176 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Central Hudson Gas & Electric Corporation
Consolidated Edison of New York, Inc.
Niagara Mohawk Power Corporation
New York State Electric & Gas Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric Corporation

Docket No. EL21-66-000

v.

New York Independent System Operator, Inc.

ORDER DENYING COMPLAINT

(Issued September 3, 2021)

1. On April 9, 2021, pursuant to section 206 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] the New York Transmission Owners (NYTOs)[3] filed a complaint against the New York Independent System Operator, Inc. (NYISO) alleging that the funding methodology for System Upgrade Facilities and System Deliverability Upgrades (collectively, System Upgrades) in the NYISO Open Access Transmission Tariff (OATT) is unjust, unreasonable, and contrary to judicial and Commission precedent because it does not compensate the NYTOs for the risks and costs associated with owning, operating, and maintaining System Upgrades. Accordingly, the NYTOs seek to amend the OATT and the Market Administration and Control Area Services Tariff (collectively, Tariffs) to allow the

[1] 16 U.S.C. § 824e.

[2] 18 C.F.R. § 385.206 (2020).

[3] For purposes of this filing, the NYTOs include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation doing business as National Grid; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

NYTOs to provide initial funding for System Upgrades caused by generator interconnections and subsequently charge the interconnection customer to recover a return on and of this cost (i.e., establish TO Initial Funding). For the reasons discussed below, we deny the NYTOs' complaint.

I. Background

A. Order No. 2003[4]

2. Under the Commission's default pricing policy in Order No. 2003, interconnection customers pay the higher of (1) the costs of network upgrades needed to accommodate the new generating facility or (2) the rolled-in transmission rate reflecting the cost of the entire transmission network. Under the default pricing policy, the costs of network upgrades are funded initially by the interconnection customer as construction costs are incurred, unless the transmission provider elects to fund the construction itself.[5] When the interconnection customer initially funds the network upgrades, the interconnection customer is then entitled to credits against the charges at the rolled-in rates for transmission service taken by the interconnection customer, and the costs of the network upgrades are then included in the transmission owner's rolled-in transmission rates. The Commission noted that, if the transmission provider believes it can obtain financing for the network upgrades at a more favorable rate, it has the option to initially finance the network upgrades itself and immediately include the associated costs in rolled-in transmission rates.

3. The Commission allowed flexibility regarding the interconnection pricing policies that independent transmission providers may propose to adopt, subject to Commission approval. Specifically, an independent transmission provider could propose to directly assign the cost of network upgrades to the interconnection customer without providing credits (i.e., establish participant funding).[6]

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[4] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

[5] *Id.* P 676. Article 11.3 of the Order No. 2003 *pro forma* interconnection agreement states: "Unless the Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer."

[6] *Id.* PP 699-700.

B. NYISO's Existing Funding Mechanism for System Upgrades

4. NYISO has adopted participant funding for System Upgrades; thus, interconnection customers pay for the capital costs of constructing and installing the System Upgrades that are necessary to reliably and efficiently interconnect and integrate their generating facilities.[7] The NYTOs explain that the interconnection customer subsequently conveys the System Upgrades to the relevant transmission owner to own, operate, and maintain.[8]

C. *Ameren* and Related Commission Orders

5. The NYTOs assert that their complaint is supported by the decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Ameren Services Co. v. FERC*[9] and related Commission precedent, which addressed TO Initial Funding in the Midcontinent Independent System Operator, Inc. (MISO) region. As background, MISO, like NYISO, has adopted participant funding; thus, an interconnection customer is responsible for 100% of the costs of network upgrades that would not be needed but for the interconnection of the customer's generator (with a possible 10% reimbursement for network upgrades that are 345 kV and above in MISO).[10] MISO's Generator Interconnection Agreement (GIA) allows the transmission owner to unilaterally elect to provide the initial funding for the capital cost of the network upgrades required for the interconnection, and then assign the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return on and of the transmission owner's cost of capital (MISO TO Initial Funding Option).[11] In

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[7] Complaint at 12; *see also* NYISO, NYISO OATT, § 25.5 attach. S Class Year Study and Expedited Deliverability Study Processes (15.0.0); *N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,159, at PP 50, 57-59 (2004), *order on reh'g*, 111 FERC ¶ 61,347 (2005).

[8] Complaint at 12.

[9] 880 F.3d 571 (D.C. Cir. 2018) (*Ameren*).

[10] *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 8 (2009).

[11] MISO's TO Initial Funding Option originated in MISO's compliance with Order No. 2003 as a way for a transmission provider to up-front fund the costs of network upgrades and roll the network upgrade capital costs into its rate base instead of using the interconnection customer's funds to finance the network upgrades. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,027, at P 38 (2004). MISO did not propose revisions to the TO Initial Funding Option provision in its tariff when it adopted participant funding and did not propose a rate for how it would be

2015, in response to a complaint submitted under FPA section 206, the Commission found that the MISO TO Initial Funding Option was unjust, unreasonable, unduly discriminatory, and preferential in light of the opportunities for undue discrimination and for increasing costs to interconnection customers where there is no increase in service, and directed MISO to remove MISO TO Initial Funding from its tariff.[12]

6. On appeal, the D.C. Circuit vacated and remanded the Commission's orders.[13] Among other things, the court stated that the Commission improperly dismissed the argument that, if transmission owners are not allowed to earn a return on the costs of network upgrades that are financed by the interconnection customer, transmission owners will bear uncompensated risks caused by the requirement to own, operate, and maintain the network upgrades. The court also stated that the Commission inappropriately dismissed the argument that the Commission's orders modified the transmission owners' entire enterprise and thus created a risk that new capital investment will be deterred, requiring transmission owners to act in part as a non-profit business.[14] The court referenced Supreme Court precedent in *Hope*[15] requiring that a regulated industry is entitled to returns sufficient to ensure that new capital can be attracted. The court stated that the Commission must explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return. The court was concerned that, if more and more of a transmission owner's business is to be owned and operated on a non-profit basis (through the addition of more network upgrades), these additions may deter investors and diminish the ability of the transmission grid to attract capital for future maintenance and expansion. The court required the Commission, on remand, to provide reasoned consideration of the transmission owners' arguments.[16]

7. On remand, the Commission stated that it erred in failing to: (1) adequately address transmission owners' contention that the Commission's vacated orders would force them to construct and operate network upgrades on a non-profit basis;

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applied under participant funding.

[12] *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, *order on reh'g*, 153 FERC ¶ 61,352 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,098 (2016); *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,099 (2016).

[13] *Ameren*, 880 F.3d at 580-581.

[14] *Id.* at 581-582.

[15] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope*).

[16] *Ameren*, 880 F.3d at 582.

(2) adequately address transmission owners' concerns that their investors would be forced to accept risk-bearing additions to their network with zero return; and (3) address the effect of the Commission's orders on the ability of transmission businesses to attract future capital.[17] The Commission found that there was not enough evidence in the record to sustain the Commission's findings in the vacated orders and reinstated the ability of transmission owners to elect the MISO TO Initial Funding Option.

II. Complaint

8. As further discussed below, the NYTOs allege that the existing funding mechanism for System Upgrades is unjust and unreasonable because it does not allow transmission owners to recover a reasonable rate of return to compensate them for the risks and costs associated with the ownership, operation, and maintenance of System Upgrades.[18] The NYTOs request that the Commission direct NYISO on compliance to file a just and reasonable replacement rate in the form of changes to the NYISO Tariffs that efficiently implement TO Initial Funding.[19] The NYTOs also ask that the Commission order NYISO to revise the OATT to adopt a *pro forma* Facilities Service Agreement (FSA) modeled on that approved for use by MISO.[20] The NYTOs further request that the Commission direct NYISO to conform the boilerplate terms and conditions in a NYISO *pro forma* FSA to those contained in other NYISO *pro forma* agreements.

9. The NYTOs argue that establishing TO Initial Funding is a just, reasonable, and not unduly discriminatory or preferential replacement rate because it: (1) is authorized by section 25.5.4 of the OATT; (2) allows for the return that compensates transmission owners for the otherwise uncompensated risks and costs incurred in an amount sufficient

[17] *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at P 28 (2018) (*Ameren* Remand Order), *order on reh'g,* 169 FERC ¶ 61,233 (2019) (*Ameren* Remand Rehearing Order).

[18] Complaint at 13-14, 42.

[19] *Id.* at 13, 34-35. Contemporaneously with the complaint, in Docket No. ER21-1647-001, the NYTOs made an FPA section 205 filing which proposes an amendment to section 25.5.4 of the NYISO OATT that would provide transmission owners the option to unilaterally elect to fund System Upgrades caused by generator interconnections and subsequently charge the interconnection customer to recover a return on and of this cost (i.e., establish TO Initial Funding). In an order issued concurrently with this order denying the complaint, we reject that filing on procedural grounds. *See N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,143 (2021).

[20] Complaint at 30-31 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075, at P 21 (2020)).

to maintain their credit and attract capital; (3) would bring the Tariffs into compliance with *Hope*, *Bluefield*,[21] and *Ameren*; and (4) imitates the TO Initial Funding Option that the Commission approved in MISO.[22]

10. The NYTOs allege that adopting TO Initial Funding raises no undue discrimination concerns in NYISO because the energy markets in New York are deregulated and the NYTOs are long divested of their generation.[23] The NYTOs explain that, with minor exceptions, neither the NYTOs nor their affiliates own or develop affiliate generation within the affiliate NYTO's transmission district in New York. Therefore, the NYTOs allege that there is no reasonable opportunity for one of the NYTOs to treat third-party generation and affiliate-owned generation in an unduly discriminatory manner.

11. The NYTOs request that TO Initial Funding be adopted and implemented before the commencement of the initial decision period in the next generator class year, i.e., the 2021 Class Year.[24] The NYTOs state that the significant increase in the volume of System Upgrades necessitates prompt adoption and implementation of TO Initial Funding.[25] The NYTOs also ask that the Commission direct NYISO to make a compliance filing establishing TO Initial Funding within 90 days from the Commission's order.[26]

III. Notice of Filing and Responsive Pleadings

12. Notice of the NYTOs' complaint was published in the *Federal Register*, 86 Fed. Reg. 20,142 (April 16, 2021), with interventions and protests due on or before April 29, 2021. On April 13, 2021, the NYTOs filed an errata to the complaint. On April 28, 2021, the Commission issued a notice granting a motion to extend the time to file comments and protests to May 7, 2021.

13. Timely motions to intervene were filed by: American Electric Power Service Corporation;[27] Exelon Corporation, Exelon Generation Company, LLC, and its affiliates;[28]

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[21] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (*Bluefield*).

[22] Complaint at 7, 28-35.

[23] *Id.* at 38.

[24] *Id.*

[25] *Id.* at 7.

[26] *Id.* at 38-39.

Public Citizen, Inc.; The FirstEnergy Transmission Companies;[29] TDI USA Holdings LLC; PPL Electric Utilities Corporation; Public Service Electric and Gas Company; Independent Power Producers of New York, Inc.; New York State Energy Research & Development Authority (NYSERDA); New York Power Authority; LSP Transmission Holdings II, LLC and LS Power Grid New York Corporation (together, LS Power); Dominion Energy Services, Inc.;[30] Municipal Electric Utilities Association of New York; Solar Energy Industries Association; EDF Renewables, Inc.; EDP Renewables North America LLC; NRG Power Marketing LLC; Long Island Power Authority and Long Island Lighting Company; Astoria Generating Company, L.P. and Eastern Generation, LLC; MISO Transmission Owners;[31] Ameren Services Company;[32] Electric Power

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[27] American Electric Power Service Corporation filed on behalf of its affiliates: Appalachian Power Company; Indiana Michigan Power Company; Kentucky Power Company; Kingsport Power Company; Ohio Power Company; Wheeling Power Company; AEP Appalachian Transmission Company, Inc.; AEP Indiana Michigan Transmission Company, Inc.; AEP Kentucky Transmission Company, Inc.; AEP Ohio Transmission Company, Inc.; and AEP West Virginia Transmission Company, Inc.

[28] Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company, and Potomac Electric Power Company.

[29] FirstEnergy Service Co., as agent, filed on behalf of its affiliates: American Transmission Systems, Inc.; Jersey Central Power & Light Company; Mid-Atlantic Interstate Transmission LLC; West Penn Power Company; The Potomac Edison Company; Monongahela Power Company; and Trans-Allegheny Interstate Line Company.

[30] Dominion Energy Services, Inc. filed on behalf of Virginia Electric and Power Company.

[31] MISO Transmission Owners include: Ameren Services Company, as agent for Union Electric Company and Ameren Illinois Company; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Lafayette Utilities System; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services;

Supply Association; ITC Midwest, LLC, International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Great Plains LLC; D. E. Shaw Renewable Investments, L.L.C.; Equinor Wind US LLC; and RWE Renewables Americas, LLC. The New York State Public Service Commission (New York Commission) filed a notice of intervention.

14. Timely motions to intervene and comments were filed by Edison Electric Institute (EEI) and WIRES.[33] Timely motions to intervene and protests were filed by: NextEra Energy Resources, LLC (NextEra); Invenergy Renewables LLC (Invenergy); New York State Department of State Utility Intervention Unit (UIU); the City of New York, Natural Resources Defense Council, Sustainable FERC Project, and Multiple Intervenors[34] (collectively, Consumer Stakeholders); and American Clean Power Association, Alliance For Clean Energy-New York, New York Battery and Energy Storage Technology Consortium, and Energy Storage Association (collectively, NY Interconnection Customers). The New York Commission and NYSERDA (State Entities) filed a protest.

15. On May 20, 2021, New York Association of Public Power filed an out-of-time motion to intervene.

16. On May 7, 2021, NYISO filed an answer to the complaint. On May 21, 2021, LS Power filed a motion to respond and response to the NYISO answer.

17. On May 24, 2021, the NYTOs filed a motion for leave to answer and answer to the NYISO answer and to the comments and protests.

Montana-Dakota Utilities Co.; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power, Inc.; Republic Transmission, LLC; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[32] Ameren Services Company filed on behalf of its affiliates: Ameren Illinois Company, Ameren Transmission Company of Illinois, and Union Electric Company.

[33] WIRES is an international non-profit trade association of investor-, publicly, and cooperatively owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies.

[34] Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

IV. Discussion

A. Procedural Issues

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant New York Association of Public Power's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Issues

21. For the reasons discussed below, we deny the complaint. We find that the NYTOs have failed to satisfy their burden under section 206 of the FPA to demonstrate that the existing System Upgrade funding mechanism in the OATT is unjust, unreasonable, unduly discriminatory, or preferential. In particular, we find that: (1) *Bluefield*, *Hope*, and *Ameren* do not require the Commission to find that the OATT is unjust and unreasonable because it does not provide for TO Initial Funding; and (2) the NYTOs have not presented sufficient evidence to show that the existing funding mechanism results in the NYTOs facing uncompensated risks and costs associated with the System Upgrades that force the NYTOs to operate segments of their business on a non-profit basis or prevent the NYTOs from attracting needed capital. Because we find that the NYTOs have not met their burden under FPA section 206 to demonstrate that the OATT is unjust, unreasonable, unduly discriminatory, or preferential, we do not reach the question of whether the proposed replacement rate (TO Initial Funding) is just, reasonable, and not unduly discriminatory or preferential.[35]

[35] Complaint at 28-38; Invenergy Protest at 5; NextEra Protest at 3, 6-7; NY Interconnection Customers Protest at 18, 20-25; State Entities Protest at 3-5; UIU Protest at 11-16; *cf* Consumer Stakeholders Protest at 5-14.

1. *Bluefield*, *Hope*, and *Ameren*

a. Complaint

22. The NYTOs contend that the existing funding mechanism is *per se* unjust and unreasonable under Supreme Court precedent.[36] The NYTOs explain that the Supreme Court has held that "[r]ates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory."[37] According to the NYTOs, the Supreme Court has also held that the return should be commensurate with returns on investments in other enterprises having corresponding risks and sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[38] The NYTOs also note that the Supreme Court held that setting a just and reasonable rate involves balancing investor and consumer interests to arrive at a rate that provides the utility and its investors a reasonable rate of return without being exploitative to consumers. According to the NYTOs, this holding implicitly accepts that the rates will provide a return to the public utility and investors. Accordingly, the NYTOs contend that Supreme Court precedent requires a return to be recoverable, which they argue is a fundamental failure under the existing funding mechanism.

23. The NYTOs contend that the *Ameren* decision and subsequent Commission precedent make clear that the holdings in *Bluefield* and *Hope* apply to a transmission owner's right to earn a reasonable return for the uncompensated risks and costs associated with the ownership, operation, and maintenance of System Upgrades.[39] According to the NYTOs, in *Ameren* the D.C. Circuit held that investors do not expect "to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return" and that investors "invest in entire enterprises, not just portions thereof."[40] The NYTOs further note that the D.C. Circuit stated that the removal of the MISO TO Initial Funding Option from MISO's tariff might force the MISO transmission owners "to act, at least in part, as a nonprofit business" and thus the Commission's orders "create a risk that new capital investment will be deterred."[41] The NYTOs note that the *Ameren* court vacated the underlying Commission orders and

[36] Complaint at 15.

[37] *Id.* at 15-16 (quoting *Bluefield*, 262 U.S. at 690).

[38] *Id.* at 16 (quoting *Hope*, 320 U.S. at 603).

[39] *Id.* at 16-17.

[40] *Id.* at 17 (quoting *Ameren*, 880 F.3d at 581).

[41] *Id.* (quoting *Ameren*, 880 F.3d at 581).

remanded the proceedings to the Commission to address the MISO transmission owners' arguments and "explain[] whether all risks are truly 'baked in,' respond[] to the transmission owner entire enterprise arguments, and address[] the effect of these orders on the ability of transmission businesses to attract future capital."[42] The NYTOs state that, on remand, the Commission reversed its prior orders that had removed the MISO TO Initial Funding Option from MISO's tariff.[43] The NYTOs argue that the existing funding mechanism for System Upgrades is *per se* confiscatory and unjust and unreasonable because it fails to provide the NYTOs any opportunity to recover a return for the risks and uncompensated costs associated with owning, operating, and maintaining System Upgrades that are necessary to provide jurisdictional interconnection service, as required by *Ameren*.[44]

b. NYISO Answer to the Complaint

24. NYISO takes no position on the question of whether *Ameren* or other precedent require a change to its established funding mechanism for System Upgrades, which was accepted by the Commission as just and reasonable and compliant with Order No. 2003.[45]

c. Comments and Protests

25. WIRES and EEI filed comments in support of the complaint. WIRES and EEI argue that the NYISO Tariffs are unjust and unreasonable because they are not consistent with the law as set forth in *Ameren* and violate the capital attraction standards in *Hope* and *Bluefield*.[46] WIRES states that the Supreme Court has long held that a public utility shall be afforded the opportunity to earn a reasonable rate of return that is sufficient to attract capital and to sustain the financial integrity of the enterprise.[47]

26. Several commenters submitted protests of the complaint. They argue that *Ameren* does not provide a right for the NYTOs to earn a rate of return on the System Upgrades, as the NYTOs suggest.[48] Instead, they argue that in *Ameren*, the court simply noted its

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[42] *Id.* at 17-18 (quoting *Ameren*, 880 F.3d at 582).

[43] *Id.* at 18.

[44] *Id.* at 15, 18.

[45] NYISO Answer at 2, 5.

[46] WIRES Comments at 6; EEI Comments at 6.

[47] WIRES Comments at 6 (citing *Ameren*, 880 F.3d at 581).

[48] State Entities Protest at 4; NY Interconnection Customers Protest at 2-3, 6-11;

belief that the Commission failed to provide sufficient analysis before striking down a similar tariff provision, and thus, remanded the matter for further consideration; the court did not reach the merits of the TO Initial Funding issues that were raised.[49] They contend that the court's finding in no way supports the proposition that a tariff provision of the type presented in this matter must be implemented, and the Commission's remand order never squarely addressed the transmission owners' arguments or further developed the record. Thus, they argue that *Ameren* and subsequent Commission precedent provide no foundation to force the new tariff provisions establishing TO Initial Funding as proposed by the NYTOs. NY Interconnection Customers also state that the NYTOs ignore express determinations from the Commission that *Ameren* does not apply to all regions.[50] UIU argues that the NYTOs appear to disregard over 15 years of Commission precedent regarding the need for independent entity variations for many aspects of the unique nature of the New York market and NYISO's Tariffs.[51] UIU argues that there is no judicial or Commission precedent that requires all regions to have the same interconnection rules for funding of network upgrades.

27. Consumer Stakeholders argue that neither *Bluefield* nor *Hope* address the question of whether transmission owners are the appropriate entity to be financing and investing in System Upgrades necessitated by interconnecting generators, which Consumer Stakeholders contend is the key topic at issue in this proceeding.[52] Rather, according to Consumer Stakeholders, *Bluefield* and *Hope* address at what point the "total effect" of a rate falls below the constitutional floor and becomes a taking of the public utility's property without just compensation.[53]

28. Invenergy argues that *Hope* and *Bluefield* do not support the NYTOs' proposal, and that nothing in these cases entitles the utility to its desired return on all parts of its business or all equipment it operates, let alone such equipment that may be provided cost-free to the utility.[54] Invenergy contends that the Court in *Bluefield* discussed the return

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UIU Protest at 16-18; Invenergy Protest at 14.

[49] State Entities Protest at 4; NY Interconnection Customers Protest at 10; UIU Protest at 18; Invenergy Protest at 14.

[50] NY Interconnection Customers Protest at 2-3, 6-7 (quoting *Am. Elec. Service Corp. v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,121, at P 56 (2019)).

[51] UIU Protest at 16.

[52] Consumer Stakeholders Protest at 15.

[53] *Id.* at 15 (citing *Hope*, 320 U.S. at 603).

[54] Invenergy Protest at 10-11.

on the value of the property which the utility employs, but this presumes that the utility actually funded that property. Further, Invenergy states that *Bluefield* dealt primarily with the manner in which the utility's property is to be valued in rate base, and the decision neither addressed the treatment of property that a customer (not the utility) paid for, nor contemplated giving the utility a right to collect a return on equipment it did not fund.[55] Invenergy contends that the Court in *Hope* expressly did not address the rate base on which a return is based and states that a utility must have sufficient revenue not only for operating expenses but also for the capital costs of the business.[56] Invenergy states that the Court further held that rates allowing the utility to successfully operate are valid, even if they represent a relatively low return on rate base. Invenergy explains that these cases stand for the unremarkable premise that a utility's rate of return must not be so low that the company is unable to generate the revenue necessary to operate its business, and while the ability to attract capital may be part of that, neither decision addressed in any detail how much capital a utility must be able to attract, nor do they mandate that a utility collect a return on every single piece of equipment, even if some of that equipment is contributed cost-free by a customer.

d. NYTOs' Answer to Comments and Protests

29. In response to Invenergy's arguments that the NYTOs are not entitled to a return because the interconnection customers currently make the investment, the NYTOs argue that this is not the constitutional standard delineated in *Bluefield*.[57] The NYTOs state that whether the transmission assets' costs are borne by interconnection customers or retail customers has no bearing on the public utility's right to a regulated return. The NYTOs argue that System Upgrades are used to render generator interconnection service under the OATT, and therefore the NYTOs are entitled to a reasonable return on that transmission property. The NYTOs argue that the fact that the NYTOs have not historically made the investment in System Upgrades is of no importance because it is the lack of the opportunity for them to do so that is the cause of the injury.[58] The NYTOs contend that the very mechanism through which public utilities are deprived of their constitutional rights cannot legitimately be put forth to nullify such rights or to claim that they do not exist, nor does it negate the regulatory compact nor vitiate utilities' lawful right to earnings under it.

30. In response to arguments that TO Initial Funding should be limited to MISO, the NYTOs argue that *Hope* and *Bluefield* are not limited in their application only to MISO,

[55] *Id.* at 11 (citing *Bluefield*, 262 U.S. at 691-692).

[56] *Id.* (citing *Hope*, 320 U.S. at 603-605).

[57] NYTOs Answer at 4.

[58] *Id.* at 5.

and the *Ameren* court recognized the broad applicability of those Supreme Court decisions, regardless of location.[59] The NYTOs argue that there is simply no distinction between the risks borne by the MISO transmission owners and the NYTOs as they relate to interconnection-related upgrades, and the fact that transmission owners in another region (i.e., the MISO transmission owners) are authorized to earn a return on such upgrades supports that the NYTOs are similarly entitled to earn a return for their equivalent property. Therefore, the NYTOs argue that a denial of the NYTOs' comparable right would reduce the NYTOs' enterprise-level return in a manner not commensurate with enterprises of comparable risk and disadvantage the NYTOs in their acquisition of capital in violation of the judicial standard.[60]

e. Commission Determination

31. We find that *Ameren* and the related Commission precedent in MISO is distinguishable from the instant case and therefore disagree with the NYTOs that it necessarily requires a change to NYISO's established funding mechanism for System Upgrades. In *Ameren*, the court held that the Commission failed to adequately address the MISO transmission owners' argument that if the MISO tariff did not allow them to earn a return on the costs of network upgrades that were financed by the interconnection customer, they would bear uncompensated risks.[61] The court accordingly declined to reach the merits—and did not affirmatively find that in all circumstances, or even in MISO, that *Hope* requires transmission owners to earn a rate of return on network upgrades.[62] Rather, the court found that the Commission must squarely address the MISO transmission owners' concerns.[63] On remand, the Commission found that there was insufficient evidence in the record to sustain the Commission's removal of the pre-existing MISO TO Initial Funding Option from MISO's tariff.[64] Neither *Ameren* nor the

[59] *Id.* at 9.

[60] *Id.* at 9-10 (citing *Hope*, 320 U.S. at 603).

[61] *Ameren*, 880 F.3d at 580-81.

[62] *See, e.g.*, *id*. at 582 (finding "no need to reach the merits" because the Commission "failed even to respond" to the concerns raised by petitioners).

[63] *Id.* at 580-81.

[64] The dissent cites a brief filed by Commission staff in the D.C. Circuit in an appeal of the post-*Ameren* orders on remand. *N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,143 (2021) (Danly, Comm'r, dissenting at P 5). But, as described above, those orders found a lack of evidence to support the removal of the TO Initial Funding Option from MISO's tariff—and do not dictate the outcome here. To the extent the dissent suggests that the Commission's brief in that case binds the agency here, that suggestion is

Commission's orders on remand require the Commission to establish TO Initial Funding where it does not already exist; they merely require the Commission to appropriately consider parties' arguments and the record evidence, which we do below.

32. Further, *Hope* and *Bluefield* do not entitle the NYTOs to earn a return on System Upgrades where there has not been a showing that the current transmission rates do not already reflect the risks of owning, operating, and maintaining the transmission system with System Upgrades included and that the transmission owners will be unable to raise capital absent a return directly applied to System Upgrade capital costs. In *Hope*, the Supreme Court explained that, to be just and reasonable, a return "should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[65] The Supreme Court went on to explain that, although a rate "might produce only a meager return on the so-called 'fair value' rate base," where the rate "enable[s] the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed [it] certainly cannot be condemned as invalid."[66] In *Bluefield*, the Supreme Court explained that "rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service" are unjust and unreasonable.[67] Therefore, rather than necessarily entitling the NYTOs to earn a return on System Upgrades, *Hope* and *Bluefield*, in concert with section 206 of the FPA, require the NYTOs to show that the existing funding mechanism exposes them to uncompensated risks associated with owning, operating, and maintaining System Upgrades, and that the existing funding mechanism impedes the NYTOs' ability to attract future capital so as to prevent the NYTOs from operating successfully or maintaining financial integrity. As discussed below, we find that the NYTOs have failed to make such a showing.

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incorrect as a matter of law. *See, e.g.*, *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) (recognizing that an agency's authority runs to it as "an entity apart from its members, and it is its institutional decision—none other—that bear legal significance"); *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) ("Actions of the Commission shall be determined by a majority vote of the members present.") (quoting 42 U.S.C. § 7171(e)).

[65] *Hope*, 320 U.S. at 603.

[66] *Id.* at 605.

[67] *Bluefield*, 262 U.S. at 690.

2. Allegation that the OATT is Unjust and Unreasonable because it Fails to Provide the NYTOs with a Reasonable Rate of Return to Compensate them for Risks and Costs Associated with the Ownership, Operation, and Maintenance of System Upgrades

a. Complaint

33. The NYTOs argue that the Commission should find that the existing System Upgrade funding mechanism is confiscatory and unjust and unreasonable because the NYTOs: (1) face real risks relating to their ownership, operation, and maintenance of System Upgrades for which they are uncompensated; and (2) are forced to increasingly become non-profit entities with significantly diminished ability to attract capital because they are denied recovery of a reasonable rate of return.[68]

34. The NYTOs argue that they face regulatory, reliability, cybersecurity, environmental, and operational risks associated with their ownership, operation, and maintenance of the System Upgrades for which they and their investors are not compensated.[69] The NYTOs state that an investor requires compensation, through a higher return, to make an investment with greater risk relative to other investments with lower risks. Therefore, the NYTOs explain, as a company's risk increases, a higher rate of return is required.[70] The NYTOs further explain that, when regulated utilities are generally unable to earn their authorized return, increases in risk or potential losses must be recognized in the authorized returns to the investors.[71] The NYTOs allege that System Upgrades only expose investors to expected risks and losses because there is no return.[72] Therefore, the NYTOs argue that the incremental risks associated with the System Upgrades are reflected as a reduction in the investor's expected returns overall, which results in uncompensated costs to the transmission owner.

35. The NYTOs note that NYISO's interconnection studies can identify any type of transmission facility as being required to enable a reliable interconnection.[73] The NYTOs explain that System Upgrade facilities are virtually indistinguishable from general

[68] Complaint at 18.

[69] *Id.* at 18-19.

[70] *Id.* at 19 (quoting Complaint, attach. A, The Prepared Direct Testimony of Joshua C. Nowak at 10) (Nowak Test.).

[71] *Id.* at 19 (quoting Nowak Test. at 11).

[72] *Id.* at 19-20 (quoting Nowak Test. at 13).

[73] *Id.* at 20.

transmission plant, and therefore the risks associated with System Upgrade facilities are generally the same as those associated with a transmission owner's general transmission facilities. However, the NYTOs state that the relevant difference is that, while the NYTOs earn a return on the rest of their utility plant, they do not do so for the System Upgrades.[74] The NYTOs further explain that the incremental addition of a growing number of System Upgrades facilities increases the transmission owner's overall risk profile. The NYTOs additionally note that these risks are disclosed to investors, who also consider climate risks as part of their decision-making.[75] According to the NYTOs, rating agencies heavily weigh regulatory risks and acknowledge cybersecurity risks.[76]

36. The NYTOs note that the existing funding mechanism excludes System Upgrades from the utility plant on which a return is earned, and effectively causes the authorized rate of return to be insufficient relative to the risks.[77] The NYTOs contend that the System Upgrades are incremental risks beyond those faced by other utilities that are not forced to operate comparable non-profit facilities. The NYTOs argue that this heightened risk may drive investors to seek alternative investments. The NYTOs state that deterring new capital investments compromises each transmission owner's ability to provide safe and reliable services and remain financially sound.

37. The NYTOs state that they are increasingly compelled to operate as non-profit entities under the existing funding mechanism for System Upgrades which, according to the NYTOs, impedes their ability to attract capital.[78] The NYTOs explain that "requiring transmission owners to operate, in part, as nonprofits fundamentally changes the investor-owned utility business model and impacts investor assessment of their required return, [because] investors must invest in a utility's entire enterprise, including any nonprofit appendages."[79] The NYTOs contend that the *Ameren* court recognized that, as more of a transmission owner's business becomes operated on non-profit basis, the more likely it is such additions will deter investors and diminish the ability of the transmission owner to attract future capital.[80] According to the NYTOs, absent TO Initial Funding, each of the transmission owner's respective businesses will become increasingly owned, operated,

[74] *Id.* at 20 n.58.

[75] *Id.* at 23-26 (quoting Nowak Test. at 35, 42-43, 48-49, 56-57).

[76] *Id.* at 20-21 (quoting Nowak Test. at 23); *see also id.* at 23.

[77] *Id.* at 27 (quoting Nowak Test. at 64-65).

[78] *Id.*

[79] *Id.* (quoting Nowak Test. at 63).

[80] *Id.* at 28 (quoting *Ameren*, 880 F.3d at 582).

and maintained on a non-profit basis. The NYTOs allege that the addition of more System Upgrades will further increase the level of non-profit operations and exacerbate issues related to attracting capital and financial integrity.[81]

38. Finally, the NYTOs argue that the existing funding mechanism for System Upgrades is unjust and unreasonable because it is inconsistent with the express language of section 25.5.4 of the OATT under which the construction of System Upgrades is subject to a transmission owner's right to recover its costs plus a return.[82] The NYTOs state that the plain language of section 25.5.4 of the OATT allows a transmission owner to recover all reasonably incurred costs and a reasonable return, and the existing funding approach does not provide any means or mechanism for the transmission owner to recover such costs and a return.

b. NYISO Answer to the Complaint

39. NYISO argues that, absent a Commission determination that *Ameren* or other recent precedent require that NYISO change its long-established System Upgrade funding mechanism, its currently effective Tariffs remain just and reasonable, and the complaint should be denied.[83] NYISO also argues that, absent a Commission determination that the authority identified by the NYTOs requires NYISO's Tariffs to permit a transmission owner to elect to fund System Upgrades identified in NYISO's interconnection procedures, the complaint fails to demonstrate that NYISO's Tariffs are unjust and unreasonable.

40. NYISO argues that the current funding mechanism for System Upgrades is a long-established, fundamental component of NYISO's interconnection procedures, intertwined with other portions of NYISO's Tariffs, and if the Commission grants the complaint, Tariff revisions would be necessary to ensure that there are no inconsistencies or uncertainties within NYISO's Tariffs concerning the application of the existing funding mechanism for System Upgrades.[84] NYISO adds that, because the MISO funding requirements and agreements were developed within the specific context of MISO's interconnection procedures, they may provide helpful guidance but cannot be transplanted into NYISO's interconnection procedures. NYISO explains that it should be provided with the flexibility to address this matter in the context of its unique interconnection procedures without requiring it to adopt specific practices that the Commission has accepted in other regions.[85]

[81] *Id.* (quoting Nowak Test. at 66).

[82] *Id.* at 13-14.

[83] NYISO Answer at 2, 5.

[84] *Id.* at 6.

c. Comments and Protests

41. WIRES and EEI filed comments in support of the complaint.[86] WIRES and EEI agree with the NYTOs that the current NYISO Tariffs compel the NYTOs to assume regulatory, reliability, cybersecurity, environmental, and operational risks and costs associated with their ownership and operation of interconnection upgrades for which they currently do not earn a rate of return.[87] WIRES and EEI assert that satisfying state and federal climate targets has led to a significant number of new renewable and storage resources seeking to interconnect to the NYTOs' systems, causing the need for significant upgrades. WIRES and EEI explain that this will require expedient expansion of the New York transmission system and argue that the NYTOs cannot be made to operate on a non-profit basis or have significant enterprise risks left uncompensated.[88] EEI states that the NYTOs are forced into operating an ever-increasing amount of their assets on such a non-profit basis, undermining their ability to attract capital.[89]

42. Protesters argue that the NYTOs have not met their burden under FPA section 206 to demonstrate that the existing Tariffs are unjust, unreasonable, unduly discriminatory or preferential.[90] Consumer Stakeholders explain that the complainant is required to provide the Commission with evidentiary materials, including documents that support the facts in the complaint.[91] Protesters argue that the NYTOs have failed to put forth actual evidence that they face uncompensated risks and costs associated with the System Upgrades.[92] Rather, protesters argue that the allegations are unquantifiable and speculative.[93] Protesters state that, while Mr. Nowak attaches a risk catalog to his testimony, he fails to provide any accompanying quantification and risk analysis about how likely each risk is

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[85] *Id.* at 7.

[86] WIRES Comments at 2; EEI Comments at 1-2.

[87] WIRES Comments at 6-7; EEI Comments at 4.

[88] WIRES Comments at 5-6; EEI Comments at 1-2.

[89] EEI Comments at 4.

[90] Consumer Stakeholders Protest at 15; NY Interconnection Customers Protest at 13; State Entities Protest at 5-6; UIU Protest at 4.

[91] Consumer Stakeholders Protest at 15.

[92] *Id.* at 22; NY Interconnection Customers Protest at 19; State Entities Protest at 5-7.

[93] UIU Protest at 4, 12; Consumer Stakeholders Protest at 22.

viewed pursuant to the instant matter of applying such risks as a result of System Upgrades.[94]

43. NY Interconnection Customers argue that the "uncompensated risks" that the NYTOs claim are associated with their ownership of System Upgrades are immaterial, and in many cases, these upgrades actually reduce those risks.[95] NY Interconnection Customers add that, if the risks the NYTOs identify truly were material, the NYTOs have an obligation to disclose this to investors in U.S. Securities and Exchange Commission (SEC) filings. To the knowledge of the NY Interconnection Customers, the NYTOs have not identified the lack of a rate of return on System Upgrades as a material risk on any SEC filing since the existing funding approach for System Upgrades was established and, instead, have repeatedly cited the investments associated with attaining those same state targets as revenue opportunities.

44. Protesters disagree with the NYTOs' claim that they are uncompensated for the risks of owning and maintaining the System Upgrades.[96] Several protesters contend that any labor or materials used to maintain, operate, or repair these facilities, if they are not directly charged to a developer, are included in the utilities' regulated expenditures.[97] State Entities contend that, when the New York Commission sets the revenue requirement for a utility—including its estimated cost of capital—it includes the labor, materials, and risk associated with these facilities.[98] State Entities argue that the recitation of risks in the utility filing are risks that all utilities face, with or without the investment in System Upgrades paid for by developers, and are reflected in the target just and reasonable rate of return set by the New York Commission.

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[94] Consumer Stakeholders Protest at 22; NY Interconnection Customers Protest at 19; Invenergy Protest at 8.

[95] NY Interconnection Customers Protest, attach. A, Affidavit of Michael S. Goggin at 2 (Goggin Aff.).

[96] State Entities Protest at 8; NY Interconnection Customers Protest at 19; UIU Protest at 12.

[97] NY Interconnection Customers Protest, Goggin Aff. at 2 (stating even if the claimed risk increases were real, the NYTOs would already be compensated for these risk increases through standard state ratemaking processes); *see also* UIU Protest at 12 (arguing that future operations and maintenance (O&M) expenses related to System Upgrade infrastructure not covered by the interconnection customer payment are generally recovered from native load customers in retail rates).

[98] State Entities Protest at 8.

45. Protesters also argue that, when an interconnection customer funds the System Upgrade, the transmission owner puts no capital at risk, and so the regulated return (which reflects the utility's total opportunity cost of capital to ensure ongoing capital attraction) is irrelevant.[99] Consumer Stakeholders contend that the NYTOs do not need to earn a return on investments that they do not make, noting that the capital cost is provided entirely by the interconnecting generator.[100] Protesters add that the NYTOs have conflated investment risk and operating expense,[101] and do not need to fund and earn a return on the System Upgrades to recover unsupported claims regarding hypothetical operating risk.

46. Consumer Stakeholders assert that at issue in this case is not what is a reasonable return as set forth in *Bluefield* and *Hope*, but instead whether the NYTOs can establish a new right that they have never had before. Consumer Stakeholders further assert that the NYTOs have failed to articulate what benefits, if any, inure to anyone but their shareholders as a result of the complaint.[102]

47. Protesters argue that the NYTOs cite no actual evidence supporting their theory that they are being forced to bear additional risks associated with System Upgrades but are unable to earn a return on the facilities and are, therefore, less attractive to investors.[103] Consumer Stakeholders also contend that the NYTOs provide no evidence that the NYTOs lack revenue for operating expenses or that they cannot maintain their credit or attract capital. State Entities assert that the open competitive market for financing has been successful to date and that none of the arguments filed in this proceeding have indicated that the financing has not been effective for the developers or, ultimately, the ratepayers.[104] Consumer Stakeholders state that utilities have no constitutional right to profits pursuant to both *Bluefield* and *Hope*.[105] Invenergy argues that, even without any quantitative evidence, to the extent the NYTOs argue there is some theoretical incremental risk increase that can be associated with a specific grid improvement resulting from System Upgrades, it would be negligible in the context of their entire

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[99] UIU Protest at 12; *cf* Consumer Stakeholders Protest at 16.

[100] Consumer Stakeholders Protest at 16-17.

[101] *Id.* at 17; UIU Protest at 14; State Entities Protest at 9.

[102] Consumer Stakeholders Protest at 20.

[103] *Id.* at 16; Invenergy Protest at 8; State Entities at 6-7; UIU Protest at 14.

[104] State Entities Protest at 11.

[105] Consumer Stakeholders Protest at 17.

transmission investment and cannot be pointed to as affecting the NYTOs' ability to attract capital.[106]

48. NY Interconnection Customers state that the NYTOs spill considerable ink identifying potential risks and discussing generalized disclosures to investors in SEC filings and rating agency positions, but do not actually identify the absence of a rate of return for System Upgrades as impairing the NYTOs' ability to attract capital.[107] NY Interconnection Customers further state that the NYTOs' SEC filings show that the very factors they cite as "risks" before this Commission are framed as revenue opportunities elsewhere, and their securities filings and credit ratings show healthy enterprises with an ongoing ability to attract capital.

49. Invenergy argues that the NYTOs read section 25.5.4 of the OATT too broadly and cite no precedent suggesting that the provision should permit a transmission owner to recover costs of and a return on all System Upgrades, including those funded by the interconnection customer.[108]

50. NY Interconnection Customers contend that NYISO sought and was granted an independent entity variation from the Order No. 2003 paradigm that allowed the transmission owner to initially fund the costs of engineering, procurement, construction, and installation of the required network upgrades.[109] NY Interconnection Customers state that the NYTOs supported the proposal to no longer provide reimbursement to the interconnection customer for amounts funded for System Upgrades, and thus chose to no longer roll the amounts in rate base and earn a return on any System Upgrades. Hence, the NY Interconnection Customers argue that the complaint is a collateral attack on the NYTOs' own support for a funding mechanism that deviated from the default pricing policy in Order No. 2003.

51. NextEra states that the Commission should take this opportunity to revisit the existing funding mechanism for System Upgrades in NYISO and exercise its authority under FPA section 206 to direct NYISO and the NYTOs to show cause why directly assigning the cost of System Upgrades to generators is just and reasonable, and not unduly discriminatory or preferential.[110] NY Interconnection Customers also ask that the

[106] Invenergy Protest at 9.

[107] NY Interconnection Customers Protest at 17.

[108] Invenergy Protest at 16.

[109] NY Interconnection Customers Protest at 4 (citing Order No. 2003-A, 106 FERC ¶ 61,220 at P 694).

[110] NextEra Protest at 3.

Commission institute a paper hearing or technical conference on its own initiative to comprehensively review the issues raised in the protests.[111]

d. NYTOs Answer to Comments and Protests

52. The NYTOs argue that the protesters' attempts to rebut the NYTOs' showing that the NYTOs bear uncompensated risks for System Upgrades are contrary to both the *Ameren* court's and the Commission's findings that transmission owners face the risks of uncompensated costs associated with these interconnection-related upgrades.[112] The NYTOs disagree with protesters' arguments that the evidence presented by Mr. Nowak's testimony is more about the ordinary risks of the utility business and not specific to System Upgrades.[113] The NYTOs state that System Upgrades are an ordinary portion of their transmission plant, and the NYTOs should be entitled to the same earnings on System Upgrades as they are on the rest of their system.

53. The NYTOs also argue that protests fail to overcome the NYTOs' demonstration of uncompensated risks and at best serve only to possibly mitigate the uncompensated risks identified in Mr. Nowak's testimony; they do not disprove the uncompensated risks.[114] The NYTOs disagree with protesters' arguments that, because specific occurrence of all the identified uncompensated risks have not been quantified for System Upgrades, the risks do not exist. The NYTOs assert that a risk is the possibility of loss or injury; the loss need not have occurred for a risk to exist. They contend that risk is a prospective concept, and the quantification of such costs resulting from unrecovered transmission-related costs is a retrospective concept.[115] Moreover, the NYTOs argue that several of the risks identified in Mr. Nowak's testimony have, in fact, occurred. The NYTOs rebuke the assertion that risks associated with System Upgrades do not exist because they are not specifically delineated in recent risk disclosures.[116] The NYTOs further argue that the risks associated with System Upgrades are not offset by financial benefits because the System Upgrades are not rate-based public policy transmission upgrades driven by the growth of renewable energy for which NYTOs earn a return. The NYTOs also contend that arguments that the risks of System Upgrades are offset by reliability benefits is incorrect and irrelevant because System Upgrade Facilities, which constitute

[111] NY Interconnection Customers Protest at 31-32.

[112] NYTOs Answer at 11.

[113] *Id.* at 12.

[114] *Id.* at 13.

[115] *Id.* at 14.

[116] *Id.* at 15.

the majority of current generator-funded System Upgrades (with the remainder being System Deliverability Upgrades), are not constructed and installed to increase reliability.[117]

54. The NYTOs also disagree with protesters' arguments that the risks associated with System Upgrades are already addressed at the retail level.[118] The NYTOs state that retail level recovery compensates transmission owners for most of their out-of-pocket O&M expense for System Upgrades but does not provide a capital return.[119] The NYTOs state that pass-through recovery of O&M (on less than a dollar-for-dollar basis) versus the recovery of a return attendant to capital expenditures are two very different things. According to the NYTOs, the notion that the risks identified in Mr. Nowak's testimony are risks all utilities face is largely true; however, the NYTOs argue that the contention that the risks are reflected in the targeted just and reasonable rate of return set by the New York Commission does not address the fact that the rate of return is not applied to the assets creating the incremental risk. The NYTOs contend that they do not receive any incremental return for the capital assets that comprise a part of the NYTOs' systems as a result of the NYISO generation interconnection process in their state retail rates.

55. The NYTOs argue that the *Ameren* court already dismissed arguments that transmission owners must show a prior problem attracting capital.[120] The NYTOs assert that, while the court observed that a public utility's non-profit operation of generator-funded upgrades might escape arrestive impact so long as they represent only a "tiny" portion of its business, the court did not hold that it is legally permissible to compel a utility to conduct any portion of its business on a non-profit basis, or that a utility's right to a reasonable return arises only after a minimum threshold of non-profit operation is met.[121] According to the NYTOs, if the quantity of previously constructed System Upgrades were tolerable to manage on a non-profit basis, which the NYTOs do not concede, the NYTOs argue that is no longer the case because interconnection requests continue to mount and the demand for interconnection services continues to grow. Moreover, the NYTOs respond to Invenergy's argument that the NYTOs expected non-profit operations are negligible by arguing that the expected $248 million in System Upgrades cost allocations is hardly negligible, and likewise, the forfeiture of earnings on two percent of the NYTOs' business cannot be characterized as insignificant. Instead, the NYTOs argue that both figures demonstrate the materiality of the concern that the proposed TO Initial Funding would address.

[117] *Id.* at 17.

[118] *Id.* at 18.

[119] *Id.* at 19.

[120] *Id.* at 7.

[121] *Id.* at 7-8 (quoting *Ameren*, 880 F.3d at 582).

56. The NYTOs assert that their previous support for the existing System Upgrade funding mechanism does not bind them to continued support for that approach.[122] The NYTOs add that a technical conference would also serve no purpose because the costs of the funding mechanism have no bearing on whether the NYTOs' current inability to earn a return on System Upgrades is unjust and unreasonable and even if they were relevant, the cost specific cost impacts are largely unknowable because, among other things, the interconnection customers' financing costs are generally non-public.[123] In response to NextEra's argument that the Commission should issue a show cause order to require the abandonment of participant funding and the universal adoption of the Order No. 2003 crediting approach, the NYTOs contend that those arguments raise complex issues beyond the scope of these proceedings.

e. Commission Determination

57. We find that the NYTOs have not met their burden under section 206 of the FPA to show that the existing funding mechanism for System Upgrades contained in the OATT is unjust, unreasonable, and unduly discriminatory or preferential. The NYTOs argue that the existing funding mechanism for System Upgrades does not allow them to be compensated for risks associated with those System Upgrades. To be clear, the NYTOs do not allege that the existing funding mechanism for System Upgrades exposes them to costs as contemplated within the meaning of section 25.5.4 of the OATT, but rather exposes them to risks.[124] As discussed below, the NYTOs have failed to demonstrate that, due to the existing funding mechanism, the ownership, operation, and maintenance of System Upgrades exposes them to risks for which they are not already compensated. Therefore, the NYTOs have not shown that the existing funding mechanism impedes the NYTOs' ability to attract future capital so as to prevent the NYTOs from operating successfully or maintaining financial integrity.[125]

58. We first find that the NYTOs have not shown that the existing funding mechanism exposes them to uncompensated risks associated with owning, operating, and maintaining the System Upgrades such that the existing System Upgrade funding mechanism in the OATT is unjust, unreasonable, unduly discriminatory, or preferential. The NYTOs generally assert that they face regulatory, reliability, cybersecurity, environmental, and

[122] *Id.* at 26.

[123] *Id.* at 26-27.

[124] Notwithstanding that the complaint is framed in terms of risks and costs, the complaint primarily argues how the existing funding mechanism results in uncompensated risks.

[125] *See supra* P 32 (discussing the NYTOs' burden under FPA section 206 and the capital attraction standard set forth in *Hope* and *Bluefield*).

operational risks for the System Upgrades for which they are not compensated. However, they provide no evidence that existing transmission rates do not sufficiently compensate them for such risks as part of owning, operating, and maintaining a transmission owner's entire system, nor do they allege that rating agencies have assigned the transmission owners to higher risk categories based on these risks. Instead, again without support, the NYTOs argue that the only way to earn a return commensurate with risks on the transmission system is to include the underlying transmission property in rate base and that the approved jurisdictional rate of return must be applied to the net plant of all System Upgrades on the transmission system. Such unsubstantiated assertions are insufficient to support an FPA section 206 complaint.

59. We also find that the NYTOs have not provided sufficient evidence to show that the existing funding mechanism impedes their ability to attract capital so as to prevent them from operating successfully or from maintaining the financial integrity of the NYTOs' enterprise, as contemplated by *Hope* and *Bluefield*. The NYTOs focus on the disclosure of the risks of owning, operating, and maintaining System Upgrades to investors, as well as the rating agencies, who heavily weigh regulatory risks and acknowledge cybersecurity risks. According to the NYTOs, the anticipated incremental additions of System Upgrades to the NYTOs' systems will increase each transmission owner's overall risk profile that investors and rating agencies consider. Even assuming that the risks of owning, operating, and maintaining System Upgrades are disclosed to investors and rating agencies, who in turn consider these risks as part of the NYTOs' risk profiles,[126] this does not answer the question of whether those risks are already incorporated into the NYTOs' current transmission rates, such that the NYTOs are already compensated for these alleged risks.[127] Instead, the evidence provided by the NYTOs shows only that investors consider the risk profiles of companies regulated by the Commission when making investment decisions and that, in general, if investors perceive that the rate of return is not high enough to cover the risk of their investment, they will not invest in the company. This does not support a finding that the existing funding mechanism impedes the NYTOs' ability to attract capital or to maintain the financial integrity of the NYTOs' enterprise.

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[126] As discussed below, we also find that the NYTOs do not support the assertion that investors consider these risks to be uncompensated.

[127] When setting a just and reasonable return on equity for a utility, the Commission will typically construct a proxy group of utilities that were given similar credit risk ratings by a rating agency as the utility being reviewed. The proxy group utilities are then used to create an upper and lower limit on the zone of reasonableness for the return on equity that may be approved for the utility under review. As a result, if a utility has its risk profile downgraded then its proxy group will change accordingly and so will the return on equity zone of reasonableness. *See, e.g.*, *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030, at PP 25, 49-54 (2018).

60. The NYTOs argue that the only way to earn a return commensurate with their risks is to include the capital costs of the System Upgrades in their rate base, such that the Commission-approved rate of return is applied to the net plant of the entire transmission system, including System Upgrades. In the NYTOs' view, they are entitled to a reasonable return on the System Upgrades that are used to render generator interconnection service under the OATT.[128] This theory, however, is inconsistent with *Hope* and *Bluefield*—both of which focus on a utility's right to earn a return on the "enterprise" as a whole that is commensurate with "other enterprises having corresponding risks."[129] Consistent with *Hope* and *Bluefield*, the Commission calculates a utility's return on equity based on the risk profile of the enterprise as a whole,[130] and the NYTOs have failed to demonstrate that their currently approved rates of return, calculated for each enterprise as a whole, do not consider enterprise-wide risks of investing in the entire transmission system, including System Upgrades.[131] Furthermore,

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[128] Complaint at 15-16; NYTOs Answer at 4.

[129] *See Hope*, 320 U.S. at 603 (return "should be commensurate with returns on investments in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise"); *Bluefield*, 262 U.S. at 692–93. The dissent's theory that the NYTOs are entitled to recover a project-specific return on System Upgrades misapprehends this precedent.

[130] *See, e.g.*, *Ass'n of Business Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,129 (2019), *order on reh'g*, 171 FERC ¶ 61,154, at P 4 (discussing various models the Commission has used at different points in time to estimate a utility's risk profile), *order on reh'g*, 173 FERC ¶ 61,159 (2020); *Emera Maine v. FERC*, 854 F.3d 9, 20 (D.C. Cir. 2017) ("An ROE is 'the cost to the utility of raising capital' . . . 'sufficient to assure confidence in the financial integrity of the enterprise.'" (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001) and *Hope*, 320 U.S. at 603)); *Petal Gas v. FERC*, 496 F.3d 695, 699 (explaining the Commission's use of proxy groups to provide market data from public companies "comparable to a target *company*" that "reflect *a company's* risk level" to "permit calculation of the 'risk-adjusted expected rate of return sufficient to attract investors'" (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001)) (emphasis added)).

[131] The dissent asserts that the existing funding mechanism subjects the NYTOs to increased risks for which they are not compensated. *N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,143 (2021) (Danly, Comm'r, dissenting at P 4). However, the base return on equity in a utility's transmission rate is designed to account for risks faced by an enterprise. *See supra* n.130; *infra* n.135. Similarly, the target just-and-reasonable rate of return set by the New York Commission is designed to account for a New York utility's enterprise-wide risks. *See* State Entities Protest at 5-6. The NYTOs also maintain the

although the NYTOs note that rating agencies take these risks into account in their assessments of transmission owners' risk profiles, the NYTOs do not provide any support that: (1) the rating agencies have indicated that the NYTOs face increased risks due to System Upgrades; or (2) the NYTOs' current transmission rates do not already account for rating agencies' risk assessments.

61. Furthermore, the NYTOs speculate about how generator-funded System Upgrades might increase risk and, therefore, affect the NYTOs' ability to raise capital to fund their operations as a whole. However, the NYTOs provide no evidence that investors specifically consider the risks of owning, operating, and maintaining generator-funded System Upgrades as being uncompensated risks when making investment decisions. For example, the NYTOs provide no demonstration that they have reported to investors that the existence of interconnection customer-funded System Upgrades on their system creates risks to the overall financial strength of the NYTOs' business, no support regarding the valuation of the claimed uncompensated risks, and no evidence that rating agencies have assigned transmission owners to higher risk categories based on concerns about the amount of System Upgrades on the transmission system. This speculation is insufficient to satisfy the NYTOs' FPA section 206 burden to demonstrate that the existing funding mechanism for System Upgrades is not just and reasonable or sufficient to attract future capital investment in the NYTOs' entire enterprise.

62. We further disagree with the NYTOs' contention that the existing funding mechanism for System Upgrades is inconsistent with the express language in section 25.5.4 of the OATT. Section 25.5.4 states that the NYTOs have the "right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, all reasonably incurred costs, plus a reasonable return on investment."[132] The NYTOs rely on the argument that "costs" encompass the alleged uncompensated risks associated with owning, operating, and maintaining the System Upgrades. We disagree. Instead, as explained below, we find that the reference to "costs" in section 25.5.4 is not the same as "risks."[133] Under section 25.5.4, transmission owners only have the right to recover "incurred costs, *plus* a reasonable return on investment." We right to file under section 205 of the FPA to seek to modify their base returns on equity to the extent they believe those returns are inadequate to compensate them for the enterprise-wide risks they face. The NYTOs have therefore failed to demonstrate, based on the record before us, that their base returns on equity are an insufficient means to compensate them for the risks they identify in their complaint.

[132] Complaint at 13-14; *see also* NYISO OATT, attach. S, § 25.5.4.

[133] Note that in an order issued concurrently with this order, we similarly interpret the same language in section 3.10(a) of the NYISO-TO Agreement to not encompass the risks to which the NYTOs point. *See N.Y. Indep. Sys. Operator, Inc.,* 176 FERC ¶ 61,143 (2021).

interpret the term "costs" under section 25.5.4 to encompass costs properly recovered in transmission rates, both those on which a transmission owner may seek a reasonable return under its transmission rate and those on which a return is not permitted but which are nevertheless recoverable in transmission rates. But the types of alleged uncompensated risks associated with owning, operating, and maintaining System Upgrades to which the NYTOs point[134] are not "costs" within the meaning of section 25.5.4; rather, they are risks traditionally associated with the development of the return on equity component of a rate for jurisdictional service and have been included in the consideration of the appropriate base return on equity applied to the rate base.[135] We are not persuaded by the NYTOs' attempt to equate alleged uncompensated risks to costs recoverable under section 25.5.4 of the OATT. Therefore, the existing funding mechanism for System Upgrades is not inconsistent with the express language in section 25.5.4 of the OATT, as the NYTOs allege, because the NYTOs do not demonstrate that they are incurring "costs" as contemplated within the meaning of section 25.5.4 as a result of the existing funding mechanism.[136]

63. Finally, we decline NextEra's request that we revisit the existing funding mechanism for System Upgrades to consider the direct assignment of System Upgrade costs to generators because we find this request to be beyond the scope of this proceeding. This proceeding is limited to the NYTOs' claim that the existing funding mechanism for System Upgrades is unjust, unreasonable, unduly discriminatory, and preferential because it does not compensate the NYTOs for the risks associated with owning, operating, and maintaining System Upgrades.

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[134] Complaint at 19-26.

[135] *See El Paso Nat. Gas Co.*, 145 FERC ¶ 61,040, at P 693 (2013) ("Fundamentally, rate of return and risk go hand-in-hand: the higher the risk, the higher the required rate of return."), *order on reh'g and compliance*, 154 FERC ¶ 61,120 (2016).

[136] We note that the Commission recently affirmed that the NYTOs have a federal right of first refusal to "build, own, and recover the costs of upgrades to their existing transmission facilities, as permitted under Order No. 1000, including upgrades that are part of another Developer's proposed transmission project that NYISO selects in its regional transmission plan for purposes of cost allocation." *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC 61,038, at P 30 (2021) (NYISO April 2021 Order). We clarify that the instant proceeding is unrelated to transmission facilities permitted under Order No. 1000 and the facts presented in the NYISO April 2021 Order.

The Commission orders:

The NYTOs' complaint is hereby denied, as discussed in the body of this order.

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

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Central Hudson Gas & Electric Corporation
Consolidated Edison of New York, Inc.
Niagara Mohawk Power Corporation
New York State Electric & Gas Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric Corporation

Docket No. EL21-66-000

v.

New York Independent System Operator, Inc.

(Issued September 3, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order because it runs afoul of Commission and judicial precedent and falls short of reasoned decision making by failing to respond to evidence presented in the complaint.[1] The majority denies the New York Transmission Owners (NYTOs) complaint seeking recovery of what it deems to be "risks" that are not appropriately categorized as "costs" as contemplated by the New York Independent System Operator, Inc.'s Open Access Transmission Tariff (OATT).[2] And so the status quo thus remains in place—an unlawful and confiscatory System Upgrade funding mechanism that compels the NYTOs to own, operate, and maintain System Upgrades on a profitless basis, denying those transmission owners (TOs) the opportunity to earn the return on those assets.[3]

2. The majority finds that *Bluefield*[4] and *Hope*[5] require the NYTOs to show the "existing funding mechanism exposes them to uncompensated risks associated with

[1] *See* 5 U.S.C. § 706(2) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (E) unsupported by substantial evidence . . . .").

[2] *See Cent. Hudson Gas & Elec. Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,149, at PP 57-58, 62 (2021) (September 3 Order). The terms System Upgrade Facilities (SUFs), System Deliverability Upgrades (SDUs) and System Upgrades are used interchangeably herein.

[3] *See* NYTOs April 9, 2021 Complaint at 1-3 (Complaint).

owning, operating, and maintaining System Upgrades, and that the existing funding mechanism impedes the NYTOs' ability to attract future capital so as to prevent the NYTOs from operating successfully or maintaining financial integrity."[6] They go on to hold that *Ameren*[7] is distinguishable and does not require a change[8] and "find that the NYTOs have failed to make such a showing."[9] Having rejected the NYTOs complaint at step one, the majority never considers the replacement rate.[10]

3. The NYTOs explain they do not recover a return on System Upgrades in transmission rates or retail rates.[11] They identify uncompensated risks as including regulatory, reliability, cybersecurity, environmental and operational risks.[12] Yet, in spite

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[4] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (*Bluefield*).

[5] *Fed. Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591 (1944) (*Hope*).

[6] September 3 Order, 176 FERC ¶ 61,149 at P 32.

[7] *Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) (*Ameren*).

[8] *See* September 3 Order, 176 FERC ¶ 61,149 at P 31.

[9] *Id.* P 32; *see also id.* PP 21, 57.

[10] *Id.* P 21.

[11] *See, e.g.*, Complaint at 12 ("The NYISO OATT does not provide the TOs a means to recover a reasonable rate of return for the capital costs associated with the SUF/SDU, nor do the TOs include such assets in their rate base as a capital asset for recovery from customers (the operation and maintenance ("O&M") associated with SUFs/SDUs are generally recovered from native load customers through retail rates)."); *see also* NYTOs August 13, 2021 Answer to Comments at 4 ("[T]he capital costs of the SUFs and SDUs are not added to the NYTOs' retail rate-base on which a return is earned. As such, retail rates do not compensate the TOs for all the risks and costs associated with the SUFs/SDUs (which is what is encompassed by what an ROE compensates), nor does it satisfy the Constitutional standard that a utility is to be provided an opportunity to earn a return for the value of its property used to render jurisdictional service.") (citations omitted); Complaint at 3 ("The Existing Funding Approach compels the Complainants to construct, own, and operate the SUFs/SDUs on a non-profit basis by not allowing them to earn a return on those assets . . . such a result is *per se* confiscatory and unlawful.").

[12] *See* Complaint at 6 ("Specifically, the TOs face regulatory risks, reliability risks, cybersecurity risks, environmental risks, and operational risks for the SUFs/SDUs, but for which the TOs currently recover no return.").

of their showing, the majority finds that "the NYTOs have not presented sufficient evidence to show that the existing funding mechanism results in the NYTOs facing uncompensated risks and costs associated with the System Upgrades that force the NYTOs to operate segments of their business on a non-profit basis or prevent the NYTOs from attracting needed capital."[13] The majority goes on to hold:

> We first find that the NYTOs have not shown that the existing funding mechanism exposes them to uncompensated risks associated with owning, operating, and maintaining the System Upgrades such that the existing System Upgrade funding mechanism in the OATT is unjust, unreasonable, unduly discriminatory, or preferential. The NYTOs generally assert that they face regulatory, reliability, cybersecurity, environmental, and operational risks for the System Upgrades for which they are not compensated. However, they provide no evidence that existing transmission rates do not sufficiently compensate them for such risks as part of owning, operating, and maintaining a transmission owner's entire system, nor do they allege that rating agencies have assigned the transmission owners to higher risk categories based on these risks. Instead, again without support, the NYTOs argue that the only way to earn a return commensurate with risks on the transmission system is to include the underlying transmission property in rate base and that the approved jurisdictional rate of return must be applied to the net plant of all System Upgrades on the transmission system. Such unsubstantiated assertions are insufficient to support an FPA section 206 complaint.[14]

4. The NYTOs' arguments are not, as the majority describes them, "unsubstantiated assertions." They are a clearly stated, unadorned recitation of facts. The majority cannot properly rely upon such an out-of-hand dismissal of a well-pleaded argument.[15] The "unsubstantiated assertions:" consist of a 75-page affidavit with over 50 additional pages of exhibits that the majority alludes to in its recitation of the arguments but almost wholly fails to discuss in its order. We have to do more than recite the record evidence. We have to actually grapple with evidence before us and meaningfully respond to it.

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[13] September 3 Order, 176 FERC ¶ 61,149 at P 21; *see also id.* P 32.

[14] *Id.* P 58.

[15] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (citation omitted); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1054 (D.C. Cir. 2003) (requiring Commission to "adequately explain its decision").

5. The failure to include evidence from rating agencies or investors explicitly stating that the NYTOs face increased risk ratings that has impeded their ability to attract capital or maintain financial integrity cannot be dispositive. It is common knowledge that these entities review risk profiles as stated by the NYTOs.[16] As the majority acknowledges, the NYTOs' evidence shows investors consider the risk profiles when making decisions and, in general, if they perceive the rate of return is not high enough to cover the investment risk, they *will not invest* in the company.[17] The majority's conclusion that this does not support a finding that the existing funding mechanism impedes their ability to attract capital or maintain financial integrity is based neither on the evidence nor on sound logic.[18]

6. The NYTOs show that existing section 25.5.4 of Attachment S to the OATT is unjust and unreasonable because it recognizes that the NYTOs' "obligation *to implement* . . . System Upgrades" entitles them to cost recovery plus a return,[19] but it provides no recovery mechanism.[20] The majority simply responds that risks are not costs under that section. Yet, a recent Commission pleading submitted to the U.S. Court of Appeals for the District of Columbia Circuit recognized that transmission owners have uncompensated risks when forced to operate network upgrades that are paid for through generator funding and that this entitles them to be compensated now for operating the upgrades.[21] Well-established Commission and judicial precedent are clear that they are entitled to recover costs and earn a return on property used to provide jurisdictional service, such as the interconnection service here, under the OATT.[22]

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[16] *See* Complaint at 20-27.

[17] September 3 Order, 176 FERC ¶ 61,149 at P 59.

[18] *See id*.

[19] OATT, Attach. S, § 25.4 (emphasis added).

[20] *See* September 3 Order, 176 FERC ¶ 61,149 at PP 57, 62.

[21] *See* NYTOs August 13, 2021 Answer to Comments at 5 & n.19 (citing Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 43 (May 3, 2021)). The majority seems to imply I am unfamiliar with the legal import of statements made in appellate briefs submitted by Commission counsel. September 3 Order, 176 FERC ¶ 61,149 at P 31 n.64. Having overseen the Commission's appellate litigation program for several years, I am aware that the Commission only acts through its orders. I cite to the brief to point out the apparent inconsistencies.

[22] *See, e.g.*, *Hope*, 320 U.S. at 603; *Bluefield*, 262 U.S. at 690; *Ameren*, 880 F.3d at 579-80.

7. Independent of *Ameren* and its successors,[23] the majority's order also cannot be squared with our order in April that found the NYTOs had broadly reserved their rights under the ISO-TO Agreement and possess a federal right of first refusal for upgrades to their transmission facilities. This included upgrades that are part of other developers' proposed transmission projects which are selected in NYISO's regional transmission plan.[24]

8. What this case boils down to is a basic logical flaw based on the majority's failure to recognize a fundamental point—while it may be difficult to assess with precision the risk assumed by a transmission owner operating a System Upgrade, the one thing we do know is that it is not riskless. It cannot be. That being the case, *some* mechanism for compensating transmission owners for otherwise un-offset liabilities must be contemplated under the Federal Power Act. A single result is therefore logically compelled: the complaint must be heard on the merits and *some* replacement rate, no matter how vanishingly small, if that is what the evidence demands, must replace the current regime of uncompensated assumption of risk. And I doubt it would be negligible, the sheer number of System Upgrades for which the NYTOs are responsible subject them to ever-increasing risks for which the current regime provides no compensation.[25]

~~For these reasons, I~~ respectfully dissent.

[23] *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc*., 171 FERC ¶ 61,075, at P 33 ("the rate of return available to transmission owners when they provide initial funding for network upgrades compensates them for business risk, such as lawsuits, reliability compliance obligations, and environmental and construction risks; in addition, it prevents transmission owners from operating a significant portion of their business on a non-profit basis and ensures that future capital can be attracted") (citations omitted), *reh'g order*, 173 FERC ¶ 61,037 (2020).

[24] *N.Y. Indep. Sys. Operator, Inc*., 175 FERC ¶ 61,038, at P 34 (2021); *see also* ISO-TO Agreement, § 3.10(d) (right to recover costs plus a return associated with constructing and owning or financing expansions or modifications to its facilities); *id.*, § 3.11 (any rights not specifically transferred to NYISO remain with the NYTOs); *id.*, § 6.09 (in relevant part, in the event of a conflict with the OATT, the ISO-TO Agreement "shall prevail.").

[25] *See* Complaint at 5 ("[W]hile for Class Year 2011 NYISO studied six interconnection requests resulting in the identification of approximately $320 million of [System Upgrades], for Class Year 2019 NYISO studied 78 interconnection requests resulting in the identification of over $1.2 billion in [System Upgrades], a nearly four-fold increase in terms of costs"). The NYTOs "currently are prevented from recovering a rate of return for that increasingly significant portion of their business." *Id.* Interconnection Customers have accepted responsibility for $248,797,424 of the System Upgrade Facilities and associated headroom identified for Class Year 2019. *Id.* at 5 n.18.

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James P. Danly
Commissioner