

178 FERC ¶ 61,179  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New York Independent System Operator, Inc.

Docket No. EL22-2-001

ORDER ON COMPLAINT

(Issued March 11, 2022)

1. On October 12, 2021, as amended on October 13, 2021, New York Independent System Operator, Inc. (NYISO) filed a complaint, under section 206 of the Federal Power Act (FPA),<sup>1</sup> alleging that its existing Order No. 1000<sup>2</sup> public policy transmission planning process (Order No. 1000 Process) in its Open Access Transmission Tariff (OATT) is unjust and unreasonable to the extent that it does not contain rules to implement the New York Transmission Owners' (NYTOs)<sup>3</sup> federal Right of First Refusal (ROFR) contained in NYISO's foundational agreements (Complaint). As a remedy, NYISO submitted proposed tariff revisions to its OATT to implement a NYTO's federal ROFR to build an upgrade to its existing transmission facilities that are part of another Developer's Order No. 1000 Public Policy Transmission Project.<sup>4</sup> As discussed below, we grant the Complaint and accept the proposed tariff revisions contained in the replacement tariff records, effective October 12, 2021, as requested.<sup>5</sup>

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<sup>1</sup> 16 U.S.C. § 824e.

<sup>2</sup> *Transmission Planning & Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom., S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>3</sup> NYTOs include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

<sup>4</sup> Capitalized terms that are not otherwise defined in this order have the meaning specified in Attachment Y or section 1 of NYISO's OATT.

## **I. Background**

### **A. NYISO's Existing Order No. 1000 Process**

2. Attachment Y of the existing OATT includes NYISO's Order No. 1000 Process, which, among other things, establishes the requirements by which NYISO solicits and evaluates proposed solutions to an identified Public Policy Transmission Need and selects the more efficient or cost-effective transmission solution to address that need for purposes of cost allocation.<sup>6</sup> If a Public Policy Transmission Need is identified for a planning cycle of the public policy process, NYISO will solicit proposed Public Policy Transmission Projects and Other Public Policy Projects to address the need. NYISO states that its transmission planning processes use the sponsorship model, which permits Developers wide latitude in proposing transmission solutions to an identified transmission need. NYISO states that potential solutions may include both new transmission facilities and upgrades to a NYTO's existing transmission facilities.

3. NYISO states that following its receipt of proposed solutions, NYISO assesses the viability and sufficiency of the proposed solutions and presents the results in a Viability and Sufficiency Assessment to stakeholders.<sup>7</sup> Each Developer of a Public Policy Transmission Project found to be viable and sufficient may then elect for its project to proceed to be evaluated for selection. NYISO will then evaluate and select the more efficient or cost-effective Public Policy Transmission Project in accordance with the selection metrics set forth in the OATT and as reported in a Public Policy Transmission Planning Report. NYISO states that the Developer that proposed the selected Public Policy Transmission Project is required to enter into a Public Policy Transmission Planning Process Development Agreement (Development Agreement) with NYISO, which establishes requirements for the Developer to complete the project by the required project in-service date. The Developer of the selected Public Policy Transmission Project is eligible to allocate and recover the costs of the project under the OATT.

### **B. April 2021 Order Concerning the NYTOs' Federal ROFRs**

4. On April 15, 2021, the Commission granted in part NYISO's petition for declaratory order (Petition),<sup>8</sup> confirming that the NYTOs have a federal ROFR under NYISO's foundational agreements<sup>9</sup> and section 31.6.4 of NYISO's OATT<sup>10</sup> to

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<sup>5</sup> See Appendix I for the tariff records accepted for filing.

<sup>6</sup> Complaint at 11.

<sup>7</sup> *Id.*

<sup>8</sup> *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021) (April 2021 Order).

build, own, and recover the cost of upgrades to their existing transmission facilities, as permitted under Order No. 1000.<sup>11</sup> The Commission also agreed that OATT section 31.6.4 tracks the language from Order No. 1000 concerning the permitted exception to the requirement to eliminate a federal ROFR so as to allow an incumbent transmission provider to build, own, and recover the costs for upgrades to its own transmission facilities.<sup>12</sup> However, the Commission denied in part the Petition on the related issue of how a NYTO exercises its federal ROFR for upgrades to its existing transmission facilities under the existing OATT.<sup>13</sup> The Commission found that the NYISO OATT is silent as to how to implement a federal ROFR for a NYTO's upgrades to its own facilities in NYISO's Order No. 1000 Process.<sup>14</sup> The Commission also stated that it was premature to address other issues raised in the record on the implementation of the federal ROFR for upgrades, such as cost containment and the timing of when the federal ROFR for upgrades should be exercised in NYISO's Order No. 1000 Process, and stated that it would evaluate these implementation details when NYISO proposes tariff revisions.<sup>15</sup>

5. NYISO states that, after the April 2021 Order, it re-engaged stakeholders to develop tariff revisions to implement the federal ROFR for upgrades in NYISO's Order No. 1000 Process, and stakeholders were unable to reach a consensus to authorize NYISO to submit tariff revisions pursuant to FPA section 205.<sup>16</sup>

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<sup>9</sup> NYISO stated that its foundational agreements include the Agreement Between NYISO and Transmission Owners (ISO-TO Agreement) and other agreements. April 2021 Order, 175 FERC ¶ 61,038 at P 1, n.3.

<sup>10</sup> NYISO OATT, § 31.6.4 provides, in relevant part:

Nothing in this Attachment Y affects the right of a Transmission Owner to: (1) build, own, and recover the costs for upgrades to the facilities it owns, provided that nothing in Attachment Y affects a Transmission Owner's right to recover the costs of upgrades to its facilities . . . . For purposes of Section 31.6.4, the term "upgrade" shall refer to an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility.

<sup>11</sup> April 2021 Order, 175 FERC ¶ 61,038 at PP 33-34.

<sup>12</sup> *Id.* P 34.

<sup>13</sup> *Id.* PP 40-41.

<sup>14</sup> *Id.* P 41.

<sup>15</sup> *Id.* P 42.

## II. Complaint

6. NYISO states that, under FPA section 206, it must demonstrate that its existing rate is unjust and unreasonable.<sup>17</sup> NYISO asserts that its existing Order No. 1000 Process in the OATT is unjust and unreasonable to the limited extent that it does not contain tariff provisions to implement the NYTOs' federal ROFRs to build upgrades to their existing transmission facilities. First, NYISO explains that the April 2021 Order found that the foundational agreements provide the NYTOs with a federal ROFR to build upgrades, OATT section 31.6.4 provides that nothing in the Order No. 1000 Process affects the NYTOs' ROFRs to build upgrades, and there is no mechanism in the OATT to implement the NYTOs' ROFRs in NYISO's Order No. 1000 Process.<sup>18</sup> NYISO therefore asserts that the rules in its Order No. 1000 Process are not just and reasonable because they do not implement the NYTOs' ROFRs established in the foundational agreements and reserved in OATT section 31.6.4. Second, NYISO argues that, absent tariff provisions to implement the NYTOs' ROFRs, its Order No. 1000 Process (1) lacks the transparency, openness and coordination required by Order No. 890<sup>19</sup> and (2) could undermine NYISO's evaluation and identification of the more efficient or cost-effective solution to a Public Policy Transmission Need required by Order No. 1000.<sup>20</sup> Third, NYISO asserts that its Order No. 1000 Process does not address the rights and responsibilities for both nonincumbent transmission Developers and NYTOs concerning upgrades that are part of selected Public Policy Transmission Projects. NYISO therefore argues that the lack of clear implementing tariff provisions is likely to result in disputes at the Commission and in court, which will cause delays and potentially harm competitive transmission development in New York. NYISO states that for these reasons, its existing rate is unjust and unreasonable.

7. As a remedy, NYISO proposes revisions to its OATT to establish the rules by which a NYTO can exercise its federal ROFR regarding upgrades identified in NYISO's Order No. 1000 Process.<sup>21</sup> NYISO asserts that its proposed tariff revisions are just and

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<sup>16</sup> Complaint at 2, 6-7.

<sup>17</sup> *Id.* at 8 (citing 16 U.S.C. § 824e(a); 18 C.F.R. § 385.206 (2021)).

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

<sup>19</sup> *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>20</sup> Complaint at 10.

reasonable and not unduly discriminatory or preferential, are consistent with Commission precedent, and comply with Order Nos. 890 and 1000. NYISO further asserts that its proposal maintains the level of competitiveness in its public policy process required by Order No. 1000 without affecting the right of an incumbent transmission owner to build, own, and recover the costs for upgrades to its transmission facilities, as recognized in Order No. 1000.

8. Specifically, NYISO proposes OATT revisions that would distinguish components of a selected Public Policy Transmission Project into new transmission facilities and upgrades to existing transmission facilities (Public Policy Transmission Upgrades),<sup>22</sup> designating those components to the Developer and/or NYTO, as applicable.<sup>23</sup> NYISO proposes to revise the project information requirements so that a Developer must: (i) identify new transmission facilities and any Public Policy Transmission Upgrades that are part of its proposed project in the project description; and (ii) separately identify the in-service dates for the specific project components, including any Public Policy Transmission Upgrades, to properly sequence the project's development.<sup>24</sup> NYISO states that these revisions will enable Developers to consider at the start of the process which project components may be subject to NYTOs' ROFRs and to take this into account when developing their project proposals. NYISO states, for instance, that a nonincumbent transmission Developer can evaluate project alternatives to maximize the number of new transmission facilities while still achieving an innovative, efficient, and cost-effective solution. NYISO states that these requirements will enable Developers to make informed decisions, will increase the potential for a wider range of competitive solutions in line with Order No. 1000, and will mitigate against the withdrawal of projects if the Developer were instead to later learn that a substantial portion of its project consists of Public Policy Transmission Upgrades.

9. NYISO states that under its existing process, a Developer may voluntarily submit a cost cap for its proposed Public Policy Transmission Project.<sup>25</sup> NYISO states that it

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<sup>21</sup> *Id.* at 11.

<sup>22</sup> NYISO defines Public Policy Transmission Upgrade based on the existing definition of upgrade in section 31.6.4 of the OATT, which the Commission previously accepted as consistent with the definition of an upgrade in Order No. 1000-A. *Id.* at 13.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 17 & n.63 (citing *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098 (2020) (accepting NYISO's proposed mechanism to allow Developers to propose voluntary cost containment measures for Order No. 1000 Public Policy Transmission Projects)).

proposes to revise the voluntary cost containment requirements to state that a Developer that chooses to include a cost cap must provide with its initial project submission a cost cap for all new transmission facilities that are part of its proposed project, but the costs of any component that meets the definition of Public Policy Transmission Upgrade will not be subject to the cost cap.<sup>26</sup> NYISO states that it does not propose to change the voluntary nature of a Developer's cost cap.

10. NYISO notes that certain stakeholders disagreed with this aspect of NYISO's proposal; they argued that nonincumbent Developers should be able to include upgrades in their cost cap and that a NYTO who exercises its ROFR to build upgrades should be bound by the cost cap proposed by a Developer of the Order No. 1000 Public Policy Transmission Project that includes an upgrade. NYISO argues that requiring a NYTO to accept another Developer's voluntary cost containment measure, based on the unique financial structure of the proposing Developer, would limit or condition the NYTOs' federal ROFRs confirmed by the Commission in the April 2021 Order.<sup>27</sup> Also, NYISO asserts that the Commission has previously rejected arguments that NYISO be: (1) required to make cost the primary selection metric; or (2) required to include specific cost containment metrics among its selection criteria.<sup>28</sup> NYISO also notes that the Commission has not required that Regional Transmission Organizations and Independent System Operators (RTOs/ISOs) provide specific metrics to evaluate and select transmission projects based upon Developers' cost containment measures.<sup>29</sup>

11. NYISO states that it proposes a process, which runs concurrently with its Viability and Sufficiency Assessment, in which NYISO will classify the facilities contained in proposed Public Policy Transmission Projects as new transmission facilities or Public Policy Transmission Upgrades.<sup>30</sup> After its receipt of the proposed Public Policy Transmission Projects, NYISO will review Developers' project information, including the Developers' classifications of their project components as either new transmission facilities or Public Policy Transmission Upgrades. At least 30 calendar days prior to NYISO's presentation of the initial draft of the Viability and Sufficiency Assessment, NYISO will make its own determination and post a list that will identify new transmission facilities and Public Policy Transmission Upgrades, but it will not link the

<sup>26</sup> *Id.* at 17.

<sup>27</sup> *Id.* at 17-18.

<sup>28</sup> *Id.* at 18-19 & nn.66-67.

<sup>29</sup> *Id.* at 19 & n.68 (citing, e.g., Order No. 1000, 136 FERC ¶ 61,051 at P 704 (agreeing that cost containment is important, but "declin[ing] to establish a corresponding cost allocation principle")).

<sup>30</sup> *Id.* at 22.

identified facilities to a specific project. NYISO states that within 20 calendar days of NYISO's posting of the list, any interested party may dispute NYISO's classification of a facility. NYISO states that it will then post the final list on or before NYISO's filing of the Viability and Sufficiency Assessment with the New York Public Service Commission (New York Commission). NYISO states that after the submission of the Viability and Sufficiency Assessment, the Developer has the option to elect whether to proceed with its project to be evaluated for selection and to be responsible for the study costs.

12. As part of NYISO's evaluation and selection of the more efficient or cost-effective transmission solution, NYISO proposes that its independent consultant will develop an independent capital cost estimate, contingency percentage, and escalation factors for the Public Policy Transmission Upgrades.<sup>31</sup> NYISO states that using independent estimates will enable it to make a comparative evaluation of all Public Policy Transmission Upgrades as it identifies the more efficient or cost-effective solution, regardless of whether the NYTO exercises its ROFR for upgrades. NYISO states that under its revised requirements for the Public Policy Transmission Planning Report, it will designate the new transmission facilities from the selected Public Policy Transmission Project to the Developer that proposed the project and designate any portion of the selected Public Policy Transmission Project that satisfies the definition of a Public Policy Transmission Upgrade for purposes of the NYTOs' ROFR rights to the applicable NYTO(s).<sup>32</sup>

13. NYISO states that, within 30 calendar days of the NYISO Board's approval of the Public Policy Transmission Planning Report, a NYTO that has been designated for any Public Policy Transmission Upgrades must provide a notice to NYISO if it does *not* intend to exercise its federal ROFR for one or more upgrades.<sup>33</sup> NYISO states that if the NYTO does not take any action within this period, the NYTO will be responsible for constructing the upgrades. NYISO states that if the NYTO notifies NYISO that it does not intend to exercise its federal ROFR for one or more upgrades, NYISO will designate such upgrades to the Developer that proposed the underlying Public Policy Transmission Project. NYISO states that, at the conclusion of the notification period, NYISO will post on its website a final list of new transmission facilities and Public Policy Transmission Upgrades, and the Developers and NYTOs, as applicable, that are building these facilities.<sup>34</sup> NYISO states that a NYTO that is building a Public Policy Transmission

<sup>31</sup> *Id.* at 23. Under NYISO's existing tariff, NYISO may engage an independent consultant to develop a total capital cost estimate, contingency percentages, and escalation factors for the new transmission facilities in a Public Policy Transmission Project. *See* NYISO OATT, § 31.4 (20.0.0), § 31.4.8.

<sup>32</sup> Complaint at 24-25.

<sup>33</sup> *Id.* at 26.

<sup>34</sup> *Id.* at 27.

Upgrade will be required to enter into a Development Agreement with NYISO, and the NYTO will be eligible to allocate and recover under the OATT the costs associated with its upgrade.

14. NYISO points out that there is a spectrum of potentially reasonable approaches on timing to exercise the federal ROFR for upgrades that the Commission has approved across the RTO/ISO regions. NYISO states, for example, that four RTOs/ISOs elected either to not subject upgrades to a competitive evaluation process or to not allow nonincumbent Developers to include upgrades in their proposals; therefore, federal ROFRs for upgrades are addressed at the beginning of these four Order No. 1000 processes.<sup>35</sup> NYISO states that PJM Interconnection, L.L.C. (PJM) took a similar approach to NYISO's proposed approach, noting that PJM also designates new transmission facilities and any upgrades in the selected transmission project to the appropriate designated entity following selection of the more efficient or cost-effective solution; therefore, PJM and NYISO address federal ROFRs for upgrades later in their Order No. 1000 processes.<sup>36</sup>

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<sup>35</sup> *Id.* at 19 (citing, e.g., Midcontinent Independent System Operator, Inc. (MISO), OATT, attach. FF (85.0.0), § V and § VIII.C.1 (designating projects included in the MISO Transmission Expansion Plan to one or more Transmission Owners, unless the identified facility constitutes a Competitive Transmission Project, which excludes facilities that meet the definition of upgrade under section VIII.A.2 of attach. FF); Southwest Power Pool, Inc., OATT, attach. Y, § I (8.0.0) and § III (8.0.0) (competitively soliciting proposals for projects from qualified RFP participants that are not subject to a right of first refusal; specifically, those transmission facilities that meet the criteria as Competitive Upgrades); California Independent System Operator Corp., OATT, § 24.5 (1.0.0) (issuing a market notice soliciting proposals to finance, construct, own, operate and maintain only regional transmission facilities eligible for competitive solicitation, which are those projects that do not constitute an upgrade or a local transmission facility); ISO New England Inc., Transmission Markets and Services Tariff, § II (OATT), attach. K (20.0.0), § 4.2 and §4.3 (performing a preliminary feasibility review of proposed solutions to ensure that the project is only eligible to be constructed by the applicable transmission owner in accordance with the Transmission Owner Agreement because the proposed solution is an upgrade to existing Transmission Owner facilities)).

<sup>36</sup> *Id.* at 19-20 (citing PJM Operating Agreement, Schedule 6, § 1.5.8 (establishing a process by which PJM assigns projects to designated entities following PJM's Board approval of the Regional Transmission Expansion Plan, and expressly providing that "Transmission Owner Upgrades" will be designated to the transmission owner that owns the facility to be upgraded)); *see also PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128, at P 146 (2014) (*PJM*) (accepting section 1.5.8). PJM and NYISO both have a sponsorship model in their Order No. 1000 processes.

15. NYISO states that it explored several options during its extensive stakeholder discussions as to the timing of the upgrades designation process, including whether there was a point before the NYISO Board's selection of a solution at which the NYTOs should be required to exercise the NYTOs' federal ROFRs in order to obtain additional benefits in the process.<sup>37</sup> NYISO states that it determined that requiring NYTOs to exercise the ROFR at an earlier point could substantially delay the completion of the public policy process by requiring the NYTOs to assess and consider a significant number of Public Policy Transmission Upgrades and upgrade permutations – any of which could be associated with projects that would not ultimately get selected.

16. NYISO states that it determined that there is value in retaining the option for nonincumbent transmission Developers to propose solutions that contain upgrades to existing transmission facilities because it allows for innovative solutions.<sup>38</sup> NYISO explains that, while an upgrade may ultimately be designated to a NYTO, a Developer may still benefit from proposing an upgrade because the addition of an upgrade to an existing transmission facility may increase the performance of a nonincumbent Developer's proposed project in one or more of the criteria used by NYISO in selecting the more efficient or cost-effective solution.<sup>39</sup> NYISO states that by giving nonincumbent transmission Developers the ability to propose innovative solutions that include new transmission facilities and upgrades to existing transmission facilities, with a clear understanding of the process for NYTOs to exercise their federal ROFRs for upgrades, its Order No. 1000 Process continues to promote the identification of the more efficient or cost-effective solution, as required by Order No. 1000.

17. NYISO states that certain stakeholders also argued that the presumption should be that a NYTO will not exercise its federal ROFR to build Public Policy Transmission Upgrades, and therefore that the NYTO should be required to elect whether it will or will not build the upgrades after the NYISO Board approves the Public Policy Transmission Planning Report.<sup>40</sup> NYISO disagrees with this approach. NYISO argues that, as it proposes, the presumption should be that the NYTOs will exercise their ROFRs consistent with the reserved rights that the NYTOs have to upgrade their own transmission facilities in the foundational agreements. NYISO also argues that this stakeholder argument concerning the presumption is a matter of semantics and will not drive any meaningful difference in the impact of the exercise of the NYTOs' ROFR rights on its Order No. 1000 Process. NYISO states that the NYTO (1) will have notice early in the Order No. 1000 Process of potential Public Policy Transmission Upgrades

<sup>37</sup> *Id.* at 27.

<sup>38</sup> *Id.* at 20.

<sup>39</sup> *Id.*, Att. 3, Aff. of Mr. Smith, at P 11.

<sup>40</sup> *Id.* at 28.

that impact its system, (2) will be identified in the draft Public Policy Transmission Planning Report, and (3) will be extensively involved throughout the stakeholder discussions and in the review of the report.

18. Finally, to fully implement its proposal, NYISO proposes conforming revisions to its Development Agreement, requirements for approvals and authorizations, Transmission Interconnection Procedures, and cost allocation and cost recovery rules.<sup>41</sup> NYISO also proposes to supplement its rules to address the situation in which a NYTO is unable to complete its Public Policy Transmission Upgrade.<sup>42</sup> In addition, NYISO proposes some clarifying and clean-up changes to the OATT.<sup>43</sup>

19. NYISO requests that the proposed tariff revisions become effective October 12, 2021, the date it filed the Complaint, so that the revisions can be made effective prospectively to the current planning cycle of NYISO's Order No. 1000 Process.<sup>44</sup>

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

20. Notice of NYISO's Complaint was published in the *Federal Register*, 86 Fed. Reg. 58,069 (Oct. 20, 2021), with interventions and protests due on or before November 2, 2021.<sup>45</sup> Timely motions to intervene were filed by the entities listed in Appendix II. The New York Commission filed a notice of intervention.

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<sup>41</sup> *Id.* at 30-36.

<sup>42</sup> *Id.* at 34-35.

<sup>43</sup> *Id.* at 36.

<sup>44</sup> NYISO's October 13, 2021 Amended Filing, at 1-2. NYISO states that because of technical issues in electronically filing its Complaint, the Commission ultimately accepted its Complaint for filing on October 12, 2021. In NYISO's October 13, 2021 Amended Filing, NYISO updates the requested effective date for the proposed tariff revisions to October 12, 2021, the date it filed the Complaint, consistent with the requirements of FPA section 206.

<sup>45</sup> This notice of filing was issued after NYISO's October 13, 2021 amended filing was submitted in Docket No. ER22-22-001. On October 12, 2021, the Commission originally issued a notice of filing for the Complaint. *Combined Notice of Filing #1*, October 12, 2021 (October 12 Combined Notice). The October 12 Combined Notice inadvertently listed Docket No. ER22-89-000 as the docket. On October 14, 2021, the Commission issued an errata notice correcting the docket number in the October 12 Combined Notice to Docket No. EL22-2-000. *N.Y. Independent System Operator, Inc.*, Errata Notice, Docket No. EL22-2-000 (issued Oct. 14, 2021).

21. NYTOs filed timely comments in support of the Complaint. Timely protests were filed by New York Consumer Advocates<sup>46</sup> and LSP Transmission Holdings II, LLC and its affiliate LS Power Grid New York, LLC (together, LS Power). On November 17, 2021, NYISO and NYTOs filed answers to the protests.

**A. Comments In Support**

22. NYTOs assert that NYISO has met its burden of demonstrating that its OATT is not just and reasonable and that the OATT amendments proposed by NYISO are just and reasonable. According to the NYTOs, the existing OATT is not just and reasonable because it does not include a mechanism to implement NYTOs' federal ROFRs for upgrades in NYISO's Order No. 1000 Process.<sup>47</sup> NYTOs state that although the existing OATT recognizes a NYTO's federal ROFR for upgrades, it does not yet include an implementation process. Without such an implementation process, NYTOs assert that the Developer of a proposed project could propose to build an upgrade to a NYTO's existing transmission facility that would conflict with the NYTO's ROFR to construct the upgrade. NYTOs contend that such a scenario would violate the NYISO's foundational agreements and OATT section 31.6.4, which are the basis upon which the Commission affirmed, in the April 2021 Order, the existence of the NYTO's federal ROFR for upgrades in NYISO's Order No. 1000 Process. Further, NYTOs state that without an implementation process, affected NYTOs, NYISO, and Developers would be left to solve disputes about upgrades on a case-by-case basis, or through litigation, which NYTOs assert could cause delay and uncertainty, and impede needed transmission expansion. NYTOs assert that their rights are being impaired by the existing OATT and that they have endeavored since 2018 to foster stakeholder consensus around a process to implement their federal ROFR rights.<sup>48</sup>

23. NYTOs aver that NYISO's proposed remedy reflects significant stakeholder feedback and would resolve the problems identified above.<sup>49</sup> NYTOs state that they support the proposal that once the NYISO has selected a Public Policy Transmission Project, each NYTO on whose system an upgrade has been identified would have

<sup>46</sup> New York Consumer Advocates include the New York Commission, New York State Energy Research and Development Authority, Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and the Sustainable FERC Project. Multiple Intervenors are an unincorporated association of approximately 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

<sup>47</sup> NYTOs Comments at 2.

<sup>48</sup> *Id.* at 5-6.

<sup>49</sup> *Id.* at 8.

30 days to notify NYISO if it declines to exercise its federal ROFR rights with respect to all or any part of the identified upgrades. NYTOs argue that to make reasonable determinations on whether to exercise their ROFR rights to build upgrades on their systems, it is appropriate to defer the decision point until shortly after the issuance of the final report selecting the Public Policy Transmission project.<sup>50</sup>

24. NYTOs assert that requiring a NYTO to decline its right to build an upgrade earlier in the process would require significantly greater time and dedication of a NYTO's resources to analyze all proposed projects identified earlier in the Viability and Sufficiency Assessment. NYTOs assert that this would be severely wasteful given that only one, or perhaps two, proposed projects will be selected to address a given need. NYTOs note, for example, that the current public policy process for the Long Island offshore wind solicitation resulted in 19 proposals, and each proposal includes upgrades to numerous existing transmission facilities.<sup>51</sup> NYTOs state that the following is a non-exhaustive list of tasks that would be carried out for a NYTO to determine whether to decline its federal ROFR rights with respect to a particular transmission upgrade: (1) conduct engineering studies to determine the physical feasibility of each identified upgrade on its system; (2) perform detailed engineering and prepare detailed cost estimates for each upgrade; (3) determine whether the upgrade fits within the NYTO's resource and financing capabilities; and (4) process and obtain necessary approvals from executive management and, in some cases, the board of directors. NYTOs contend that the process proposed by NYISO is efficient, as it enables NYTOs to conduct the appropriate analyses more quickly and to satisfy reasonable internal decision-making and approval processes, and is fair to the Developer as well.<sup>52</sup>

25. NYTOs also assert that they agree with NYISO that it would be inappropriate to require a NYTO to adopt a Developer's voluntary cost containment proposal for upgrades as a condition of exercising the NYTO's federal ROFR rights to build and recover the costs of those upgrades.<sup>53</sup> NYTOs argue that while they support cost containment and anticipate cost containment measures may ultimately result from the Commission's normal ratemaking procedures, NYTOs agree with NYISO that NYTOs' federal ROFR rights may not lawfully be abridged or curtailed by the involuntary imposition of a Developer's cost containment commitment. NYTOs contend that the violation of their federal ROFR rights for upgrades would be unlawful under the Fifth Amendment to the U.S. Constitution, the FPA, OATT section 31.6.4, and the foundational ISO-TO Agreement.<sup>54</sup>

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<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 9 n.28.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.* at 11.

26. NYTOs further argue that, even if the imposition of a Developer's cost cap on upgrades constructed by a NYTO was permissible, it would create implementation issues that would be challenging to resolve. NYTOs state, for example, that if a Developer estimates the cost of an upgrade to be low while the overall project estimate may be sufficient for cost recovery and containment purposes, mandatory cost containment could functionally defeat NYTOs' ROFR rights because cost recovery would be inadequate to cover the reasonably estimated costs of the upgrade.<sup>55</sup> NYTOs state that, in contrast, NYISO's proposal utilizes its independent consultant's estimate of the upgrade costs for the purposes of selecting the proposed project with transparency and fairness.<sup>56</sup>

27. With respect to cost concerns, NYTOs also point out that: (1) ROFR rights do not apply to other (non-upgrade) components of proposed projects; (2) NYISO's consultant's cost estimate for upgrades will provide an independent data point, which could be consulted in rate-recovery proceedings; (3) the Commission has authority to review costs recovered and returns on upgrades constructed under a ROFR; (4) voluntary cost containment for upgrades may result from the ratemaking process or settlement; and (5) NYTOs frequently competitively bid construction services for projects, which would provide the benefits of competitive bidding on upgrades. For these reasons, NYTOs believe that NYISO's proposal to decline to apply mandatory cost containment to upgrades is appropriate.

## **B. Protests**

28. In their protests, both New York Consumer Advocates and LS Power request that the Commission deny NYISO's Complaint.<sup>57</sup>

29. With respect to the first prong for consideration in a FPA section 206 complaint, LS Power argues that in the April 2021 Order, the Commission did not find that NYISO's existing tariff is unjust and unreasonable, and NYISO fails to demonstrate here that its existing tariff is unjust and unreasonable.<sup>58</sup> LS Power explains that while the April 2021 Order noted a lack of clarity in NYISO's tariff, the Commission did not find that the lack of clarity meant that NYISO's tariff was unjust and unreasonable.<sup>59</sup> LS Power asserts

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<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 12-13.

<sup>56</sup> *Id.* at 13.

<sup>57</sup> New York Consumer Advocates Protest at 3; LS Power Protest at 2.

<sup>58</sup> LS Power Protest at 2.

<sup>59</sup> *Id.* at 2-3 (citing April 2021 Order, 175 FERC ¶ 61,038 at PP 40-42).

that if the Commission had found that the lack of clarity in NYISO's tariff meant that NYISO's tariff was unjust and unreasonable, the Commission had an obligation under FPA section 206 to declare it as such in the April 2021 Order. LS Power argues that the Commission anticipated that NYISO's stakeholder process would address the missing clarity in NYISO's tariff. LS Power argues that a stakeholder process is the correct approach to address this issue because NYISO's tariff cannot be unjust and unreasonable simply because a mechanism to exercise contractual ROFR rights is not included in NYISO's tariff.<sup>60</sup> LS Power also argues that although NYISO made three arguments why its existing tariff is unjust and unreasonable, the reality is that NYISO could not garner enough stakeholder support for its proposal and then NYISO had to justify why its existing tariff is unjust and unreasonable. Regarding NYISO's arguments that the existing tariff does not comply with Order Nos. 890 and 1000, LS Power claims that those arguments are contrary to NYISO's own filings, and the Commission found that NYISO complied with Order Nos. 890 and 1000.<sup>61</sup> LS Power also asserts that a tariff is not rendered unjust and unreasonable simply because it does not address every potential

dispute.<sup>62</sup> Accordingly, LS Power argues that the Commission should reject NYISO's Complaint because NYISO has not met the first prong under FPA section 206 to demonstrate that its existing tariff is unjust and unreasonable.<sup>63</sup>

30. With respect to the second prong for consideration in an FPA section 206 complaint, New York Consumer Advocates and LS Power assert that the Commission should reject NYISO's proposed tariff records because the tariff provisions concerning cost containment and the timing to implement and exercise the federal ROFRs are unjust and unreasonable.<sup>64</sup> With respect to cost containment, LS Power states that, under NYISO's proposal, the incumbent transmission owner could assert a claim for the upgrade portions of a nonincumbent Developer's proposal and the project would be analyzed as if no cost containment was offered on the upgrades even though the nonincumbent Developer may have been willing to apply cost containment to the upgrade portions of its Order No. 1000 Public Policy Transmission Project. New York Consumer Advocates and LS Power argue that the Commission should reject NYISO's proposal because exempting NYTOs who exercise federal ROFRs for upgrades from having to incorporate a Developer's cost cap would be unjust and unreasonable.<sup>65</sup> New York

<sup>60</sup> *Id.* at 7-8.

<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.* at 8-9 (citing *Indicated SPP Transmission Owners v. Southwest Power Pool, Inc.*, 162 FERC ¶ 61,213, at P 60 (2018)).

<sup>63</sup> *Id.* at 7-8.

<sup>64</sup> New York Consumer Advocates Protest at 13-14; LS Power Protest at 12-13.

Consumer Advocates assert that NYISO is proposing that NYTOs who exercise ROFRs be accorded all of the benefits of the public policy process – such as access to cost allocation and cost recovery through NYISO’s tariff – without being subject to any cost limitations.<sup>66</sup> New York Consumer Advocates also argue that there is no compelling justification for NYISO refusing to consider cost containment measures encompassing upgrades for which ROFRs are not exercised.<sup>67</sup>

31. LS Power argues that requiring an incumbent transmission owner to be bound by a nonincumbent developer’s cost containment proposal if that incumbent transmission owner exercises their ROFRs for upgrades does not change the voluntary nature of the NYISO’s cost containment regime.<sup>68</sup> LS Power explains that the incumbent transmission owner can still decline to accept the cost containment measures and forego the opportunity to build the upgrade. LS Power also notes it is important to remember a ROFR is a function of the incumbent transmission owners agreeing among themselves to divide future transmission projects when they joined an ISO/RTO.<sup>69</sup> LS Power states that the Commission has held on numerous occasions that those foundational agreements are not arm’s length negotiated agreements subject to *Mobile-Sierra*<sup>70</sup> public interest protection or similar contractual protection.<sup>71</sup> LS Power argues that although the Commission did not remove ROFRs for upgrades in the Order No. 1000 Process, there should not be a federal monopoly for upgrades. LS Power asserts that applying cost containment to upgrades balances the existing transmission owners’ ROFRs for upgrades with the right of the consumer, and obligation of the Commission, for just and reasonable rates.<sup>72</sup>

32. New York Consumer Advocates and LS Power argue that NYISO’s proposal to not apply cost containment to upgrades would undermine competition in New York,

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<sup>65</sup> New York Consumer Advocates Protest at 13-14; LS Power Protest at 12-13.

<sup>66</sup> New York Consumer Advocates Protest at 4.

<sup>67</sup> *Id.* at 14-15.

<sup>68</sup> LS Power Protest at 12.

<sup>69</sup> *Id.* at 11.

<sup>70</sup> *Id.* (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (collectively, *Mobile-Sierra*)).

<sup>71</sup> *Id.* at 11 & n.25.

<sup>72</sup> *Id.* at 12.

create an unlevel playing field and unfair process, and expose consumers to unnecessarily higher costs.<sup>73</sup> New York Consumer Advocates argue that NYISO's proposal would let others evaluate, design, engineer, and select transmission projects, but would then allow NYTOs to step in, after the Order No. 1000 Process concludes, to take over others' work products without cost containment.<sup>74</sup> LS Power asserts that NYISO's proposal will lead Developers to stop proposing cost containment measures, thus foregoing the benefits of competition.<sup>75</sup> New York Consumer Advocates also argue that not applying cost containment to upgrades subject to a NYTO's ROFR rights may make that project cost-ineffective.<sup>76</sup> In addition, New York Consumer Advocates argue that a NYTO faces little pressure to minimize costs, and customers would have virtually no recourse from higher costs, absent a prudency review.<sup>77</sup>

33. New York Consumer Advocates protest NYISO's proposal to presume that a NYTO will exercise its federal ROFR to build an upgrade and to allow a NYTO up to 30 calendar days after a transmission solution is selected by the NYISO Board to decline to exercise its ROFR for an upgrade.<sup>78</sup> They argue that, to create greater certainty in the Order No. 1000 Process, a NYTO should be required to take affirmative action to exercise its ROFR for an upgrade and exercise that ROFR early in the Order No. 1000 Process when NYISO first lists and classifies such facilities.<sup>79</sup> In response to NYISO's arguments that requiring NYTOs to take some form of affirmative action would be inconsistent with the ISO-TO Agreement, New York Consumer Advocates claim this argument lacks merit.<sup>80</sup> They argue that whatever rights have been reserved by NYTOs in their agreements with NYISO merely bestow rights, and the ROFRs will still need to be exercised. In response to NYISO's argument that whether NYTOs are required to affirmatively exercise their ROFR rights "is a matter of semantics," New York Consumer Advocates disagree.<sup>81</sup> They argue that a NYTO exercising its ROFR rights triggers a set

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<sup>73</sup> New York Consumer Advocates Protest at 13; LS Power Protest at 12-13.

<sup>74</sup> New York Consumer Advocates Protest at 13.

<sup>75</sup> LS Power Protest at 12-13.

<sup>76</sup> New York Consumer Advocates Protest at 8-9 (citing Complaint, Att. 3, Aff. of Mr. Smith, at PP 9-10).

<sup>77</sup> *Id.* at 11.

<sup>78</sup> *Id.* at 16-17.

<sup>79</sup> *Id.* at 19.

<sup>80</sup> *Id.* at 21.

of obligations related to costs and prudence. Rather than presuming that NYTOs will exercise their ROFR rights, New York Consumer Advocates state that it would be preferable for NYTOs to exercise those ROFR rights earlier in the Order No. 1000 Process.

34. In response to NYISO's claim that its proposal provides optionality for the nonincumbent Developers to design their projects to the best advantage in the evaluation and selection process, even though an upgrade may be designated to the applicable NYTO, New York Consumer Advocates argue that NYISO's proposal will chill competition.<sup>82</sup> They argue that nonincumbent Developers will not know whether they will have the opportunity to build an upgrade until a month after a preferred solution already has been selected. They assert that, in this circumstance, Developers are less likely to spend substantial money or time developing project proposals involving upgrades.

35. New York Consumer Advocates also disagree with NYISO's argument that it would be too burdensome for the NYTOs to evaluate earlier in the process each project proposal advanced by competitive developers.<sup>83</sup> They argue that the NYTOs should not have any difficulty assessing several proposals to upgrade their own transmission facilities given NYTOs' knowledge of, and system planning for, their systems. They argue that requiring the NYTOs to exercise their ROFRs earlier in the Order No. 1000 Process would provide greater clarity to Developers by (1) allowing Developers to make more informed decisions; and (2) permitting Developers to tailor their proposals to account for when the Developer would be responsible for building an upgrade.<sup>84</sup>

36. LS Power argues that in addition to rejecting NYISO's proposed tariff revisions, which were opposed by a majority of stakeholders, the Commission should direct NYISO to continue stakeholder discussions for 60 days to determine whether stakeholders can approve a proposal for proposed tariff provisions that are just and reasonable.<sup>85</sup> In its protest, LS Power highlights several concerns with the stakeholder process. LS Power states that during the stakeholder process, NYISO took the position that it did not have the legal authority to enforce or address cost containment measures related to the NYTOs' exercise of their ROFRs for upgrades. LS Power states that NYISO only offered one proposal for stakeholder vote (which did not include any cost containment

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<sup>81</sup> *Id.* at 22-23.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.* at 9-10.

<sup>84</sup> *Id.* at 19.

<sup>85</sup> LS Power Protest at 13.

measures for upgrades), which stakeholders rejected, and NYISO then filed this Complaint.<sup>86</sup> LS Power therefore asserts that NYISO did not engage with stakeholders on their preferred approach, which is to allow an existing transmission owner to exercise a ROFR for upgrades identified in another Developer's proposal by accepting all aspects of the Developer's upgrade proposal, including cost containment for upgrades. LS Power argues that stakeholders are due a fair opportunity to pass a proposal that addresses the issue that NYISO informed the Commission would be decided by stakeholders. LS Power states that if stakeholders support a proposal to apply cost containment to upgrades, NYISO would be required by section 2.10 of its OATT to file the proposal under FPA section 205. LS Power states that if stakeholders do not support a proposal to apply cost containment to upgrades, the Commission should require NYISO to adopt tariff provisions that allow nonincumbent Developers to propose cost containment for all portions of their proposal, even upgrades, with a requirement that in order for an incumbent transmission owner to assert a ROFR for an upgrade, it would have to adopt the Developer's proposed cost containment.<sup>87</sup>

### C. Answers

37. In their respective answers, NYISO and NYTOs respond to protestors' arguments. In response to LS Power's argument that the lack of clarity in the NYISO OATT on ROFR implementation does not make it unjust and unreasonable, NYTOs contend that the Commission has previously held that a lack of clarity in an OATT may, in fact, result in it being unjust and unreasonable.<sup>88</sup> In response to LS Power's argument that the Commission did not find the existing OATT to be unjust and unreasonable in the April 2021 Order, NYTOs explain that NYISO's Petition did not present this issue to the Commission.<sup>89</sup> NYISO argues that LS Power's reliance on *Indicated SPP Transmission Owners v. Southwest Pwr. Pool, Inc.* is inapposite, as that precedent had nothing to do with cost responsibility.<sup>90</sup>

38. NYISO also argues that LS Power's assertion of an inadequate stakeholder process is inaccurate. NYISO states that the topic was addressed in more than 11 stakeholder meetings since the beginning of 2019 and that LS Power seeks to diminish these efforts to reach stakeholder consensus.<sup>91</sup> NYISO states that its proposed tariff

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 13.

<sup>88</sup> NYTOs Answer at 4 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,254, at P 8 (2016)).

<sup>89</sup> *Id.* at 5.

<sup>90</sup> NYISO Answer at 5; *see supra* P 29.

revisions: (1) carefully considered stakeholders' proposed changes; (2) comply with Commission precedent; (3) provide for the timely administration of its Order No. 1000 Process; (4) align with the scope of NYTOs' federal ROFR rights as established in NYISO's foundational agreements, reserved in the OATT section 31.6.4, and clarified by the Commission in the April 2021 Order; and (5) are more flexible for nonincumbent Developers than the ROFR requirements for upgrades adopted by other RTO/ISOs.

39. NYISO asserts that the Commission should reject LS Power's request to return the ROFR issue back to the stakeholder process because these meetings have resulted in little progress toward consensus. NYISO states that the division among stakeholders required NYISO's Petition, led to the failure to authorize an FPA section 205 filing, and resulted in the instant Complaint.<sup>92</sup> Finally, NYISO states that it believes that additional stakeholder processes would adversely impact the administration of its ongoing public policy process to enhance transmission to support offshore wind.<sup>93</sup>

40. NYISO states that compared to the approaches of other RTO/ISOs, NYISO's proposed approach provides a nonincumbent Developer with more flexibility.<sup>94</sup> Specifically, NYISO states that a Developer in NYISO may include upgrades as part of a project proposal even if the upgrades are subject to the NYTO's ROFR rights. NYISO argues that this approach provides more optionality to the Developer, as opposed to removing upgrades entirely from the competitive process, as has been found just and reasonable in other regions.<sup>95</sup> Additionally, NYISO states, the proposed revisions also permit both incumbent and nonincumbent Developers to propose voluntary cost containment measures for new transmission facilities.<sup>96</sup>

41. With respect to protesters' claims of an unlevel playing field, both NYISO and NYTOs argue that claims of anti-competitiveness are an attempt to revise the balance between a NYTO's property rights and competition established by Order No. 1000.<sup>97</sup> Both parties contend that any such attempt to diminish a NYTO's federal ROFR rights, which were exempted from Order No. 1000's competition requirements, constitute a

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<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 9-10.

<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.* at 11-12.

<sup>95</sup> *Id.* at 12, 14.

<sup>96</sup> *Id.* at 14.

<sup>97</sup> *Id.* at 13; NYTOs Answer at 5.

collateral attack on Order No. 1000. NYISO states that the Commission routinely rejects collateral attacks on prior orders in the absence of new or changed circumstances.<sup>98</sup> NYISO avers that in Order No. 1000, the Commission did not go so far as to require the elimination of all federal ROFRs, such as the right to build, own, and recover cost for upgrades to transmission owners' facilities, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation.<sup>99</sup> NYISO argues that the proposed remedy is structured to implement the NYTOs' ROFRs for upgrades in a manner consistent with the competition required under Order No. 1000 as it relates to entirely new transmission facilities.<sup>100</sup> NYTOs further explain that the sponsorship model adopted by NYISO provides the competitive benefit for creative Developer proposals to identify more efficient and cost-effective project alternatives to address an identified transmission need; NYTOs argue that their ROFR rights do not overrule these benefits.<sup>101</sup>

42. Both NYISO and NYTOs argue that the protestors too narrowly define cost effectiveness. NYISO argues that Order No. 1000 does not mandate that the transmission provider select the least cost project or apply cost containment provisions.<sup>102</sup> NYISO argues that cost is one of a wide selection of metrics used to make determinations about proposed projects. According to the NYTOs, protestors suggest that the NYTOs are seeking an inappropriate premium on upgrades; NYTOs state that they seek only to preserve their right to recover prudently incurred costs.<sup>103</sup> NYTOs state that it is also inaccurate to suggest that they have no incentive to adopt cost containment, or that cost containment equates to a project's competitive benefits. NYTOs contend that they support NYISO's voluntary cost containment framework but oppose the imposition of a third party's cost structure on the NYTO's cost recovery for upgrades.

43. According to NYTOs, protestors fail to cite any precedent where a public utility has been forced to accept a third-party's cost structure. In contrast, NYTOs argue, each NYTO has the right to recover its costs. NYTOs state that their ROFR rights, including for cost recovery and regional cost allocation, are protected in OATT section 31.6.4.<sup>104</sup>

<sup>98</sup> NYISO Answer at 15-16 & nn.48-49 (citing, e.g., *Alamito Co.*, 43 FERC ¶ 61,274, at 61,753 (1987); *New England Conf. of Pub. Util.*, 135 FERC ¶ 61,140, at P 27 (2011)).

<sup>99</sup> *Id.* at 16 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 319).

<sup>100</sup> *Id.* at 17 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 426).

<sup>101</sup> NYTOs Answer at 6.

<sup>102</sup> NYISO Answer at 13.

<sup>103</sup> NYTOs Answer at 6.

NYTOs further state that OATT section 31.6.4 was revised to include the requirement that, if the upgrade was selected in the regional transmission plan for the purposes of cost allocation, then the regional cost allocation method in Attachment Y applies, unless the NYTO declines the pursuit of regional cost allocation. In addition, NYTOs argue that the foundational agreements reserve to each NYTO the right to unilaterally file a section 205 filing to recover reasonably incurred costs.<sup>105</sup>

44. NYTOs contend that while LS Power seems to suggest that the Commission may restrict the *Mobile-Sierra* standard in RTO/ISO foundational agreements, the ISO-TO Agreement has been approved by the Commission and is, thus, the filed rate.<sup>106</sup> NYTOs state that section 6.14 of the ISO-TO Agreement specifically provides that any modifications to section 3.10 of that agreement, which reserves both the NYTOs' ROFRs and their right to cost recovery, are expressly made subject to the strict *Mobile-Sierra* standard; accordingly, NYTOs contend that the *Mobile-Sierra* standard applies to any attempt to revise those provisions absent mutual consent of the parties.<sup>107</sup> NYTOs contend that ROFR rights for upgrades to a transmission owner's existing transmission facilities were recognized in Order No. 1000. Because of this, NYTOs argue that ROFR rights can only be modified by a subsequent notice and rulemaking. Otherwise, limiting the NYTOs' ROFR rights, they argue, would be unduly discriminatory because the Commission allows transmission owners in other regions to exercise their ROFR rights and to do so without being subject to cost containment.<sup>108</sup>

45. Finally, both NYISO and NYTOs disagree with New York Consumer Advocates' assertion that the presumption that NYTOs will be designated as the entity to build, own, and recover the cost of upgrades is not just and reasonable. NYISO states that the requirement for an NYTO to reject its designation as the Designated Entity for an upgrade is based on the nature of the NYTOs' rights retained in the ISO-TO Agreement. NYISO states that, in asserting that a NYTO should make an affirmative election, rather than an election to reject a designation by the NYISO, New York Consumer Advocates fail to articulate why NYISO's proposal is not just and reasonable.<sup>109</sup> NYISO further states that its proposed presumption that a NYTO will exercise its ROFR rights for upgrades is also consistent with the Order No. 1000 planning processes of other

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<sup>104</sup> *Id.* at 7.

<sup>105</sup> *Id.* at 8 (citing ISO-TO Agreement, § 3.10).

<sup>106</sup> *Id.* at 9.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 9-10.

<sup>109</sup> *Id.* at 18.

RTO/ISOs that completely exclude upgrades from the competitive evaluation process, where the applicable transmission owner is presumed to be responsible for building, owning, and recovering the cost of upgrades to their existing facilities.

46. In response to the New York Consumer Advocates' arguments that NYISO's proposed deadline of allowing a NYTO to exercise its ROFR right after the winning bid(s) is selected is too late in the process and that NYTOs would not be harmed by an earlier deadline because the NYTOs know their systems and should readily be able to make such determinations, NYTOs argue that knowing their systems does not obviate the need to analyze proposed upgrades and obtain corporate approvals for investment.<sup>110</sup> NYTOs argue that imposing this deadline earlier in the process would impose delays because the NYTOs would have to analyze the potential upgrades presented by all of the proposed projects and not just those associated with the winning proposals.

#### **D. Procedural Matters**

47. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

48. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2021), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept NYISO's and NYTOs' answers because they provided information that assisted us in our decision-making process.

#### **E. Substantive Matters**

49. As discussed below, we grant the Complaint and accept the proposed tariff records effective October 12, 2021, as requested.

##### **1. Existing Tariff**

50. Under the first prong of FPA section 206, NYISO must demonstrate that its existing tariff provisions are unjust and unreasonable.<sup>111</sup> We find that NYISO has made that demonstration by showing that NYISO's Order No. 1000 Process in its OATT is unjust and unreasonable absent a mechanism for the NYTOs to exercise their right to implement a federal ROFR for upgrades to their existing transmission facilities that are included in a Developer's Public Policy Transmission Project. In particular, in the April 2021 Order, the Commission found that the language in the foundational agreements is a permissible federal ROFR for upgrades to NYTOs' existing transmission

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<sup>110</sup> *Id.* at 10.

<sup>111</sup> 16 U.S.C. § 824e(a); 18 C.F.R. § 385.206 (2021).

facilities.<sup>112</sup> Also, the Commission found that OATT section 31.6.4 tracks the language from Order No. 1000 concerning the permitted exception to the requirement to eliminate a federal ROFR so as to allow an incumbent transmission provider to build, own, and recover the costs for upgrades to its own existing transmission facilities;<sup>113</sup> therefore, OATT section 31.6.4 reserved NYTOs' federal ROFRs for upgrades to their own transmission facilities in NYISO's Order No. 1000 Process. However, the Commission found that the NYISO OATT is silent as to how to implement a federal ROFR for a NYTO's upgrades to its own existing transmission facilities.<sup>114</sup> We agree with NYISO that the lack of clear rules implementing NYTOs' federal ROFRs for upgrades to their own existing transmission facilities in NYISO's Order No. 1000 Process in its OATT is unjust and unreasonable and will likely result in disputes at the Commission and in court, which will cause delays and potentially harm competitive transmission development in New York.<sup>115</sup> We note that the Commission has accepted tariff provisions for five RTOs/ISOs to implement federal ROFRs for upgrades in their Order No. 1000 processes.<sup>116</sup> For these reasons, we find that NYISO's Order No. 1000 Process

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<sup>112</sup> April 2021 Order, 175 FERC ¶ 61,038 at P 33.

<sup>113</sup> *Id.* P 34.

<sup>114</sup> *Id.* P 41.

<sup>115</sup> NYISO states that there is a high potential that solutions proposed to satisfy its current Order No. 1000 process for the Long Island offshore wind solicitation will include upgrades to existing transmission facilities. Complaint at 39. NYTOs assert that the current Order No. 1000 process for the Long Island offshore wind solicitation resulted in 19 proposals, and each proposal includes upgrades to numerous existing transmission facilities. NYTOs Comments at 9 n.28. *See also* April 2021 Order, 175 FERC ¶ 61,038 at P 12 (explaining that Developers' Public Policy Transmission Projects will likely modify NYTOs' existing transmission facilities because: (1) there is a high likelihood that Public Policy Transmission Projects will be located within existing rights-of-way due to New York's unique circumstances; and (2) the New York Commission, which is responsible for identifying Public Policy Transmission Needs under NYISO's Order No. 1000 Process and for siting transmission projects, has expressed an intent that new transmission projects be located, to the extent possible, in existing rights-of-way). New York's unique circumstances include: (1) power needs that are largely located in the highly-populated southeastern portion of the state, including New York City and Long Island, while generation resources that serve that demand are spread across the state; and (2) limited rights-of-way to develop new transmission facilities to deliver the generation to serve these areas due to various environmental and agricultural impact concerns. *Id.* P 12 n.34.

<sup>116</sup> *See supra* notes 35-36.

in its OATT is unjust and unreasonable absent a mechanism for the NYTOs to exercise their right to implement a federal ROFR for upgrades to their own existing transmission facilities that are included in a Developer's Public Policy Transmission Project.

51. LS Power argues that a tariff is not rendered unjust and unreasonable simply because it does not address every potential dispute.<sup>117</sup> While we agree with this general statement that is supported by Commission precedent, the fact that tariffs are not necessarily unjust and unreasonable because they do not address every potential dispute does not mean the Commission is precluded from finding that the NYISO OATT is unjust and unreasonable based on the circumstances presented here. The exercise of the NYTOs' federal ROFR for upgrades to its existing transmission facilities in another Developer's Public Policy Transmission Project is a significant and recurring issue<sup>118</sup> in NYISO's Order No. 1000 Process that should be addressed in NYISO's OATT through clear rules that provide certainty to Developers, NYTOs and NYISO.

52. LS Power asserts that, if the Commission had found that the lack of clarity in NYISO's tariff concerning the NYTOs' federal ROFRs for upgrades meant that NYISO's existing tariff was unjust and unreasonable, the Commission had an obligation under FPA section 206 to declare it as such in the April 2021 Order.<sup>119</sup> We disagree. The Commission's April 2021 Order addressed NYISO's Petition, which raised certain, limited issues for the Commission's consideration.<sup>120</sup> The Commission's authority to issue declaratory orders pursuant to Rule 207(a)(2) of its Rules of Practice and Procedure flows from section 554(e) of the Administrative Procedure Act, which by the use of the word "may" provides the Commission with discretion whether and when to issue declaratory orders "to terminate a controversy or remove uncertainty."<sup>121</sup> The manner in which the Commission addresses a petition for declaratory order depends on the "specific facts and circumstances" presented to the Commission.<sup>122</sup> Accordingly, the

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<sup>117</sup> LS Power Protest at 8-9 (citing *Indicated SPP Transmission Owners v. Southwest Power Pool, Inc.*, 162 FERC ¶ 61,213 at P 60).

<sup>118</sup> See *supra* note 115.

<sup>119</sup> LS Power Protest at 2-3.

<sup>120</sup> April 2021 Order, 175 FERC ¶ 61,038 at P 7.

<sup>121</sup> 18 C.F.R. § 385.207(a) (2021); see 5 U.S.C. § 554(e) ("[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty").

<sup>122</sup> *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042 (2020) (citing *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206 at PP 44-45 & n.72 (quoting *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)); *Sharyland Utils., L.P.*, 121 FERC ¶ 61,006, at P 23 (2007) (granting petition for declaratory order "[b]ased on the specific facts presented. . . .")).

Commission's April 2021 Order addressed the issues raised in NYISO's Petition, which did not include a request that the Commission make a determination as to whether its existing tariff was unjust and unreasonable absent a mechanism for the NYTOs to exercise their right to implement a federal ROFR for upgrades to their own existing transmission facilities that are included in a Developer's Public Policy Transmission Project. In addition, the Commission stated that it was premature to opine on how or when the various aspects of the federal ROFR for upgrades should be implemented, and the Commission would evaluate tariff revisions to effectuate implementation details when they are presented to the Commission.<sup>123</sup> In the instant proceeding, NYISO has proposed revised tariff records to effectuate implementation details, which we address below.

## 2. Proposed Tariff Records

53. Under the second prong of FPA section 206, whether initiated by a complaint or *sua sponte*, the Commission has the burden to establish a just and reasonable rate to replace the rate it has found unjust and unreasonable.<sup>124</sup> The Commission need not adopt the best or perfect rate, as long as the Commission has explained its choice and chosen a just and reasonable rate.<sup>125</sup> As set forth below, we find NYISO's proposed replacement tariff provisions to be just and reasonable. The tariff provisions provide clarity to all Developers that wish to propose a Public Policy Transmission Project as to how NYISO will identify and consider upgrades to existing transmission facilities when it evaluates Public Policy Transmission Projects. In addition, as we discuss further below, NYISO's proposal is consistent with the Commission's findings in Order No. 1000 and other related precedent on federal ROFRs for upgrades to existing transmission facilities. We therefore accept the proposed tariff revisions effective October 12, 2021, as requested.

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<sup>123</sup> April 2021 Order, 175 FERC ¶ 61,038 at P 42.

<sup>124</sup> *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,134, at P 114 & n.173 (2020) (*PJM I*) (citing *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011)), *order on reh'g*, 174 FERC ¶ 61,180 (2021) (*PJM II*).

<sup>125</sup> *PJM II*, 174 FERC ¶ 61,180 at P 27 & n.75 (citing *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1169 (D.C. Cir. 1996) (per curiam) ("FERC correctly counters that the fact that AEPCO may have proposed a reasonable alternative to SFV rate design is not compelling. The existence of a second reasonable course of action does not invalidate an agency's determination."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 955 (D.C. Cir. 2007) ("We need not decide whether the Commission has adopted the best possible policy as long as the agency has acted within the scope of its discretion and reasonably explained its actions."); *Cities of Batavia v. FERC*, 672 F.2d 64, 84 (D.C. Cir. 1982) ("[T]he billing design need only be reasonable, not theoretically perfect.")).

**a. Cost Containment**

54. For the following reasons, we accept as just and reasonable NYISO's proposal to not subject NYTOs who exercise a federal ROFR to build an upgrade to their own existing transmission facilities to the voluntary cost containment measures included in Developers' proposed Public Policy Transmission Projects in NYISO's Order No. 1000 Process. In Order No. 1000, the Commission affirmed that its reforms "do not affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities . . . regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation."<sup>126</sup> The Commission further stated that Order No. 1000 "does not remove or limit any right an incumbent Transmission Owner may have to build, own or recover costs for upgrades to the transmission facilities owned by an incumbent."<sup>127</sup> Also, while Order No. 1000 required evaluation of competitive proposals that result in the selection of the "more efficient or cost-effective" transmission solution to an identified regional transmission need, it did not mandate that the transmission provider select the least-cost transmission project or apply cost containment for any project.<sup>128</sup> Accordingly, we find that NYISO's proposal is consistent with Order No. 1000 and NYISO's voluntary cost containment rules as it does not affect the right of an incumbent transmission owner to recover its upgrade costs.

55. Protestors' suggestion to rely upon a Developer's voluntary cost cap from an Order No. 1000 competitive process as a basis to limit a NYTO's cost recovery opportunities would be contrary to Order No. 1000, which did not "remove or limit any right an incumbent Transmission Owner may have to build, own and recover costs for upgrades to the transmission facilities owned by an incumbent."<sup>129</sup> Further, making a Developer's proposed cost cap binding on the NYTO would raise complex implementation issues because the Developer's cost containment proposal may or may not represent a reasonable expectation of the NYTO's upgrade costs. We also note that nothing in NYISO's proposal prevents a NYTO from voluntarily agreeing to cost containment measures for upgrades to its existing facilities. As NYTOs note, voluntary cost containment for upgrades may result from the ratemaking process or a settlement.<sup>130</sup>

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<sup>126</sup> Order No. 1000, 136 FERC ¶ 61,051 at P 319.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* PP 256, 704.

<sup>129</sup> *Id.* P 319. We note, however, that Order No. 1000 declined to adopt a cost containment principle. *Id.* P 704.

<sup>130</sup> *See supra* P 27.

56. Based on the record before us, we are not persuaded by protestors' concerns that accepting NYISO's proposal would be inconsistent with Order No. 1000. Order No. 1000 does not mandate that the transmission provider select the least cost project or apply cost containment provisions. Cost is one of many selection metrics that may be used to make determinations about whether a proposed Public Policy Transmission Project should be selected in the regional transmission plan for purposes of cost allocation.<sup>131</sup> Therefore, we agree with NYISO and NYTOs that protestors too narrowly define cost effectiveness of Public Policy Transmission Projects. In addition, protestors do not provide any evidence that NYISO's proposal will no longer result in the identification of the more efficient or cost-effective transmission solution as required by Order No. 1000.<sup>132</sup> With respect to protestors' claims of an unlevel playing field in the competition for a Public Policy Transmission Project, we find that protestors' claims constitute a collateral attack on Order No. 1000, and an attempt to revise Order No. 1000's balance between a NYTO's rights regarding upgrades to its existing transmission facilities and the competition for development of new regional transmission facilities. In Order No. 1000, the Commission explained that "an incumbent transmission provider would be permitted to maintain a federal right of first refusal for upgrades to its own transmission facilities."<sup>133</sup>

57. LS Power argues that stakeholders are due a fair opportunity to pass a proposal that addresses the cost containment issue for upgrades and requests that the Commission direct NYISO to continue stakeholder discussions for 60 days to determine whether stakeholders can approve a proposal. The record concerning NYISO's Petition in Docket No. EL20-65-000 and the record in this proceeding reflect that NYISO has sought a stakeholder consensus around a process to implement NYTOs' federal ROFRs for upgrades in NYISO's Order No. 1000 Process since 2018, and NYISO has conducted 11 stakeholder meetings since the beginning of 2019.<sup>134</sup> Therefore, stakeholders have had

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<sup>131</sup> Order No. 1000 defines a transmission facility selected in a regional transmission plan for purposes of cost allocation as a transmission facility that has been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because it is a more efficient or cost-effective solution to regional transmission needs. *Id.* PP 5, 63.

<sup>132</sup> Indeed, New York Consumer Advocates note that "there have not been any decisions made over the past six and a half months [since the April 2021 Order was issued] that demonstrate these competitive concerns." New York Consumer Advocates Protest at 9.

<sup>133</sup> Order No. 1000, 136 FERC ¶ 61,051 at P 319.

<sup>134</sup> NYTOs Comments at 5-6; NYISO Answer at 6.

an opportunity to pass a proposal that addresses the cost containment issue for upgrades, and we decline to direct NYISO to continue further stakeholder discussions on this issue. As LS Power notes, if stakeholders support a proposal to apply voluntary cost containment for upgrades, NYISO would be required by section 2.10 of its OATT to file the proposal under FPA section 205 for our consideration. Therefore, nothing decided in this order prevents LS Power and other stakeholders from continuing stakeholder discussions to pursue such a voluntary cost containment proposal for upgrades. Finally and most importantly, we have determined that NYISO's Order No. 1000 Process in its OATT is unjust and unreasonable absent a mechanism for the NYTOs to exercise their right to implement a federal ROFR for upgrades to their own existing transmission facilities that are included in a Developer's Public Policy Transmission Project and, pursuant to FPA section 206, the Commission has the burden to establish a just and reasonable rate to replace the rate it has found unjust and unreasonable.

**b. Upgrade Timing Issues and Presumption**

58. The Commission has taken a flexible approach as to how RTOs/ISOs implement federal ROFRs for upgrades to existing transmission facilities in their Order No. 1000 processes. The Commission has accepted proposals for four RTOs/ISOs that address federal ROFRs for upgrades at the beginning of their Order No. 1000 processes by electing either to not subject upgrades to a competitive evaluation process or to not allow nonincumbent transmission Developers to include upgrades in their proposals.<sup>135</sup> The Commission also accepted PJM's approach, which is similar to NYISO's proposed approach, as to when the upgrade is designated to the incumbent transmission owner. Like NYISO's proposal, PJM designates new transmission facilities and any upgrades in the selected transmission project to the appropriate designated entity later in the Order No. 1000 process, following selection of the more efficient or cost-effective transmission solution.<sup>136</sup> Given the Commission's flexible approach on the implementation of federal ROFRs for upgrades in Order No. 1000 processes and the Commission's acceptance of PJM's approach on the timing to designate any upgrades in the selected transmission project to the appropriate designated entity following selection of the more efficient or cost-effective transmission solution, we accept NYISO's proposal as just and reasonable, consistent with this Commission precedent.

59. We also find that NYISO's proposed timing to identify upgrades early in the process and NYISO's proposed timing for a NYTO to decline to exercise its federal

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<sup>135</sup> See *supra* note 35.

<sup>136</sup> *PJM*, 147 FERC ¶ 61,128 at P 146; see *supra* note 36. In contrast to PJM's approach, NYISO's approach also provides an opportunity for nonincumbent transmission Developers to build upgrades if the incumbent transmission owner declines to build the upgrade.

ROFR rights (up to 30 calendar days after a transmission solution is selected by the NYISO Board) is just and reasonable. Because NYISO's proposal requires nonincumbent Developers to identify any upgrades in their Public Policy Transmission Projects as part of NYISO's revised project information requirements, Developers will need to factor the upgrades into their decision-making early in their proposed projects. We also find persuasive NYISO's point that requiring NYTOs to exercise the federal ROFR earlier than the NYISO Board's selection of a transmission solution could substantially delay the completion of the public policy process by requiring the NYTOs to assess and consider a significant number of Public Policy Transmission Upgrades and upgrade permutations – any of which would be associated with projects that would not ultimately be selected. We note that NYISO's current public policy process for the Long Island offshore wind solicitation resulted in 19 proposals.<sup>137</sup> In addition, we expect that it is highly likely that NYTOs will exercise their federal ROFRs to build upgrades, and nonincumbent Developers will factor in a NYTO's exercise of its federal ROFR when engineering their project proposals, which would enable nonincumbent Developers to focus on competitive, and potentially more innovative, solutions. For this reason, we are not persuaded by New York Consumer Advocates' argument that the timing as to when a NYTO could decline to exercise its federal ROFR rights (up to 30 calendar days after a transmission solution is selected by the NYISO Board) will significantly impact the money or time that Developers spend to create project proposals involving upgrades. In addition, as NYISO explains, while an upgrade may ultimately be designated to the NYTO and built by the NYTO, a Developer may still benefit from proposing an upgrade because the addition of an upgrade to an existing transmission facility may increase the performance of a nonincumbent transmission Developer's proposed project.<sup>138</sup>

60. We also find that NYISO's proposal to presume that NYTOs will exercise their federal ROFR for upgrades is just and reasonable and consistent with Commission precedent. In the April 2021 Order, the Commission found that NYISO's foundational agreements, such as the ISO-TO Agreement, recognize and preserve NYTOs' ownership rights in their existing transmission facilities, including their right to build upgrades. Given the findings in the April 2021 Order, it is reasonable to presume that NYTOs will exercise their federal ROFRs for upgrades in NYISO's Order No. 1000 Process now that NYISO has proposed tariff provisions that allow NYTOs to do so. In addition, the Commission has accepted the proposals of other RTOs/ISOs, which do not require the incumbent transmission owners to affirmatively exercise their federal ROFRs; rather, they assume that the incumbent transmission owners exercise their federal ROFRs and automatically designate the building of upgrades to the incumbent transmission owners.<sup>139</sup>

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<sup>137</sup> See *supra* P 24.

<sup>138</sup> Complaint, Att. 3, Aff. of Mr. Smith, at P 11.

<sup>139</sup> See *supra* note 35.

Therefore, accepting NYISO's presumption that the NYTO will build the upgrade is in line with Commission precedent accepting proposals from other RTOs/ISOs to automatically designate the building of upgrades to the incumbent transmission owners.

The Commission orders:

(A) The Complaint is hereby granted, as discussed in the body of the order.

(B) The proposed tariff records are hereby accepted, effective October 12, 2021 as requested, as discussed in the body of the order.

By the Commission. Commissioners Clements and Christie are concurring with a joint Statement attached.

Commissioner Christie is concurring with a separate statement attached.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

## **Appendix I**

### **Tariff Records Accepted Effective October 12, 2021**

New York Independent System Operator, Inc.  
NYISO Tariffs

[NYISO OATT, 6.10 OATT Schedule 10 - Rate Mechanism For Recovery Of RTFC \(17.0.0\)](#)

[NYISO OATT, 22 OATT Attachment P - Transmission Interconnection Procedure \(8.0.0\)](#)

[NYISO OATT, 31.1 OATT Att Y New York Comprehensive System Planning Process \(28.0.0\)](#)

[NYISO OATT, 31.4 OATT Att Y Public Policy Requirements Planning Process \(22.0.0\)](#)

[NYISO OATT, 31.5 OATT Att Y Cost Allocation and Cost Recovery \(29.0.0\)](#)

[NYISO OATT, 31.6 OATT Att Y Other Provisions \(17.0.0\)](#)

[NYISO OATT, 31.7 OATT Att Y Appendices A-D \(19.0.0\)](#)

## **Appendix II**

### **Timely Motions to Intervene**

American Municipal Power, Inc.

City of New York, New York

Consumer Power Advocates (an alliance of large not-for-profit institutions in the greater New York region)

LSP Transmission Holdings II, LLC and its affiliate LS Power Grid New York, LLC (together, LS Power)

Multiple Intervenors (an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State)

Natural Resources Defense Council and the Sustainable FERC Project

New York State Energy Research & Development Authority

New York Transco, LLC

NextEra Energy Transmission New York, Inc.

NRG Power Marketing LLC

New York Transmission Owners (NYTOs)

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. EL22-2-001

(Issued March 11, 2022)

CLEMENTS and CHRISTIE, Commissioners, *concurring*:

1. We concur because, as detailed in today's order, NYISO's tariff filing is consistent with Order No. 1000 and past Commission orders implementing Order No. 1000, including our NYISO order of just last year,<sup>1</sup> relative to the use of the federal ROFR contained in Order No. 1000.

2. In concurring, we emphasize the following. Both the New York State Public Service Commission (NYSPSC) and New York State Energy Research and Development Authority (NYSERDA), a state agency and a public benefit corporation, respectively, protest the filing because of its potential cost implications for consumers.<sup>2</sup> Their concerns about potential cost impacts on consumers are absolutely legitimate and we share those concerns. We note that the Commission's order in this proceeding does not

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<sup>1</sup> *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021).

<sup>2</sup> The NYSPSC and NYSERDA were joined in this protest by Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and the Sustainable FERC Project. Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

presume nor prejudge any potential changes flowing from the ANOPR process that may change cost-allocation or cost containment protections for consumers relative to the use of the federal ROFR or other aspects of transmission planning in RTOs/ISOs. We support the Commission examining how best to protect consumers in that context.

For these reasons, we respectfully concur.

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Allison Clements  
Commissioner

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Mark C. Christie  
Commissioner

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.

Docket No. EL22-2-001

(Issued March 11, 2022)

CHRISTIE, Commissioner, *concurring*:

1. In my joint concurrence with Commissioner Clements to this order, we acknowledge that the New York State Public Service Commission (NYSPSC) and New York State Energy Research and Development Authority (NYSERDA) both protested NYISO's filing due to concerns over the potential for excessive costs to consumers from certain public policy transmission projects.<sup>1</sup> Other protesting organizations expressed similar concerns about costs to consumers.<sup>2</sup> I write separately to note the following.

2. The specific projects at issue in this proceeding are designed to implement the public policies of the State of New York, which are ultimately the responsibility of New York's elected legislators. As I noted last month in my concurrence to the NYISO tariff filing implementing certain buyer-side mitigation amendments, NYISO is a single-state ISO that is attempting to act in accordance with the public policies of the state.<sup>3</sup>

3. Every state, including New York, has among its inherent police powers the authority to certificate and site generating and transmission projects and to designate the state agencies which can exercise this authority. Such designated state agencies are typically – and certainly can be – empowered to protect the state's consumers by rejecting a certificate to construct a project, for, among other reasons, that the project is ~~too costly to consumers or that less costly alternatives are available~~. So, the primary

<sup>1</sup> *N.Y. Indep. Sys. Operator, Inc.*, 178 FERC ¶ 61,179 (2022) (Clements, Comm'r and Christie, Comm'r concurring at P 2).

<sup>2</sup> New York Consumer Advocates, November 2, 2021, Protest, *passim*. The NYSPSC and NYSERDA were joined in this protest by Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and the Sustainable FERC Project (collectively New York Consumer Advocates). Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

<sup>3</sup> *N.Y. Indep. Sys. Operator, Inc.*, 178 FERC ¶ 61,101 (2022) (Christie, Comm'r, concurring) (available at <https://www.ferc.gov/news-events/news/item-e-2-commissioner-mark-c-christie-concurrence-regarding-new-york-independent>).

recourse for protecting consumers from excessive costs for transmission projects such as those at issue herein is the state agency or agencies with this certifying authority, assuming that elected legislators have given the state agencies sufficient authority to protect consumers. And, of course, the ultimate recourse for consumers and consumer advocates concerned about the costs of New York's – or any other state's – public policies is to the ballot box.

For these reasons, I respectfully concur.

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Mark C. Christie  
Commissioner