO explains, NYISO's Emergency Operations Manual (Manual 15), which applies to all Transmission Owners, incorporates and expands on the retained emergency rights and emergency procedures described in Article 2.02 of the NYISO Transmission Owners Agreement.<sup>179</sup> In sum, we do not find the difference in language in Articles 2.02 of the NYISO Transmission Owners Agreement and the Operating Agreement regarding emergency operations to be unduly discriminatory or preferential.

128. We accept Article 2.03. LS Power contends that the requirement in Article 2.03 that Nonincumbent Transmission Owners comply with a request from Interconnecting Transmission Owners to coordinate operation of their Local Area Transmission System Facilities is improper because incumbent Transmission Owners have no similar obligation with respect to their interconnection with each other's systems.<sup>180</sup> We disagree. Incumbent Transmission Owners in NYISO must register as Transmission Operators with NERC and, therefore, be subject to NERC Reliability Standard TOP-004-2. This standard requires Transmission Operators to "develop, maintain, and implement formal policies and procedures to provide for transmission reliability," which must "address the execution and coordination of activities that impact inter- and intra-Regional reliability."<sup>181</sup> Nonincumbent Transmission Owners are not

<sup>177</sup> LS Power April 12, 2016 Protest at 10.

<sup>178</sup> The NYISO Transmission Owners Agreement states that, "[u]ntil the Operating Committee promulgates such procedures, the Transmission Owners will exercise the above responsibilities during an Emergency."

<sup>179</sup> NYISO, *Emergency Operations Manual* (July 13, 2016), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Manuals\\_and\\_Guides/Manuals/Operations/em\\_op\\_mnl.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Operations/em_op_mnl.pdf).

<sup>180</sup> LS Power April 12, 2016 Protest at 11.

<sup>181</sup> Reliability Standard TOP-004-2 (Transmission Operations), at Requirement R6.

required to register with NERC as Transmission Operators. We therefore find that the requirement in Article 2.03 of the Operating Agreement to comply with a request from the Interconnecting Transmission Owner to coordinate operation of the Nonincumbent Transmission Owner's Local Area Transmission Facilities is not unduly discriminatory or preferential.

129. We conditionally accept Article 2.07, subject to NYISO including in the compliance filing ordered herein revisions to Article 2.07 to remove the requirement that Nonincumbent Transmission Owners comply with the local reliability rules and planning criteria of the Interconnecting Transmission Owner. LS Power argues that this requirement is improper because there is no similar requirement imposed on incumbent Transmission Owners with respect to their interconnection with each other's systems.<sup>182</sup> We agree that including this requirement in the Operating Agreement is improper, but not for the reason LS Power provides. All Transmission Owners, including incumbent Transmission Owners, must comply with, or seek waiver from, the reliability rules established by NERC, NPCC, and NYSRC, which include local reliability rules and planning criteria applicable to an incumbent Transmission Owner's Transmission District, notwithstanding the absence of explicit language in the NYISO Transmission Owners Agreement or in the Operating Agreement. We find that all Transmission Owners are similarly situated with regard to their obligation to comply with local reliability rules and planning criteria and, therefore, that there is no justification for including this requirement in the Operating Agreement where it is not included in the NYISO Transmission Owners Agreement. We therefore find this difference in Articles 2.07 in the NYISO Transmission Owners Agreement and Operating Agreement to be unduly discriminatory and preferential.

130. We conditionally accept Article 2.08, subject to NYISO including in the compliance filing ordered herein a new tariff provision requiring all Transmission Owners to provide maintenance schedules to other Transmission Owners where those maintenance schedules would directly impact other Transmission Owners' facilities, and revising Article 2.08 of the Operating Agreement to refer to that new tariff provision. LS Power protests the fact that Article 2.08 does not require Interconnecting Transmission Owners to provide notification of maintenance schedules to the interconnected Nonincumbent Transmission Owner and asks that NYISO coordinate all maintenance schedules.<sup>183</sup> We agree with LS Power. Interconnecting Transmission Owners should provide maintenance schedules to interconnected Nonincumbent Transmission Owners where those schedules would directly impact the Nonincumbent Transmission Owners' facilities. As Transmission Operators registered with NERC, incumbent Transmission Owners must coordinate for

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<sup>182</sup> LS Power April 12, 2016 Protest at 11.

<sup>183</sup> *Id.*

reliability with other Transmission Owners, which should include providing maintenance schedules where they would directly impact another Transmission Owners' facilities. In addition, in Article 2.02 of the Operating Agreement, Nonincumbent Transmission Owners agree to "ensur[e] that all actions related to the operation, maintenance and modification of its facilities" are performed in accordance with the Operating Agreement, reliability rules, standards, and criteria, operating instructions, NYISO's OATT, Services Tariff, and procedures, and any interconnection agreements. Nonincumbent Transmission Owners cannot fulfill these obligations without knowing Interconnecting Transmission Owners' maintenance schedules where those schedules would directly impact Nonincumbent Transmission Owners' facilities. We find that requiring all Transmission Owners to provide maintenance schedules to other Transmission Owners where those maintenance schedules would directly impact other Transmission Owners' facilities is necessary to ensure comparable treatment of all Transmission Owners, and therefore require NYISO to add such a requirement to its tariffs.

131. We also conditionally accept Article 2.10, subject to NYISO including in the compliance filing ordered herein a new tariff provision requiring all Transmission Owners to provide information regarding investigations of equipment malfunctions and failures and forced transmission outages to other Transmission Owners, and revising Article 2.10 of the Operating Agreement to refer to that new tariff provision. LS Power protests the requirement in Article 2.10 that Nonincumbent Transmission Owners must provide the results of these investigations to Interconnecting Transmission Owners. LS Power notes that Interconnecting Transmission Owners do not have to provide this information to interconnected Nonincumbent Transmission Owners and, similarly, that incumbent Transmission Owners do not have to provide this information with respect to interconnection with each other's systems.<sup>184</sup> On the latter point, regarding incumbent Transmission Owners' requirement to provide this information to each other, LS Power is incorrect. Article 2.09 of the NYISO Transmission Owners Agreement expressly mandates that each incumbent Transmission Owner supply the results of investigations to "the other Transmission Owners." However, LS Power is correct that Interconnecting Transmission Owners do not have to provide this information to interconnected Nonincumbent Transmission Owners. We find that, just as Incumbent Transmission Owners already share this information with each other, so too should they share this information with Nonincumbent Transmission Owners, thereby aiding all Transmission Owners in avoiding operational issues on their facilities. We further find that this requirement is necessary to ensure comparable treatment of all Transmission Owners, and therefore require NYISO to add such a requirement to its tariffs.

132. We accept Article 2.13. As part of NYISO's regional transmission planning process, NYISO solicits the following types of proposed solutions to identified Reliability Needs: (1) regulated backstop solutions; (2) alternative regulated solutions;

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<sup>184</sup> *Id.* at 11–12.

and (3) market-based solutions. For each Reliability Need, NYISO designates a Transmission Owner as a Responsible Transmission Owner, consistent with the terms of the NYISO/TO Reliability Agreement and the OATT. The Responsible Transmission Owner, which will normally be the Transmission Owner in whose service territory (i.e., Transmission District) the Reliability Need arises, must prepare a regulated backstop solution.<sup>185</sup> Other developers, incumbent and nonincumbent, can propose alternative regulated solutions and market-based solutions.<sup>186</sup> In Article 2.13 of the Operating Agreement, NYISO proposes that it be able to designate a Nonincumbent Transmission Owner as a Responsible Transmission Owner to the extent that a Reliability Need arises on the Nonincumbent Transmission Owner's facilities. NYISO contends that this requirement is necessary to fully incorporate Nonincumbent Transmission Owners into the reliability transmission planning process. Moreover, NYISO argues that this approach is appropriate because NERC Transmission System Planning Performance Requirements obligate Transmission Owners to plan their systems to operate reliably within NERC's standards, which can be satisfied, in part, through the identification of a regulated backstop solution.<sup>187</sup> We agree that NYISO's proposal is just and reasonable and ensures comparability.

133. Contrary to NY Transco's protest,<sup>188</sup> we conclude that NYISO must be able to designate a Nonincumbent Transmission Owner as a Responsible Transmission Owner if a Reliability Need arises on the Nonincumbent Transmission Owner's facilities. That is because, once a Nonincumbent Transmission Owner executes the Operating Agreement, it will become a Transmission Owner in NYISO, and will be similarly situated to incumbent Transmission Owners for purposes of proposing and developing a regulated backstop solution to address a Reliability Need that arises on its facilities.<sup>189</sup> Preventing

<sup>185</sup> NYISO, OATT, Attachment Y, §§ 31.1.1, 31.2.4.3 (15.0.0).

<sup>186</sup> *Id.* § 31.2.4.

<sup>187</sup> NYISO September 13, 2016 Transmittal Letter at 19–20 (citing NERC, Transmission System Planning Performance Requirements, No. TPL-001-04 at R2).

<sup>188</sup> We note that NYTOs withdrew their protest to Article 2.13 after receiving clarification from NYISO that the proposed tariff language is intended only to allow NYISO to designate a Nonincumbent Transmission Owner without a Transmission District as a Responsible Transmission Owner to the extent that a Reliability Need arises on a facility owned by that Nonincumbent Transmission Owner. NYTOs October 28, 2016 Answer at 4–5.

<sup>189</sup> *C.f.* Order No. 1000-A, 139 FERC ¶ 61,132 at P 421 (finding that nonincumbent transmission developers, once their transmission facilities are energized, “will have a footprint” and will “thereafter have all the rights and obligations that accrue to such entities under Order No. 1000”).

NYISO from designating a Nonincumbent Transmission Owner as a Responsible Transmission Owner would mean that incumbent and Nonincumbent Transmission Owners would not be treated comparably when it comes to this aspect of NYISO's reliability transmission planning process. Moreover, although only incumbent Transmission Owners, all of which have Transmission Districts under New York State law, have previously been designated as Responsible Transmission Owners, there is nothing that requires that a Responsible Transmission Owner have a Transmission District.

134. We conditionally accept Article 3.08, subject to NYISO including in the compliance filing ordered herein revisions to Article 3.08 of the Operating Agreement to make it comparable to the NYISO Transmission Owners Agreement or explaining how Article 3.08 in the Operating Agreement is comparable to Article 3.10 of the NYISO Transmission Owners Agreement and not unduly discriminatory or preferential. The NYISO Transmission Owners Agreement gives incumbent Transmission Owners (1) "the right at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the ISO OATT, a Service Agreement under the ISO OATT, or the ISO Agreement to the extent necessary" to (2) "recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT and . . . accommodate implementation of, and changes to, a Transmission Owner's retail access program." In contrast, the Operating Agreement gives Nonincumbent Transmission Owners (1) "the right to make a filing with the Commission pursuant to Section 205 of the Federal Power Act" to (2) "recover, in accordance with the requirements of Attachment Y to the ISO OATT and/or applicable rate schedule of the ISO OATT, all of its reasonably incurred costs, including a reasonable return on investment related to the development, construction, operation and maintenance of its transmission facilities and any applicable regulatory incentives." NYISO has not demonstrated that these provisions are comparable. We therefore find that, with regard to Article 3.08 of the Operating Agreement, NYISO failed to comply with the Commission's directive to demonstrate that the Operating Agreement is comparable to the NYISO Transmission Owners Agreement and not unduly discriminatory or preferential.<sup>190</sup>

135. We conditionally accept Article 4.01, subject to NYISO including in the compliance filing ordered herein revisions to Article 4.01 to remove NYISO's right to assign the Operating Agreement. NY Transco argues that Article 4.01 of the Operating Agreement allows NYISO to assign the Operating Agreement, whereas NYISO cannot assign the NYISO Transmission Owners Agreement. According to NY Transco, NYISO should not be able to assign either agreement because NYISO should not be able to "abdicate its role as the transmission grid and/or market operator without the approval" of the Transmission Owners.<sup>191</sup> While this may be a standard

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<sup>190</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 20.



commercial term, as NYISO argues, we find that, if there is a successor corporate entity to NYISO, all Transmission Owners, both incumbent and nonincumbent, should have the same rights. At this time, we find the differences between Articles 4.01 in the NYISO Transmission Owners Agreement and in the Operating Agreement to be unduly discriminatory and preferential, and therefore require NYISO to revise Article 4.01 of the Operating Agreement to remove NYISO's right to assign the Operating Agreement.

136. We conditionally accept Articles 5.01 and 5.02, subject to NYISO including in the compliance filing ordered herein revisions to Articles 5.01 and 5.02 to limit NYISO's liability "as provided under the ISO OATT." Articles 5.01 and 5.02 of the Operating Agreement limit NYISO's and Nonincumbent Transmission Owners' liability to each other. LS Power and NY Transco argue that it is improper to limit NYISO's liability to Nonincumbent Transmission Owners because the NYISO Transmission Owners Agreement does not so limit NYISO's liability to incumbent Transmission Owners beyond what is already provided for in NYISO's tariffs.<sup>192</sup> We agree and find that the differences between Articles 5.01 and 5.02 in the two agreements are unduly discriminatory and preferential. NYISO's liability to incumbent and Nonincumbent Transmission Owners should be limited to the same extent, which is to the extent it is limited under the OATT.<sup>193</sup> We therefore direct NYISO to revise Articles 5.01 and 5.02 to state that NYISO's liability to the Nonincumbent Transmission Owner is limited "as provided under the ISO OATT." We note that LS Power is mistaken that NYISO excluded Article 5.02 of the NYISO Transmission Owners Agreement from the Operating Agreement.<sup>194</sup>

137. We accept Article 5.03. LS Power and NY Transco protest the fact that Article 5.03 of the Operating Agreement places an indemnification obligation on Nonincumbent Transmission Owners that is not placed on incumbent Transmission Owners in the NYISO Transmission Owners Agreement.<sup>195</sup> We find that Article 5.03 treats Nonincumbent Transmission Owners comparably, notwithstanding the difference in indemnification obligations. As explained above, "[t]reating similarly-situated resources on a comparable basis does not necessarily mean that the resources are treated the same."<sup>196</sup> In this case, we find that the difference in indemnification

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<sup>191</sup> NY Transco April 12, 2016 Protest at 4.

<sup>192</sup> LS Power April 12, 2016 Protest at 12–13; NY Transco April 12, 2016 Protest at 4–5.

<sup>193</sup> NYISO, OATT, § 2.11.3(b) (0.0.0). The NYISO Transmission Owners Agreement is silent as to NYISO's liability to incumbent Transmission Owners.

<sup>194</sup> LS Power April 12, 2016 Protest at 12–13; Operating Agreement, Article 5.02.

<sup>195</sup> LS Power April 12, 2016 Protest at 13; NY Transco April 12, 2016 Protest at 5.

obligations is appropriate here because, by limiting NYISO's indemnification obligation to Nonincumbent Transmission Owners, Article 5.03 of the Operating Agreement is consistent with Commission policy limiting ISO/RTO liability through indemnification.<sup>197</sup>

138. We accept Article 5.05. LS Power argues that Article 5.05 improperly requires Nonincumbent Transmission Owners to provide insurance where incumbent Transmission Owners are not required to do so under the NYISO Transmission Owners Agreement.<sup>198</sup> We disagree. The NYISO Transmission Owners Agreement requires "A Party" to procure insurance, and the Operating Agreement requires "Each Party" to procure insurance. We interpret these provisions to impose comparable insurance obligations. We therefore find that the differences between the two agreements are not unduly discriminatory or preferential.

139. We conditionally accept Articles 6.01, 6.02, and 6.03, subject to NYISO including in the compliance filing ordered herein revisions to Articles 6.01, 6.02, and 6.03 to remove the requirements that a Nonincumbent Transmission Owner "obtain[] all regulatory approvals . . . and hav[e] on file with FERC its own open access transmission tariff" before terminating the Operating Agreement, withdrawing from the ISO Agreement, the OATT, and Services Tariff, and withdrawing its assets from NYISO's control, and removing Article 6.03(c), as explained in the following paragraphs. LS Power argues that the NYISO Transmission Owners Agreement should be updated to address comparable obligations to those imposed on Nonincumbent Transmission Owners in Articles 6.01, 6.02, and 6.03 of the Operating Agreement.<sup>199</sup> Most of the differences between the two agreements relate to the fact that the NYISO Transmission Owners Agreement is a multi-party agreement, so a party withdraws from it, rather than terminating it, whereas the Operating Agreement will be between NYISO and a single Nonincumbent Transmission Owner. We find these differences to not be unduly discriminatory or preferential.

140. With that said, we agree with LS Power that the requirements in Articles 6.01 and 6.02 that a Nonincumbent Transmission Owner "obtain[] all regulatory approvals . . . and

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<sup>196</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 216.

<sup>197</sup> See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,026, at P 13 (2007) (accepting NYISO's limitation on liability and indemnity provisions in its OATT because "RTOs and ISOs must provide service to all eligible customers, and cannot deny service to particular customers based on the risk of potential damages associated with interruption of service to those customers, thus, all customers ultimately bear the cost associated with the risk of such service").

<sup>198</sup> LS Power April 12, 2016 Protest at 13.

<sup>199</sup> *Id.* at 13–14.

hav[e] on file with FERC its own open access transmission tariff” are unduly discriminatory and preferential, and therefore require NYISO to remove these requirements from the Operating Agreement. It is unclear from the language “obtain all regulatory approvals” whether NYISO is imposing an obligation on Nonincumbent Transmission Owners that is not already imposed on incumbent Transmission Owners. The language is overly broad and vague and could result in a situation in which incumbent Transmission Owners can withdraw from the NYISO Transmission Owners Agreement, but Nonincumbent Transmission Owners cannot withdraw from the Operating Agreement. In addition, regarding the requirement that a Nonincumbent Transmission Owner have “on file with FERC its own open access transmission tariff,” even without the NYISO Transmission Owners Agreement or Operating Agreement specifying it, “[e]very public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission an open access transmission tariff of general applicability for transmission services, including ancillary services, over such facilities.”<sup>200</sup> We therefore find that all Transmission Owners are similarly situated with regard to their obligation to have on file with FERC an open access transmission tariff and that there is no justification for including this requirement in the Operating Agreement where it is not included in the NYISO Transmission Owners Agreement. As such, we find this difference in Articles 6.01 and 6.02 in the NYISO Transmission Owners Agreement and Operating Agreement to be unduly discriminatory and preferential.

141. We likewise find that Article 6.03(c) is unduly discriminatory and preferential and should be removed from the Operating Agreement. Article 6.03(c) provides that, even after termination and withdrawal, Nonincumbent Transmission Owners remain responsible “for the operation, maintenance, and modification of [their] transmission facilities in accordance with [their] own open access transmission tariff, all Reliability Rules and all other applicable reliability rules, standards and criteria, and all other requirements applicable to transmission facilities in the” New York Control Area. Any public utility that operates facilities that transmit electric energy in interstate commerce is subject to its own open access transmission tariff, NERC reliability standards, and other requirements in New York. This is true for incumbent Transmission Owners as well as Nonincumbent Transmission Owners, even without explicitly so stating in the NYISO Transmission Owners Agreement. Therefore, we find that all Transmission Owners are similarly situated with respect to being subject to their own open access transmission tariff, NERC reliability standards, and other requirements applicable to transmission facilities in New York and that there is no justification for including this requirement in the Operating Agreement where it is not included in the NYISO Transmission Owners Agreement. We thus find this added requirement in Article 6.03(c) of the Operating Agreement, which is not contained in the NYISO Transmission Owners Agreement, to be unduly discriminatory and preferential.

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<sup>200</sup> 18 C.F.R. § 35.28(c)(1) (2017).

142. We conditionally accept Article 6.10, subject to NYISO including in the compliance filing ordered herein revisions to Article 6.10 to remove NYISO's right to seek an injunction or specific performance. LS Power argues that Article 6.10 of the Operating Agreement improperly makes Article 6.10 in the NYISO Transmission Owners Agreement reciprocal. LS Power therefore asks that the Commission require revisions to the NYISO Transmission Owners Agreement to make the provision reciprocal, or revisions to the Operating Agreement to make the provision one-sided.<sup>201</sup> We find the difference between Article 6.10 in the two agreements to be unduly discriminatory and preferential because incumbent and Nonincumbent Transmission Owners are similarly situated for purposes of their right to seek equitable remedies and NYISO has not justified their differential treatment in the two agreements. If NYISO believes that it needs the right to seek an injunction or specific performance to enforce the OATT, Services Tariff, Operating Agreement, or other agreement, NYISO can make a filing pursuant to section 205 of the FPA<sup>202</sup> to grant NYISO such a right in its OATT or Services Tariff so that NYISO can exercise that right against all Transmission Owners.

143. We note that Article 6.14 of the Operating Agreement provides that:

This Agreement is subject to change under Section 205 of the Federal Power Act, as that section may be amended or superseded, upon the mutual written agreement of the Parties. Absent mutual agreement of the Parties, it is the intent of this Section 6.14 that, to the maximum extent permitted by law, the terms and conditions set forth in Sections 2.01, 2.13, 3.03, 3.08, 3.09, 4.01, 5.01, 5.02, 5.03, 5.04, 5.05, 5.06, 6.01, 6.02, 6.09 and 6.14 of this Agreement shall not be subject to change, regardless of whether such change is sought (a) by the Commission acting *sua sponte* on behalf of either Party or third party, (b) by a Party, (c) by a third party, or (d) in any other manner; subject only to an express finding by the Commission that such change is required under the public interest standard under the Mobile-Sierra doctrine. Any other provision of this Agreement may be changed pursuant to a filing with FERC under Section 206 of the Federal Power Act and a finding by the Commission that such change is just and reasonable.

144. Because the Operating Agreement appears to provide that the standard of review applicable to modifications to the Operating Agreement proposed by third parties and the Commission acting *sua sponte* is, "to the maximum extent permitted by law, . . . the public interest standard under the Mobile-Sierra doctrine," we clarify the framework that would apply if the Commission were required to determine the standard of review in a

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<sup>201</sup> LS Power April 12, 2016 Protest at 14.

<sup>202</sup> 16 U.S.C. § 824d (2012).

later challenge to the Operating Agreement by a third party or by the Commission acting *sua sponte*.

145. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Ass’n, Inc. v. FERC*,<sup>203</sup> however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

**D. “Transmission Owners” in NYISO’s Tariffs**

**1. Sixth Compliance Filing**

146. NYISO states that once a Nonincumbent Transmission Owner meets the definition of Transmission Owner in NYISO’s tariffs, it will have the same rights as incumbent Transmission Owners, with the exception of a few key areas. First, NYISO explains that there are differences between the operational capabilities of Transmission Owners depending on whether they have local service provider responsibilities. Second, NYISO explains that other differences originated from the rights and obligations of incumbent Transmission Owners at the time of the transition from the New York Power Pool to NYISO. To provide for comparable treatment of all Transmission Owners, NYISO proposes to maintain a single definition of Transmission Owner that applies to all Transmission Owners. However, NYISO proposes to clarify those instances where the treatment of incumbent and Nonincumbent Transmission Owners requires the tariffs to reflect differences that derive from either of the two reasons listed above. Further, NYISO proposes revisions to the treatment of incumbent and Nonincumbent Transmission Owners under its reliability transmission planning process contained in Attachment Y of the OATT to provide comparable treatment of all Transmission Owners. Finally, NYISO proposes changes to its tariffs to capture the existence of Operating Agreements that govern the rights and responsibilities of Nonincumbent Transmission Owners.<sup>204</sup>

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<sup>203</sup> 707 F.3d 364, 370–71 (D.C. Cir. 2013).

<sup>204</sup> NYISO September 13, 2016 Transmittal Letter at 6–7, 23–25 (proposing revisions to OATT §§ 1.9, 1.15, 1.20, 2.1.1, 2.12.1, 4, 12.1, and to Services Tariff §§ 2.9,

147. NYISO explains that the OATT and Services Tariff do not generally account for the differences between the rights and obligations of incumbent and Nonincumbent Transmission Owners. NYISO proposes to use the term “Transmission Owner” for those provisions that apply equally to all Transmission Owners. However, NYISO states that, in the limited circumstances where the rights and obligations of Transmission Owners differ, NYISO proposes two categories of revisions. First, where certain obligations would not apply to Nonincumbent Transmission Owners that, for example, do not have Transmission Districts or service obligations, NYISO proposes to clarify how they will apply or that they do not apply to that type of Transmission Owner. Second, where the provisions only apply to the original eight Transmission Owners due to the rights and obligations resulting from the creation of NYISO, NYISO proposes to use the term “Member System.”<sup>205</sup> NYISO contends that its approach protects the existing rights of incumbent Transmission Owners and the rights of Nonincumbent Transmission Owners, while accommodating the potential that Nonincumbent Transmission Owners could have operational capabilities or local service provider responsibilities in the future.<sup>206</sup>

148. NYISO proposes to revise certain references to Transmission Owners and their rights related to their existing local transmission facilities under Attachment Y of the OATT for NYISO’s regional transmission planning process. Specifically, NYISO proposes to remove the term “incumbent” from the title of the provision discussing Transmission Owners’ rights because all entities that meet the definition of Transmission Owner would thereafter be incumbent.<sup>207</sup> In addition, NYISO proposes revisions to

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1.15, 2.20, 3.1, 5.3.1, 12.4, 14.4).

<sup>205</sup> The original eight Transmission Owners that comprised the membership of the New York Power Pool and originally transferred operational control of their transmission facilities to NYISO in 1999 were: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; Rochester Gas and Electric Corporation; the Power Authority of the State of New York; and Long Island Lighting Company. *Id.* at 7 & n.26.

<sup>206</sup> *Id.* at 7–10. For example, NYISO proposes to expand the definition of “Transmission District” to include any Transmission Owner that is obligated to serve load in a geographic area within the New York Control Area. Proposed NYISO OATT § 1.20; Proposed NYISO Services Tariff § 2.20. NYISO also proposes to revise Rate Schedule 5 of the Services Tariff to clarify that the requirement for an individual Transmission Owner’s system restoration plan would only apply to those Transmission Owners with a Transmission District. Proposed NYISO Services Tariff § 15.5.

<sup>207</sup> NYISO September 13, 2016 Transmittal Letter at 10 (citing Proposed NYISO OATT, Attachment Y, § 31.6.4; Order No. 1000-A, 139 FERC ¶ 61,132 at P 421).

provide that the right under Order No. 1000 to make upgrades to a local transmission facility and the right to retain, modify, or transfer rights-of-way, subject to relevant law or regulation, applies to all Transmission Owners.<sup>208</sup> NYISO states that its proposed revisions further clarify that cost recovery for upgrades to local transmission facilities, which are not subject to regional planning or competitive selection, would be outside of the OATT and Services Tariff. In addition, NYISO proposes to update the list of enrolled transmission providers to include NY Transco, which energized its transmission facilities on or about June 1, 2016, and became an enrolled transmission provider in NYISO's regional transmission planning processes.<sup>209</sup>

149. With regard to the Member Systems, NYISO contends that, at NYISO's inception, the Member Systems had certain rights and obligations characteristic of traditional utilities in New York that shaped the negotiations and drafting of NYISO's formative agreements and OATT and Services Tariff provisions. NYISO states that certain OATT and Services Tariff provisions were drafted to reflect and/or accommodate specifically negotiated arrangements between the Member Systems. Therefore, NYISO proposes to define "Member Systems" in its OATT and Services Tariff by naming each of the eight incumbent Transmission Owners. NYISO also proposes to amend the definition of Transmission Service Charge in the OATT and Services Tariff to refer to the transmission facilities owned by the Member Systems, instead of Transmission Owners generally, because Transmission Service Charges are only applicable to the Member Systems and will continue to apply to those entities alone.<sup>210</sup> NYISO explains that any new Transmission Owner will either charge for transmission service on its facilities through an applicable rate schedule or file with the Commission through NYISO a new rate schedule separate from the Transmission Service Charge to provide cost recovery, like NY Transco and NYPA have done.<sup>211</sup> NYISO states that, similarly, the NYPA Transmission Adjustment Charge was originally established through an agreement between the Member Systems and can only be used by NYPA. Likewise, NYISO proposes to revise the definition of "ISO/TO Agreement" to refer to Member Systems

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<sup>208</sup> *Id.* (citing Proposed NYISO OATT, Attachment Y, § 31.6.4; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 425, 427).

<sup>209</sup> *Id.* at 10–11 (citing Proposed NYISO OATT, Attachment Y, § 31.1.7.6; Order No. 1000-A, 139 FERC ¶ 61,132 at P 275).

<sup>210</sup> *Id.* at 12–13 (citing Proposed NYISO OATT § 1.20; Proposed NYISO Services Tariff § 2.20).

<sup>211</sup> *Id.* at 13 (citing *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,004 (2015); *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,196 (2016); *N.Y. Indep. Sys. Operator, Inc.*, Docket No. ER15-572-005 (May 18, 2016) (delegated letter order); *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268 (2016)).

instead of Transmission Owners because any Nonincumbent Transmission Owner will execute an Operating Agreement, not the NYISO Transmission Owners Agreement.<sup>212</sup> Lastly, NYISO proposes to revise the effective date provisions of the OATT and Services Tariff to make clear that they became effective when the Member Systems transferred operational control to NYISO.<sup>213</sup>

150. NYISO also proposes revisions to the OATT and Services Tariff provisions related to Transmission Congestion Contracts (TCCs) and related settlements. The OATT defines TCCs as: “The right to collect or obligation to pay Congestion Rents in the Day-Ahead Market for Energy associated with a single MW of transmission between a specified [Point of Injection] and [Point of Withdrawal]” and “are financial instruments that enable Energy buyers and sellers to hedge fluctuations in the price of transmission.”<sup>214</sup> NYISO states that Attachment M of the OATT describes NYISO’s TCC market, including various TCC-related instruments, and the NYISO-administered TCC auctions. NYISO further states that Attachment N of the OATT and Attachment B of the Services Tariff both describe congestion settlements related to NYISO’s Day-Ahead Market, as well as settlements related to TCCs and the NYISO-administered TCC auctions. NYISO proposes to revise Attachments M and N of the OATT and Attachment B of the Services Tariff to clarify their application to the Member Systems and Nonincumbent Transmission Owners.<sup>215</sup>

151. Specifically, with regard to Attachment N, NYISO states that it collects congestion rents for both energy and bilateral transactions scheduled in the Day-Ahead Market, which are meant to fund congestion payments to the primary holders of TCCs. In some hours of the Day-Ahead Market, NYISO continues, the amount of congestion rents NYISO collects may be insufficient to cover NYISO’s payment obligations, and in others, the amount of congestion rents NYISO collects may exceed NYISO’s payment obligations. In these circumstances, NYISO explains that it allocates congestion rent shortfalls or excess among the Transmission Owners that have taken on the obligation to support the full funding of TCCs.<sup>216</sup> NYISO states that Attachment N further provides for the allocation, among the applicable Transmission Owners, of Net Auction Revenues derived by the NYISO-administered TCC auctions.<sup>217</sup> NYISO proposes to clarify that,

<sup>212</sup> *Id.* at 14 (citing Proposed NYISO OATT § 1.9; Proposed NYISO Services Tariff § 2.9).

<sup>213</sup> *Id.* at 14–15 (citing Proposed NYISO OATT § 2.1.1; Proposed NYISO Services Tariff § 3.1).

<sup>214</sup> NYISO, OATT, § 1.20 (7.0.0).

<sup>215</sup> NYISO September 13, 2016 Transmittal Letter at 15.

<sup>216</sup> *Id.* at 15 & n.56 (citing NYISO, OATT, Attachment N, § 20.2.5).



“[t]his Attachment N shall only apply to Transmission Owners other than the Member Systems to the extent that the ISO Tariffs, such as in a rate schedule, do not provide otherwise.”<sup>218</sup> NYISO asserts that separate rate schedules have been added to the OATT or Services Tariff to address new transmission facilities placed into service in New York, which have expressly provided for an alternative, comparable treatment of the transmission capacity associated with such facilities as it relates to the TCC market. However, NYISO continues, neither the OATT nor Services Tariff contain a comprehensive set of rate schedules; therefore, NYISO proposes to apply Attachment N to Nonincumbent Transmission Owners only as a stopgap measure and to maintain comparable treatment among all Transmission Owners.<sup>219</sup>

152. NYISO further proposes to revise Attachment M of the OATT, which describes various TCC-related products and related rules, including Residual Capacity Reservation Right (RCRR) TCCs. NYISO explains that RCRR TCCs provide the ability for the Member Systems to reserve a limited amount of residual transmission capacity being offered for sale in the NYISO-administered TCC auctions. According to NYISO, because the RCRR TCCs construct is a mechanism that applied only to the Member Systems when it was created, NYISO proposes to clarify that the RCRR TCCs construct applies only to the Member Systems.<sup>220</sup>

153. As discussed above, NYISO also proposes to revise the Operating Agreement and OATT to require Nonincumbent Transmission Owners to develop regulated backstop solutions to Reliability Needs that arise on facilities owned by the Nonincumbent Transmission Owner, in the event market-based or alternative regulated transmission solutions are not available.<sup>221</sup> In particular, in addition to adding section 2.13 to the Operating Agreement, NYISO proposes to revise the definition of Responsible Transmission Owner in the OATT to clarify that “[t]he Responsible Transmission Owner will normally be the Transmission Owner in whose Transmission District the ISO identifies a Reliability Need and/or that owns a transmission facility on which a Reliability Need arises.”<sup>222</sup> Similarly, NYISO proposes clarifying edits to sections 6.10.1, 6.10.2, and 31.5.6.2 of the OATT.

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<sup>217</sup> *Id.* (citing NYISO, OATT, Attachment N, § 20.3.7).

<sup>218</sup> *Id.* at 17 (quoting Proposed NYISO OATT § 20.1.1).

<sup>219</sup> *Id.* at 16–17. NYISO states that, although not required by Order No. 1000, it is working to develop *pro forma* rate schedules for cost recovery of transmission solutions for its economic and public policy transmission planning processes. *Id.* at 17 n.60.

<sup>220</sup> *Id.* at 17–18 (citing Proposed NYISO OATT §§ 1.3, 1.18, 19.5, 19.9.8.5; Proposed NYISO Services Tariff §§ 2.3, 2.16, 2.18).

<sup>221</sup> *Id.* at 18–23.

## 2. Comments and Protests

154. NY Transco argues that the definition of Transmission Service in the OATT and Services Tariff needs to be revised to ensure Nonincumbent Transmission Owners satisfy the definition of Transmission Owner in the OATT and Services Tariff. NY Transco states that Transmission Owner is defined as: “The public utility or authority (or its designated agent) that owns facilities used for the transmission of Energy in interstate commerce and provides Transmission Service under the Tariff.”<sup>223</sup> NY Transco further states that Transmission Service is defined as: “Point-to-Point, Network Integration or Retail Access Transmission Service provided under Parts 3, 4, and 5 of this Tariff.”<sup>224</sup> According to NY Transco, even though it has constructed transmission facilities and turned over operational control of those facilities to NYISO, it does not meet the definition of Transmission Owner because NY Transco does not provide Transmission Service under Part 3 (Point-to-Point), 4 (Network Integration), or 5 (Retail Access) of the OATT. While NY Transco states that NYISO has treated it as a Transmission Owner for purposes of the OATT and Services Tariff and the applicable agreements, NY Transco argues that adding the following language to the definition of Transmission Service would resolve the issue: “or any other transmission service provided under the Tariff.”<sup>225</sup> NY Transco also asks that NYISO be required to promptly update any relevant guide or manual according to a reasonable schedule to reflect the changes to its OATT and Services Tariff approved by the Commission in this proceeding.<sup>226</sup>

155. NYTOs argue that Attachment N codifies an agreement among the incumbent Transmission Owners and NYISO from when NYISO was formed under which the incumbent Transmission Owners agreed to convert their existing transmission rights needed to serve their native loads into TCCs and to offer the TCCs into the market. NYTOs state that the incumbent Transmission Owners also agreed to fully fund the TCCs.<sup>227</sup> According to NYTOs, that agreement enabled NYISO to allocate the TCC auction revenues and congestion rent surpluses or shortfalls connected with the New York transmission system in an equitable manner, taking into account historical rights and obligations. NYTOs contend that, since Attachment N reflects a negotiated

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<sup>222</sup> *Id.* at 22–23 (quoting Proposed NYISO OATT § 31.1).

<sup>223</sup> NY Transco October 4, 2016 Protest at 3–4 (quoting NYISO, OATT, § 1.20; NYISO, Services Tariff, § 2.20).

<sup>224</sup> *Id.* at 4 (quoting NYISO, OATT, § 1.20).

<sup>225</sup> *Id.* at 4–5.

<sup>226</sup> *Id.* at 8.

<sup>227</sup> NYTOs October 4, 2016 Protest at 2 n.4.

agreement, it should not be disturbed by NYISO without NYTOs' consent. Moreover, NYTOs assert that NYISO's proposal is unnecessary because there is no reason why NYISO should not adequately address the treatment of incremental TCCs awarded to a Nonincumbent Transmission Owner in the Nonincumbent Transmission Owner's rate schedule. NYTOs state that, if NYISO needs a "backstop," it can achieve that with a separate tariff provision, which would satisfy the requirement for comparability without disturbing the current provisions of Attachment N.<sup>228</sup>

### 3. Answers

156. NYISO disagrees with NY Transco that the definition of Transmission Service needs to be revised for Nonincumbent Transmission Owners to satisfy the definition of Transmission Owner in the OATT and Services Tariff. NYISO explains that the NYISO OATT versions of Point-to-Point and Network Integration Transmission Service differ from their *pro forma* OATT equivalents because NYISO offers these services in the context of a financial reservation system based on location-based marginal cost pricing. According to NYISO, because NY Transco is a signatory to the NYISO OATT and Services Tariff and other agreements, NYISO's financial reservation version of Point-to-Point and Network Integration Transmission Service is provided over NY Transco's transmission facilities, such that NY Transco qualifies as a Transmission Owner.<sup>229</sup> NYISO also argues that NY Transco's arguments are beyond the scope of this proceeding because NYISO did not propose to revise the scope of any services provided through NYISO's OATT or Services Tariff.<sup>230</sup>

157. While NYISO agrees with NYTOs that the framework of Attachment N arose out of an agreement at the time NYISO was formed, NYISO contends there are no provisions in the OATT or Services Tariff, the ISO Agreement, or the NYISO Transmission Owners Agreement that expressly require the Member Systems' consent before revising Attachment N. Moreover, NYISO asserts that its proposed revisions to Attachment N do not alter any of the rights or obligations of the Member Systems thereunder, including the basis on which Net Auction Revenues are allocated. According to NYISO, extending the rights and obligations under Attachment N to Nonincumbent Transmission Owners would, among other things, extend the obligation to share in the support of fully funding TCCs. NYISO states that each Member System will continue to receive an allocation of Net Auction Revenue for a particular TCC auction based on the contribution of its

<sup>228</sup> *Id.* at 6.

<sup>229</sup> NYISO October 19, 2016 Answer at 16–18 (citing *Cent. Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,062, *order on reh'g and compliance*, 88 FERC ¶ 61,138 (1999), *order on reh'g and compliance*, 90 FERC ¶ 61,045 (2000), *order on reh'g*, 95 FERC ¶ 61,008 (2001)). ¶

<sup>230</sup> *Id.* at 16 n.56.

facilities to supporting the TCCs awarded in that auction. NYISO notes that the extent to which Nonincumbent Transmission Owners will become subject to Attachment N is likely to be limited because NYISO and Nonincumbent Transmission Owners will likely develop additional rate schedules in the future to include alternative, comparable treatment of the relevant transmission capacity.<sup>231</sup>

158. NYTOs respond that the inclusion of Nonincumbent Transmission Owners under Attachment N would affect the allocation of revenues among the incumbent Transmission Owners in violation of the agreement reached when NYISO was formed. Further, NYTOs argue that NYISO concedes that there is no need to disturb the negotiated agreement between the Member Systems and NYISO reflected in Attachment N in order to provide comparable treatment to Nonincumbent Transmission Owners because NYISO can develop alternative, comparable rate schedules.<sup>232</sup>

#### **4. Commission Determination**

159. We conditionally accept NYISO's proposed revisions to its OATT and Services Tariff to clarify references to Transmission Owners, effective April 1, 2016, and require NYISO to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to section 31.6.4 of Attachment Y of the OATT, as discussed below. We accept all proposed revisions to the OATT and Services Tariff to clarify references to Transmission Owners not otherwise discussed below.

160. NYISO proposes to revise section 31.6.4 of Attachment Y of the OATT, which NYISO states provides "the rights of Transmission Owners that were reserved under Order No. 1000."<sup>233</sup> Relevant here, NYISO proposes to revise existing section 31.6.4 as follows: "Nothing in this Attachment Y affects the right of an ~~incumbent~~ Transmission Owner to: (1) build, own, and recover outside of the ISO's Tariffs the costs for upgrades to the facilities it owns, regardless of whether the upgrade has been selected in the regional transmission plan for purposes of cost allocation."<sup>234</sup> NYISO states that the proposed revisions "clarif[y] that the cost recovery for upgrades to local transmission facilities, which are not subject to regional planning or competitive selection, would be outside of the ISO Tariffs."<sup>235</sup> NYISO does not explain why cost recovery would be outside of the OATT and Services Tariff simply because "upgrades to the facilities [a

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<sup>231</sup> *Id.* at 14–15.

<sup>232</sup> NYTOs October 28, 2016 Answer at 5–6.

<sup>233</sup> NYISO September 13, 2016 Transmittal Letter at 10.

<sup>234</sup> Proposed NYISO OATT § 31.6.4.

<sup>235</sup> NYISO September 13, 2016 Transmittal Letter at 10.

Transmission Owner] owns” are not proposed and developed as part of NYISO’s regional transmission planning process.<sup>236</sup> Order No. 1000 does not “affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities, such as in the case of tower change outs or reconductoring, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation.”<sup>237</sup> That does not mean that recovery of costs for those upgrades is outside of NYISO’s OATT and Services Tariff for Transmission Owners in NYISO. The costs for upgrades to a transmission owner’s existing transmission facilities that are subject to the Commission’s jurisdiction can only be recovered through a rate on file with, and approved by, the Commission.<sup>238</sup> Even to the extent that NYISO may have meant to preserve a Transmission Owner’s right to recover costs for upgrades to its transmission facilities that are not subject to the Commission’s jurisdiction outside of the OATT and Services Tariff, the proposed revisions are unclear and, therefore, unjust and unreasonable.

161. Moreover, the statement in section 31.6.4 of Attachment Y of the OATT that nothing in Attachment Y affects a Transmission Owner’s right to recover the costs of upgrades to its facilities “*regardless* of whether the upgrade has been selected in the regional transmission plan for purposes of cost allocation” is incorrect. Pursuant to Order No. 1000, once NYISO selects a transmission project in the regional transmission plan for purposes of cost allocation, the regional cost allocation method set forth in Attachment Y of the OATT applies, unless the project developer “decline[s] to pursue regional cost allocation.”<sup>239</sup> Therefore, section 31.6.4 should state that nothing in Attachment Y affects a Transmission Owner’s right to recover the costs of upgrades to its facilities *except* if the upgrade has been selected in the regional transmission plan for purposes of cost allocation, in which case the regional cost allocation method set forth in Attachment Y of the OATT applies, unless the Transmission Owner has declined to pursue regional cost allocation. We therefore conditionally accept NYISO’s proposed revisions to section 31.6.4 of Attachment Y of the OATT, subject to NYISO removing the language “outside of the ISO’s Tariffs” and further revising section 31.6.4, as discussed above.

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<sup>236</sup> Proposed NYISO OATT § 31.6.4.

<sup>237</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 319. For purposes of Order No. 1000, “the term upgrade means an improvement to, addition to, or replacement of a part of, an existing transmission facility,” and not “an entirely new transmission facility.” Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

<sup>238</sup> 16 U.S.C. § 824d(c) (2012).

<sup>239</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 558–559, 725; NYISO, OATT, Attachment Y, § 31.5 (21.0.0) (Cost Allocation and Cost Recovery).

162. We decline to require NYISO to revise the definition of Transmission Service in the OATT and Services Tariff, as NY Transco requests. While NY Transco argues that the definition of Transmission Service needs to be revised to ensure Nonincumbent Transmission Owners satisfy the definition of Transmission Owner,<sup>240</sup> NYISO disagrees, arguing that its versions of Point-to-Point and Network Integration Transmission Service encompass service provided by Nonincumbent Transmission Owners.<sup>241</sup> We agree with NYISO that the definition of Transmission Service in the OATT and Services Tariff does not exclude Nonincumbent Transmission Owners because NYISO's versions of Point-to-Point and Network Integration Transmission Service are offered in the context of a financial reservation system based on location-based marginal cost pricing.<sup>242</sup> When customers submit energy schedules, Transmission Service is scheduled over the relevant Transmission Owner's system, whether owned by an incumbent or Nonincumbent Transmission Owner, consistent with a security-constrained economic dispatch (i.e., customers do not expressly reserve physical transmission service).

163. We also decline to require NYISO to promptly update any relevant guide or manual according to a reasonable schedule, as NY Transco requests.<sup>243</sup> NYISO's guides and manuals provide implementation details for the provisions in NYISO's OATT and Services Tariff. While we encourage NYISO to update any relevant guide or manual to ensure clarity for market participants, we find that NYISO's proposed OATT and Services Tariff revisions, combined with the compliance obligations directed herein, ensure that "all practices that significantly affect rates, terms and conditions" are included in NYISO's tariffs, consistent with section 205(c) of the FPA.<sup>244</sup>

164. We accept NYISO's proposed revisions to Attachment N of the OATT, which describes congestion settlements related to NYISO's Day-Ahead Market, as well as settlements related to TCCs and the NYISO-administered TCC auctions. We find that NYISO's proposed revisions to Attachment N are necessary to ensure comparability in the treatment of incumbent and Nonincumbent Transmission Owners. While NYTOs

<sup>240</sup> NY Transco October 4, 2016 Protest at 3–4.

<sup>241</sup> NYISO October 19, 2016 Answer at 16–18.

<sup>242</sup> See *Cent. Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,062 at 61,206 ("The proposed ISO tariff does not define transmission service in terms of point-to-point or network services, as does the *pro forma* tariff. The tariff covers transmission service to entities purchasing from the hourly spot market or requesting stand alone transmission service for bilateral transactions.").

<sup>243</sup> NY Transco October 2, 2016 Protest at 8.

<sup>244</sup> *ISO New England Inc.*, 137 FERC ¶ 61,112, at 19 & n.36 (2011); 16 U.S.C. § 824d(c) (2012).

argue that Attachment N codifies an agreement among the incumbent Transmission Owners and NYISO from when NYISO was formed,<sup>245</sup> it is part of NYISO's OATT and subject to change the same as any other OATT provision. Moreover, as NYISO explains, there are no provisions in the OATT, Services Tariff, ISO Agreement, or NYISO Transmission Owners Agreement that require the Member Systems' consent before NYISO can propose to revise Attachment N. Although NYISO may be adding separate rate schedules to the OATT or Services Tariff to address new transmission facilities, which could provide for an alternative, comparable treatment of transmission capacity associated with such facilities as it relates to the TCC market, we agree with NYISO that the proposed stopgap measure in Attachment N is just and reasonable and ensures comparability.<sup>246</sup> Moreover, we note that this stopgap measure is unlikely to be employed because NYISO states that it is working to develop *pro forma* rate schedules for cost recovery of transmission solutions, which NYISO can ensure include alternative, comparable treatment for Nonincumbent Transmission Owners.<sup>247</sup>

## **E. Miscellaneous Tariff Changes**

### **1. Fourth Compliance Order**

165. In the Fourth Compliance Order, the Commission required the Filing Parties to revise section 31.2.8.1.6 of the NYISO OATT to state that the Required Project In-Service Date will have been provided to the developer of a selected alternative regulated transmission solution earlier in the process than the tendering of the Development Agreement.<sup>248</sup> The Commission explained that the Required Project In-Service Date “is a significant Critical Path Milestone and one of which the developer should be aware before NYISO has selected and triggered the alternative regulated transmission solution.”<sup>249</sup>

166. With respect to NYISO's ability to revoke a transmission developer's eligibility to recover costs of a transmission project, the Commission required the Filing Parties to replace the phrase “to recover its costs for the project” in section 31.2.10.1.2 of the NYISO OATT “with a statement that allows NYISO to revoke the developer's eligibility to recover the developer's costs *pursuant to the NYISO regional cost allocation mechanism.*”<sup>250</sup>

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<sup>245</sup> NYTOs October 4, 2016 Protest at 2 n.4.

<sup>246</sup> NYISO September 13, 2016 Transmittal Letter at 16–17.

<sup>247</sup> *Id.* at 17 n.60.

<sup>248</sup> Fourth Compliance Order, 153 FERC ¶ 61,341 at P 117.

<sup>249</sup> *Id.*

167. Additionally, the Commission required the Filing Parties to revise section 31.2.10.1.4(ii) of the NYISO OATT to clarify the meaning of “any requirements or restrictions on the transfer of Developer’s rights-of-way under law, conveyance, or contract.”<sup>251</sup>

## 2. Fifth Compliance Filing

168. In response to the requirement to revise the OATT to state that the Required Project In-Service Date will have been provided to the developer of a selected alternative regulated transmission solution earlier in the process than the tendering of the Development Agreement, NYISO proposes to revise sections 31.2.7, 31.2.7.3, and 31.2.8.1.6 of the NYISO OATT and Article 3.3.1 of the Reliability Development Agreement. Specifically, NYISO proposes that it will specify the Required Project In-Service Date in the Comprehensive Reliability Plan report or the updated Comprehensive Reliability Plan report, as applicable. NYISO explains that this report is the means by which NYISO publishes the results of its evaluation of proposed solutions and specifies the project selected as the more efficient or cost-effective solution to a Reliability Need.<sup>252</sup> With regard to its public policy transmission planning process, NYISO also proposes new section 31.4.11 of the NYISO OATT and Article 3.3 of the Public Policy Development Agreement, which state that the Public Policy Transmission Planning report will provide the Required Project In-Service Date. For projects selected in the public policy transmission planning process, the Required Project In-Service Date will be the date prescribed by the New York Public Service Commission (New York Commission) in its order identifying the Public Policy Transmission Need or in a subsequent order, or, if the New York Commission has not prescribed a date, the date the developer proposes and NYISO accepts.

169. With regard to NYISO’s ability to revoke its selection of a transmission project pursuant to section 31.2.10.1.2 of the NYISO OATT, NYISO proposes revisions to indicate that NYISO may revoke its selection of a project and the eligibility of the developer to recover its costs “pursuant to the ISO’s regional cost allocation mechanism.”<sup>253</sup>

170. With respect to the Commission’s directive regarding limitations on transfers of transmission projects, NYISO proposes revisions to section 31.2.10.1.4(ii) of the NYISO OATT to state that transfers of a project are subject to “any requirements or restrictions

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<sup>250</sup> *Id.* P 119 (emphasis in original).

<sup>251</sup> *Id.* P 120.

<sup>252</sup> NYISO March 22, 2016 Transmittal Letter at 38.

<sup>253</sup> *Id.* at 34–35.



on the transfer of Developer's rights-of-way under federal or state law, regulation, or contract (including mortgage trust indentures or debt instruments)."<sup>254</sup>

171. In addition, NYISO proposes several additional tariff revisions. Specifically, NYISO proposes to define the NYISO/TO Reliability Agreement in section 31.1.1 of the NYISO OATT and in the Reliability Development Agreement. NYISO also proposes to revise sections 31.2.10.1.3 and 31.4.12.3.1.3 of the NYISO OATT regarding the process for addressing the inability of the developer of a project selected in the reliability transmission planning process or public policy transmission planning process to complete the selected project. Specifically, NYISO proposes language that would allow NYISO to "take any other action [NYISO] reasonably considers is appropriate to address the Reliability Need" or "take such action as [NYISO] reasonably considers is appropriate, following consultation with the [New York Commission] and/or the Commission, to ensure that the Public Policy Transmission Need is satisfied." In addition, in section 31.4.12.3.1.3 NYISO proposes to "submit a report to the [New York Commission] and/or the Commission, as appropriate, for its consideration and determination of whether action is appropriate under state or federal law."

### **3. Commission Determination**

172. We find that NYISO complied with the Commission's directives in the Fourth Compliance Order to revise sections 31.2.8.1.6, 31.2.10.1.2, and 31.2.10.1.4(ii) of the NYISO OATT. We also accept NYISO's associated proposed revisions to sections 31.2.7, 31.2.7.3, and 31.4.11 of the NYISO OATT and Article 3.3 of the Reliability Development Agreement and Public Policy Development Agreement.

173. We conditionally accept NYISO's proposed definitions of the NYISO/TO Reliability Agreement in section 31.1.1 of the NYISO OATT and in the Reliability Development Agreement, subject to NYISO including in the compliance filing ordered herein revised definitions that are identical. As proposed, section 31.1.1 of the NYISO OATT defines the "ISO/TO Reliability Agreement" differently from the Reliability Development Agreement's definition of "NYISO/TO Reliability Agreement," even though those two definitions refer to the same agreement. We find this difference in definitions to be unclear and, therefore, unjust and unreasonable. For that reason, we direct NYISO to submit, within 30 days of the date of issuance of this order, a further compliance filing with revisions to the NYISO OATT and the Reliability Development Agreement to make the definition of "ISO/TO Reliability Agreement" identical to the definition of "NYISO/TO Reliability Agreement."

174. We reject the proposed language in sections 31.2.10.1.3 and 31.4.12.3.1.3 of the NYISO OATT that allows NYISO to take any other action NYISO reasonably considers appropriate. We find that the proposed language is overly broad and vague as to the

<sup>254</sup> *Id.* at 39.

nature and scope of such action, and therefore, unjust and unreasonable. We note that the Commission rejected similar language regarding NYISO's public policy transmission planning process for the same reason.<sup>255</sup> We further reject the proposed language in section 31.4.12.3.1.3 regarding NYISO submitting a report to the New York Commission and/or the Commission because the language is unclear as to exactly what the report will entail and the level of detail and support the report must contain, and unclear as to what type of regulatory action NYISO anticipates in response to the report.<sup>256</sup> We therefore direct NYISO to submit, within 30 days of the date of issuance of this order, a compliance filing to remove these rejected provisions from the NYISO OATT.

The Commission orders:

(A) NYISO's compliance filing is hereby conditionally accepted, effective April 1, 2016, as discussed in the body of this order.

(B) NYISO is hereby directed to submit, within 30 days of the date of issuance of this order, a compliance filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>255</sup> *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,037 at P 17, *order on clarification and compliance*, 156 FERC ¶ 61,162 (2016).

<sup>256</sup> *See id.* (rejecting similar language for these reasons and noting that “[t]he lack of detail is particularly concerning to the extent NYISO intends for the report to reflect allegations against a developer”).