

176 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.
Central Hudson Gas & Electric Corporation
Consolidated Edison Company 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. ER21-1647-001

ORDER REJECTING RATE FILING

(Issued September 3, 2021)

1. On April 9, 2021, as amended on July 8, 2021, pursuant to section 205 of the Federal Power Act (FPA),¹ the New York Transmission Owners (NYTO)² filed to amend the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT)³ to revise the existing funding methodology applicable to System Upgrade Facilities and System Deliverability Upgrades (collectively, System Upgrades) (Rate Filing).⁴ As discussed below, we reject the Rate Filing.

I. NYISO's Existing System Upgrades Funding Approach

2. The NYTOs state that, under NYISO's currently effective OATT, interconnection customers pay for the capital costs of constructing and installing the System Upgrades

¹ 16 U.S.C. § 824d.

² For the purposes of this filing, the NYTOs include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

³ NYISO submitted this filing on the NYTOs' behalf solely in NYISO's role as the OATT administrator.

⁴ Rate Filing at 2-3.

that are necessary to reliably and efficiently interconnect and integrate their generating facilities.⁵ The NYTOs explain that the interconnection customer subsequently conveys the System Upgrades to the relevant transmission owner to own, operate, and maintain.⁶

II. Rate Filing

3. The NYTOs propose to amend the existing funding approach in section 25.5.4 of the NYISO OATT (the Core Amendment) to provide transmission owners the option to elect to fund the costs of the System Upgrades caused by generator interconnections and be allowed to earn a reasonable return for those assets used to provide jurisdictional service.⁷ The NYTOs state that generators would remain responsible for the costs of System Upgrades. However, the Core Amendment would provide that, if the transmission owner elects to fund a System Upgrade, those costs and an approximate rate of return would be recovered from the interconnection customer (TO Initial Funding).⁸ The NYTOs state that the Core Amendment would revise section 25.5.4 of Attachment S of the NYISO OATT, in pertinent part, as follows:

Any Connecting or Affected Transmission Owner implementation and construction of [System Upgrades] . . . shall be subject to the Connecting or Affected Transmission Owner's 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. Such a Connecting or Affected Transmission Owner shall provide the NYISO with written notice, prior to the commencement of the Initial Decision Period, as that period is defined in Section 25.8.2 of Attachment S, if the Connecting or Affected Transmission Owner, as the case may be, elects to fund the capital costs of any System Upgrade Facilities and/or System Deliverability Upgrades identified in the underlying study(ies); otherwise,

⁵ *Id.* at 10; *see also* NYISO, NYISO OATT, § 25.5 OATT attach. S (Class Year Study and Expedited Deliverability Study Processes) (15.0.0), § 25.5.4. The NYTOs state that the Commission accepted the current funding approach in NYISO as an independent entity variation from the crediting approach adopted in Order No. 2003. Rate Filing at 14 nn.57-58 (citing *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)).

⁶ Rate Filing at 3, 10.

⁷ *Id.* at 5.

⁸ *Id.* at 5-6.

such facilities, if any, shall be funded solely by the Developer(s). In the event that the Connecting or Affected Transmission Owner elects to fund the capital costs of any System Upgrade Facilities and/or System Deliverability Upgrades, then the Connecting or Affected Transmission Owner, as the case may be, and affected Developer shall enter into a Facilities Service Agreement or, if unable to agree to the terms and conditions, the Transmission Owner shall file the Facilities Service Agreement with the Commission on an unexecuted basis. Such a Facilities Service Agreement shall provide for the Connecting or Affected Transmission Owner's recovery of its funded costs, plus a reasonable return on investment.⁹

4. The NYTOs state that they are unilaterally making the Rate Filing under FPA section 205 in accordance with filing rights expressly reserved to them in section 3.10(a) of the NYISO-TO Agreement.¹⁰ The NYTOs explain that, under section 3.10(a) of the NYISO-TO Agreement, each transmission owner reserves:

the right at any time unilaterally to file pursuant to Section 205 of the [FPA] to change the [OATT], a Service Agreement under the [OATT], or the ISO Agreement to the extent necessary: (i) to recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the [OATT].¹¹

5. The NYTOs allege that the addition of the System Upgrades to each of the NYTOs' respective systems is resulting in incremental risks for which the transmission owners are not compensated, and which result in uncompensated costs, associated with owning, operating, and maintaining System Upgrades under the existing funding approach.¹² Specifically, the NYTOs state that they face regulatory, reliability, cybersecurity, environmental, and operational risks.¹³ According to the NYTOs, these

⁹ *Id.* at 13-14. The proposed amendment is reflected in the underlined portion of the text.

¹⁰ *Id.* at 11; NYISO, NYISO Agreements, Foundation Agreements, ISO-TO Agreement (0.0.0), § 3.10(a) (NYISO-TO Agreement).

¹¹ Rate Filing at 11 (quoting NYISO-TO Agreement § 3.10(a)).

¹² *Id.* at 11.

¹³ *Id.* at 17-23.

uncompensated risks and costs are the result of the NYTOs, in conjunction with NYISO, providing generation interconnection service under the OATT, and therefore, those uncompensated costs are “related to services under the [OATT].”¹⁴ Therefore, the NYTOs argue that each transmission owner has the unilateral right to make an FPA section 205 filing to establish the appropriate mechanism to fund the costs of System Upgrades and thereby earn a return associated with the investment of those assets.¹⁵

III. Notice of Filing and Responsive Pleadings

6. Notice of the Rate Filing was published in the *Federal Register*, 86 Fed. Reg. 20,139 (Apr. 16, 2021), with interventions and protests due on or before April 30, 2021. 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.

7. Timely motions to intervene were filed by: American Electric Power Service Corporation;¹⁶ Public Service Electric and Gas Company; Public Citizen, Inc.; the FirstEnergy Transmission Companies;¹⁷ TDI USA Holdings LLC; PPL Electric Utilities Corporation; Exelon Corporation, Exelon Generation Company, LLC, and its affiliates;¹⁸ 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.;¹⁹ Municipal Electric

¹⁴ *Id.* at 12 (quoting NYISO-TO Agreement § 3.10(a)).

¹⁵ *Id.* at 3.

¹⁶ 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.

¹⁷ 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.

¹⁸ Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company, and Potomac Electric Power Company.

¹⁹ Dominion Energy Services, Inc. filed on behalf of Virginia Electric and Power

Utilities Association of New York; Solar Energy Industries Association; EDF Renewables, Inc.; EDP Renewables North America LLC; Long Island Power Authority and Long Island Lighting Company; Ameren Services Company;²⁰ Electric Power Supply Association; MISO Transmission Owners;²¹ D. E. Shaw Renewable Investments, L.L.C.; and Equinor Wind US LLC. The New York State Public Service Commission filed a notice of intervention.

8. Timely motions to intervene and comments were filed by: NYISO; Edison Electric Institute; and WIRES.²² Timely motions to intervene and protests were filed by: NextEra Energy Resources, LLC; Invenergy Renewables LLC; New York State Department of State Utility Intervention Unit (UIU); the City of New York, Natural Resources Defense Council (NRDC), Sustainable FERC Project, and Multiple Intervenors²³ (collectively, Consumer Stakeholders); and American Clean Power

Company.

²⁰ Ameren Services Co. filed on behalf of its affiliates Ameren Illinois Company, Ameren Transmission Company of Illinois, and Union Electric Company.

²¹ 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; 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.

²² 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.

²³ Multiple Intervenors is an unincorporated association of approximately 60 large

Association, Alliance For Clean Energy-New York, Independent Power Producers of New York, New York Battery and Energy Storage Technology Consortium, and Energy Storage Association (collectively, NY Interconnection Customers). The New York Commission and the NYSEDA (State Entities) filed a protest.

9. On May 19, 2021, New York Association of Public Power filed an out-of-time motion to intervene.

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

A. Comments and Protests

11. NYISO states that it does not take a position at this time concerning whether the NYTOs' unilateral filing falls within the scope of their reserved FPA section 205 filing rights.²⁴

12. Amongst other arguments,²⁵ the State Entities and UIU argue that the Commission should reject the Rate Filing because the NYTOs are not entitled to make a unilateral section 205 filing pursuant to the NYISO-TO Agreement in this instance.²⁶ The State Entities and UIU argue that, when an interconnecting generator funds the System Upgrades and then conveys ownership to the applicable transmission owner, the transmission owner has neither "incurred costs" nor made an "investment" necessitating a reasonable return. Therefore, the protesters argue that the NYTOs have not met the prerequisite filing conditions specified in section 3.10(a) of the NYISO-TO Agreement.

industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

²⁴ NYISO Comments at 6.

²⁵ The record contains protests which argue that the Commission should not accept the Rate Filing because the NYTOs have failed to meet their burden under FPA section 205. Specifically, protesters argue that the NYTOs have not shown that TO Initial Funding is just and reasonable and not unduly discriminatory or preferential. *See* Consumer Stakeholders Protest at 5-14; 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.

²⁶ State Entities Protest at 4; UIU Protest at 10.

B. Answer

13. In response to arguments that the NYISO-TO Agreement does not authorize the NYTOs to unilaterally make the Rate Filing, the NYTOs argue that the protestors read the NYISO-TO Agreement in an unnecessarily mechanical way that belies its intent and constitutional norms.²⁷ The NYTOs explain that the provisions are intended to ensure that the utilities receive their authorized regulated return and to grant the utilities the right to file to receive that authorized return whenever they are deprived of it, which they argue is what is sought in the Rate Filing. The NYTOs admit that “the utilities have not ‘incurred’ the [System Upgrades] funding costs”²⁸ but argue that is irrelevant because this lack of incurrence is what created the issue section 3.10(a) of the NYISO-TO Agreement was designed to address. According to the NYTOs, the fact that the NYTOs have not funded System Upgrades cannot be used to deny the lawful and legitimate exercise of the NYTOs’ section 205 rights to file to assert their statutory right to establish a rate inclusive of a regulated return, especially when TO Initial Funding is the means to remedy the alleged deficiency.²⁹

C. Deficiency Letter, Deficiency Response, and Responsive Pleadings

14. On June 8, 2021, Commission staff issued a deficiency letter requesting, among other things, additional support for how the NYTOs’ obligation to own, operate, and maintain System Upgrades can be considered an “investment related to services under the ISO OATT” under section 3.10(a) of the NYISO-TO Agreement. On July 8, 2021, in Docket No. ER21-1647-001, the NYTOs filed a response to the deficiency letter (Deficiency Response). Notice of the NYTOs’ Deficiency Response was published in the *Federal Register*, 86 Fed. Reg. 37,750 (July 16, 2021), with comments and protests due on or before July 29, 2021. State Entities, NY Interconnection Customers, LS Power, and UIU filed timely comments on the Deficiency Response. On August 13, 2021, the NYTOs filed an answer to the comments on the Deficiency Response.³⁰

15. The NYTOs argue that the alleged uncompensated risks and costs on each transmission owner’s system caused by the addition of the System Upgrades are the “investments” and “costs” for which the NYISO-TO Agreement provides the unilateral

²⁷ NYTOs Answer at 24.

²⁸ *Id.*

²⁹ *Id.* at 24-25.

³⁰ In their answer, the NYTOs argue that the comments seek to undermine the NYTOs’ responses to questions in the deficiency letter by rehashing arguments that the commenters have previously made in this proceeding. NYTOs Deficiency Response Answer at 3-4.

section 205 filing right to address.³¹ The NYTOs argue that, therefore, the section 205 filing is appropriately authorized by the NYISO-TO Agreement.

16. UIU contends that the NYTOs do not adequately answer the deficiency letter with respect to the NYTOs' filing rights.³² UIU argues that the NYTOs' answer appears to confuse perceived operating risks with investment risk and inappropriately concludes that there is a correlation between a utility's perceived operating risk and an investment related to services under the OATT.³³

IV. Discussion

A. Procedural Issues

17. 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.

18. 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.

19. 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 unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

B. Substantive Issues

20. For the reasons discussed below, we reject the Rate Filing on procedural grounds. We find that the NYTOs' FPA section 205 filing rights under section 3.10(a) of the

³¹ Deficiency Response at 7-8.

³² UIU Deficiency Response Comments at 4.

³³ UIU, State Entities, and NY Interconnection Customers submitted comments to the deficiency letter alleging that the deficiency response was insufficient and failed to address many of Commission staff's threshold questions and concerns. *Id.* at 4; State Entities Deficiency Response Comments at 5; NY Interconnection Customers Deficiency Response Comments at 4. LS Power also submitted comments arguing that TO Initial Funding should not be expanded to Attachment P of the NYISO OATT because no party has established or asserted that the provisions contained therein are unjust, unreasonable, unduly discriminatory, or preferential. LS Power Deficiency Response Comments at 6-7.

NYISO-TO Agreement do not afford the NYTOs the right to make an FPA section 205 filing in this instance.

21. The NYTOs state that they are making the Rate Filing in accordance with filing rights expressly reserved to them in section 3.10(a) of the NYISO-TO Agreement, under which the NYTOs may unilaterally file to change the OATT as necessary “to recover all of [their] reasonably incurred costs, plus a reasonable return on investment related to services under the [OATT].”³⁴ 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 3.10(a) of the NYISO-TO Agreement is not the same as “risks;”³⁵ therefore, section 3.10(a) does not afford the NYTOs the right to make an FPA section 205 filing to obtain compensation for the alleged uncompensated risks associated with owning, operating, and maintaining System Upgrades.

22. Under section 3.10(a) of the NYISO-TO Agreement, transmission owners only have the right to unilaterally file to recover “incurred costs, *plus* a reasonable return on investment.” We interpret the term “costs” under section 3.10(a) 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 point³⁶ are not “costs” within the meaning of section 3.10(a); rather, they are 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.³⁷ We are not persuaded by the NYTOs’ attempt to equate alleged uncompensated risks to costs recoverable under section 3.10(a) of the NYISO-TO Agreement. Because we find that risks are not a “cost” under section 3.10(a) of the NYISO-TO Agreement, we find that the NYTOs’ FPA section 205 filing rights under section 3.10(a) of the NYISO-TO

³⁴ See *supra* note 11.

³⁵ Note that in an order issued concurrently with this order, we similarly interpret the same language in section 25.5.4 of the OATT to not encompass the risks to which the NYTOs point. See *Central Hudson Gas & Electric Corp., v. N. Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,149 (2021).

³⁶ See Rate Filing at 17-23.

³⁷ 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).

Agreement do not afford the NYTOs the right to make an FPA section 205 filing in this instance.

23. Because we reject the Rate Filing on procedural grounds, we do not address its merits.

The Commission orders:

The NYTOs' Rate Filing is hereby rejected, as described 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

New York Independent System Operator, Inc.
Central Hudson Gas & Electric Corporation
Consolidated Edison Company 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. ER21-1647-001

(Issued September 3, 2021)

DANLY, Commissioner, *dissenting*:

1. I respectfully dissent from today's order.¹ It unlawfully extinguishes the filing rights under Federal Power Act (FPA) section 205² that the New York Transmission Owners (NYTOs) expressly reserved to themselves in the ISO-TO Agreement. Today's decision also runs afoul of well-established Commission and judicial precedent.

2. The ISO-TO Agreement expressly grants the NYTOs the right to "change" NYISO's Open Access Transmission Tariff (OATT) "unilaterally" and "at any time" to recover reasonably incurred costs and a return on investment related to services under the OATT.³ This is the precise purpose of the Rate Filing. If accepted, NYTOs will be afforded the option to elect to initially fund System Upgrade Facilities and System Deliverability Upgrades which will permit them to recover both the cost of the investment and a return on that investment.⁴

¹ *N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,143 (2021) (September 3 Order).

² 16 U.S.C. § 824d.

³ ISO-TO Agreement, § 3.10; *see, e.g., Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (holding the Commission lacks authority to require transmission owners to cede their FPA section 205 rights). I note that non-incumbent transmission owners have identical unilateral FPA section 205 filing rights in NYISO's OATT. *See N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,107, at P 134 (2018); *N.Y. Indep. Sys. Operator, Inc.*, Letter Order, Docket Nos. ER13-102-012, 013, and 014 (2018); *see also* OATT, Attach. Y, § 31.11, Append. H, § 3.08; *see also N.Y. Indep. Sys. Operator, Inc.*, Letter Order, Docket No. ER18-2015-000 (2018).

⁴ *N.Y. Indep. Sys. Operator, Inc.*, April 9, 2021 Transmittal at 3; *see also id.* at 5-7, 11-12, 14-15.

3. In response, the majority narrowly focuses on a single provision in the ISO-TO Agreement. The majority finds the NYTOs seek to recover alleged uncompensated risks associated with owning, operating, and maintaining interconnection customer upgrades and concludes these are not “costs” under section 3.10 of the ISO-TO Agreement.⁵ The fact that the NYTOs are not earning a return today on these upgrades is completely irrelevant to our analysis under FPA section 205 and we are under no obligation to make September 3 Order, 176 FERC ¶ 61,143 at P 22.

⁶ *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); ISO-TO Agreement, § 6.09 (in relevant part, in the event of a conflict with the OATT, the ISO-TO Agreement “shall prevail”).

⁷ September 3 Order, 176 FERC ¶ 61,143 at P 23.

⁸ OATT, Attach. S, § 25.4 (emphasis added).

⁹ NYTOs July 8, 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) (citations omitted)).

¹⁰ *See, e.g., Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (“[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 690 (1923) (“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, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.”); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 579-80 (D.C. Cir. 2018) (“[A] regulated industry is entitled to a return that is sufficient to ensure that *new* capital can be attracted and to sustain the financial integrity of the enterprise”); *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) (approving the new *pro forma* Facilities Service Agreement, which provides a standard agreement for use when a transmission owner elects the transmission owning initial funding option).

a predicate finding that the existing OATT is unjust and unreasonable. The majority ignores the fact that the NYTOs *will* make a capital investment under the new funding proposal and would subsequently earn a return on that investment which will then, in turn, compensate them for business risks. The majority's analysis is thus logically faulty, and this proceeding cannot therefore be dispatched on the basis of procedural deficiency. Moreover, this order 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 that are selected in NYISO's regional transmission plan.⁶

4. By rejecting the Rate Filing on procedural grounds, the majority declines to address the filing on the merits and never reaches a decision on whether the Rate Filing is just and reasonable.⁷ In doing so, it ignores existing section 25.5.4 of Attachment S to the OATT that the NYTOs' "obligation *to implement* . . . System Upgrades" entitles them to cost recovery plus a return.⁸ It ignores the recognition in a Commission pleading before the U.S. Court of Appeals for the District of Columbia Circuit 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.⁹ And it ignores well-established Commission and judicial precedent supporting the NYTOs' position that they are entitled to recover costs and earn a return on property used to provide jurisdictional service.¹⁰ Given the legal infirmities in the order, I cannot support it and I think it likely that transmission owners everywhere will take note of this order as they witness yet another example of the erosion of rights they thought they had unambiguously reserved.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner