

180 FERC ¶ 61,004
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.
New York Power Authority

Docket No. ER22-1014-001

ORDER ON FORMULA RATE AND TRANSMISSION INCENTIVES

(Issued July 5, 2022)

1. On February 10, 2022, as amended May 6, 2022, New York Power Authority (NYPA) submitted, pursuant to sections 205 and 219 of the Federal Power Act (FPA),¹ Part 35 of the Commission's regulations,² and Order No. 679,³ a request for: (1) authorization of a 50-basis point return on equity (ROE) adder (ROE Risk Adder) to reflect the risks and challenges associated with NYPA's investment in a transmission project in northern New York known as the Smart Path Connect Project (Project), (2) authorization of a cost-containment mechanism with a performance-based rate incentive inclusive of tiered ROE premiums with a cost cap provision (Performance-based ROE Incentive), and (3) in connection with the requested incentive-based rate treatments, proposed tariff revisions to NYPA's Formula Rate, which is set forth in section 14.2.3.1 of Attachment H of the New York Independent System Operator, Inc. (NYISO) Open Access Transmission Tariff (OATT).⁴

2. As discussed below, we conditionally grant NYPA's request for the 50-basis point ROE Risk Adder and cost-containment and risk-sharing mechanism with a Performance-based ROE Incentive, effective July 6, 2022. We also conditionally accept the proposed tariff revisions to NYPA's Formula Rate, effective July 6, 2022.

¹ 16 U.S.C. §§ 824d, 824s.

² 18 C.F.R. Pt. 35 (2021).

³ *Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁴ NYISO, NYISO Tariffs, [NYISO OATT, § 14 \(attach. H\), §§ 14.2.3-14.2.3.1 \(NYPA Formula Rate\) \(7.0.0\)](#).

I. Background**A. NYPA**

3. NYPA is a corporate municipal instrumentality and a political subdivision of the State of New York, organized under the laws of the State, operating pursuant to Title 1 of Article 5 of the New York Public Authorities Law. NYPA is a “municipality” within the meaning of section 3(7) of the FPA and is a “state instrumentality” within the meaning of FPA section 201(f).⁵ NYPA generates, transmits, and sells electric power and energy at wholesale and retail throughout New York and is a founding member of NYISO.⁶ NYPA has taken responsibility for constructing, owning, and operating critical segments of transmission infrastructure throughout the State of New York.⁷ NYPA has no distribution facilities or defined geographical service territory of its own, and since the inception of NYISO, has recovered its cost of owning and maintaining its backbone transmission facilities primarily through the NYPA Transmission Adjustment Charge (NTAC), a charge assessed to virtually all loads in NYISO on a load-ratio share basis.⁸

B. The Smart Path Connect Project

4. NYPA states that the Project is the outgrowth of New York’s clean energy legislation known as the Climate Leadership and Community Protection Act (CLCPA) that was enacted by the New York legislature in 2019 and established certain renewable energy goals (CLCPA Requirements).⁹ NYPA adds that New York subsequently enacted the Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA), which called for the New York Public Service Commission (New York Commission) to make a comprehensive study of the State’s power grid to identify distribution and transmission infrastructure needs under CLCPA and to establish a bulk transmission

⁵ 16 U.S.C. §§ 796(7) & 824(f).

⁶ Filing at 4.

⁷ *Id.*

⁸ *Id.* The NTAC formula appears at section 14.2.2.2.1 of Attachment H of the NYISO OATT. NYISO, NYISO Tariffs, NYISO OATT, § 14 (attach. H), § 14.2.2 NYPA Transmission Adjustment Charge (“NTAC”) (1.0.0), § 14.2.2.2.1.

⁹ *Id.* at 5. NYPA states that the CLCPA Requirements are: a 40% statewide reduction in greenhouse gas emissions from 1990 levels by 2030 and an 85% reduction by 2050; a minimum of 70% statewide electric generation produced by renewable energy by 2030; a 100% emissions-free electric demand system by 2040; and the procurement of at least 9 GW of offshore wind by 2035, 6 GW of photovoltaic solar generation by 2025, and 3 GW of energy storage resources by 2030.

investment program to be submitted to NYISO for incorporation into NYISO's transmission studies and planning processes.¹⁰ NYPA states that the AREGCBA established two paths for project selection: (1) the Public Policy Transmission Planning Process found at section 31.4 of the NYISO OATT, or (2) a separate path for "priority transmission projects" (Priority Projects) needed on an "expeditious" basis to meet the CLCPA Requirements. NYPA states that the AREGCBA directs NYPA to develop Priority Projects through a public solicitation process that assesses whether joint development would provide significant additional benefits in achieving the CLCPA Requirements.¹¹

5. NYPA states that the New York Commission established two criteria to determine whether a project qualifies as a Priority Project: (1) whether the project addresses the deliverability of existing generation,¹² and (2) whether an early in-service date for the project would increase the likelihood of meeting the CLCPA Requirements, and/or enhance the value of recent, ongoing or anticipated distribution, local transmission, and/or bulk transmission investments, and/or help the State realize benefits from such investments because it can be placed in-service sooner than the NYISO process would allow.¹³

6. NYPA states that on October 15, 2020, pursuant to authority under AREGCBA, the New York Commission issued a Priority Project Order that designated the Project as a Priority Project needed expeditiously to meet the CLCPA Requirements.¹⁴ NYPA adds that the New York Commission found that the Project met both of the New York Commission Priority Project criteria. The first criterion was met because investments in renewable generation in northern New York were not being fully realized due to transmission limitations, and the Project will allow for 7.5 TWh of renewable generation curtailments to be avoided annually. The second criterion was met because the NYISO Public Policy Transmission Planning Process could not meet the same goals in the same

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.* at 8 (citing *Order on Priority Transmission Projects*, CASE 20-E-0197, at 17 (New York Commission Oct. 15, 2020) (Priority Project Order)). NYPA states that the New York Commission described "deliverability of existing generation" as, "[t]he transmission investment's potential for unbottling existing renewable generation, as well as projects that are in the NYISO interconnection process, for delivery to load centers in the State, thereby reducing the amount of new generation that must be constructed to meet the CLCPA Requirements."

¹³ *Id.*

¹⁴ *Id.* at 7-8 (citing Priority Project Order at 25).

time frame that the Project may achieve as a Priority Project, and the Project was needed expeditiously to fully access and deliver the significant amount of existing renewable generation in the northern New York region.¹⁵

7. On March 30, 2021, after completing its public solicitation process, NYPA determined that it would develop the Project with Niagara Mohawk Power Corporation (Niagara Mohawk) as a co-participant.¹⁶ NYPA states that the total capital cost of the Project is estimated at \$1.1 billion; NYPA's share is \$641.3 million. Construction is anticipated to begin in 2022 and the anticipated in-service date for the Project is December 2025.¹⁷

8. The Project consists of rebuilding approximately 100 linear miles of existing 230 kV transmission lines in northern New York to 345 kV, along with associated substation construction and upgrades, to address existing congestion and curtailment issues by establishing, together with other projects currently under development by NYPA, a continuous 345 kV transmission path from areas of planned renewable generation to New York's load centers.¹⁸

9. NYPA states that the Project consists of two components, an approximately 46-mile northern section known as the "MW-Patnode" component and an approximately 55-mile southern section known as the "Adirondack-Porter" component.¹⁹ NYPA will own all of the MW-Patnode facilities and will own part of the Adirondack-Porter facilities, the rest of which will be owned by Niagara Mohawk. The Project includes rebuilding all or parts of the following transmission lines: NYPA's Moses-Willis 1&2, NYPA's Willis-Patnode and NYPA's Willis-Ryan; and Niagara Mohawk's Adirondack to Porter (Chases Lake-Porter Line 11, Adirondack-Porter Line 12, and Adirondack-Chases Lake Line 13), as well as connecting to NYPA's Moses-Adirondack 1&2 transmission facilities.²⁰ NYPA states that the Project is proposed to be built primarily within existing rights-of-way.

10. NYPA states that it has an application currently pending before the New York Commission for siting approval required under Article VII of the New York Public

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ *Id.* at 9-12.

¹⁹ *Id.* at 10.

²⁰ *Id.* at 9-10.

Service Law, including a *Certificate of Environmental Compatibility and Public Need* (Certificate of Need).²¹

C. Abandoned Plant Incentive Order

11. On March, 11, 2022, the Commission conditionally granted NYPA's request for authorization to recover 100% of its prudently incurred costs for the Project in the event the Project is cancelled or abandoned for reasons beyond NYPA's control (Abandoned Plant Incentive).²² The Commission found in the Abandoned Plant Incentive Order that the Project's approval through the Priority Order process did not satisfy Order No. 679's rebuttable presumption.²³ The Commission authorized the Abandoned Plant Incentive contingent upon the Project being issued a Certificate of Need by the New York Commission.²⁴

II. NYPA's Filing

12. NYPA requests two incentives pursuant to section 219 of the FPA for its portion of the investment in the Project: (1) a 50-basis point ROE Risk Adder, and (2) a Performance-based ROE Incentive. Additionally, NYPA proposes tariff revisions to its transmission Formula Rate to implement the incentives. NYPA requests that the Commission authorize the incentive rate treatment and accept the proposed tariff revisions to be effective no later than July 6, 2022.²⁵

III. Notice of Filing and Responsive Pleadings

13. Notice of NYPA's filing was published in the *Federal Register*, 87 Fed. Reg. 8829 (Feb. 16, 2022) with interventions and protests due on or before March 3, 2022. The New York Commission filed a notice of intervention. Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., Niagara Mohawk, and Municipal Electric Utilities Association of New York filed timely motions to intervene. On March

²¹ *Id.* at 21.

²² *N.Y. Power Auth.*, 178 FERC ¶ 61,172 (2022) (Abandoned Plant Incentive Order). The Commission also granted Niagara Mohawk's request for an abandoned plant incentive in Docket No. EL22-17-000. *Niagara Mohawk Power Corp.*, 178 FERC ¶ 61,173 (2022). Niagara Mohawk has filed a separate request for transmission incentives and associated tariff revisions for the Project in Docket No. ER22-1201-001.

²³ Abandoned Plant Incentive Order, 178 FERC ¶ 61,172 at P 26.

²⁴ *Id.* P 28.

²⁵ Deficiency Letter Response at 7.

4, 2022, the New York Association of Public Power submitted a motion to intervene out-of-time.

14. On April 7, 2022, Commission staff informed NYPA that its filing was deficient and additional information was necessary to evaluate its submission.

15. On May 6, 2022, NYPA submitted a response to the deficiency letter and also amended the filing to change the effective date to July 6, 2022 (Deficiency Letter Response). Notice of NYPA's Deficiency Letter Response was published in the *Federal Register*, 87 Fed. Reg. 29,154 (May 12, 2022), with interventions and protests due on or before May 27, 2022. None was filed.

IV. Discussion

A. Procedural Matters

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

17. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant the 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.

B. Substantive Matters

1. Transmission Incentives

a. Section 219 Requirement

18. In the Energy Policy Act of 2005,²⁶ Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments to promote capital investment in certain transmission infrastructure. The Commission subsequently issued Order No. 679, which sets forth processes by which a public utility may seek transmission rate incentives pursuant to section 219, including the incentives requested here by NYPA. In November 2012, the Commission issued the 2012 Incentives Policy Statement providing additional guidance regarding its evaluation of applications for transmission rate incentives under section 219 and Order No. 679.²⁷

²⁶ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594 (2005).

²⁷ *Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (2012 Incentives Policy Statement).

19. Pursuant to Order No. 679, an applicant may seek to obtain incentive rate treatment for a transmission infrastructure investment that satisfies the requirements of section 219, i.e., the applicant must show that “the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion.”²⁸ The Commission established the process for an applicant to demonstrate that it meets this standard, including a rebuttable presumption that the standard is met if: (1) the transmission project results from a fair and open regional planning process that considers and evaluates the project for reliability and/or congestion and is found to be acceptable to the Commission; or (2) a project has received construction approval from an appropriate state commission or state siting authority.²⁹ The Commission also stated that “other applicants not meeting these criteria may nonetheless demonstrate that their project is needed to maintain reliability or reduce congestion by presenting [to the Commission] a factual record that would support such a finding.”³⁰

i. NYPA’s Request

20. NYPA states that the Project should qualify for a rebuttable presumption under Order No. 679 because the Project has been designated as a Priority Project by the New York Commission as a part of its mandate under AREGCBA to expedite bulk transmission investments needed to achieve the CLCPA Requirements.³¹ NYPA adds that, in Order No. 679, the Commission stated that it will adopt the rebuttable presumption for “projects approved by an appropriate state commission or siting authority.”³² NYPA further states that the Project has resulted from a fair and open planning process because the public has been afforded the opportunity to comment on New York Commission planning actions relative to the designation of the Project as a Priority Project under AREGCBA.³³

21. NYPA states that, because the New York Commission substantively approved the Project, and because the Project has been identified as a part of the New York Commission’s AREGCBA-required planning process, the Project should be considered by the Commission to qualify for Order No. 679’s rebuttable presumption.³⁴

²⁸ Order No. 679, 116 FERC ¶ 61,057 at P 76.

²⁹ *Id.* P 58.

³⁰ *Id.* P 57; *see also* Order No. 679-A, 117 FERC ¶ 61,345 at P 41.

³¹ Filing at 17.

³² *Id.* at 16-17 (quoting Order No. 679, 116 FERC ¶ 61,057 at P 54).

³³ *Id.* at 17-18.

22. Alternatively, NYPA states that, if the Commission were to determine that the Project does not qualify for the rebuttable presumption, the Project is eligible for the requested incentives because the Project is needed to maintain reliability and reduce congestion.³⁵ Specifically, NYPA states that the Project will provide significant reliability benefits by facilitating a more robust transmission system in northern New York and enable an additional 1,000 MW of transfer capability for clean energy from northern New York and Canada to load downstate that will be necessary to meet the CLCPA Requirements. NYPA adds that the Project will also reduce congestion in northern New York, stating that it is estimated to result in approximately \$450 million in congestion cost savings in northern New York.³⁶

23. Relying on the Article VII Application Engineering Justification that it filed with the New York Commission, NYPA states that the Project will interconnect directly to the existing transmission backbone system of the New York Control Area and will improve reliability by reinforcing the Moses – Adirondack – Porter and Moses – Willis – Patnode/Ryan Transmission corridors.³⁷ NYPA states that the Project will complement and expand upon NYPA’s rebuild of the Smart Path Project and Segments A and B of the AC Transmission Projects³⁸ to establish a continuous 345 kV path that greatly expands the energy and capacity deliverability of renewable generation from northern and western New York to load centers.

24. NYPA further states that the Project will also enable an increase in power transfer limits across the Moses-South NYCA interface and enhance reliability by replacing the existing wood H-frame structures with steel monopole structures, thus diminishing the level of “ice-loading” to which the pole structures are subjected.³⁹

ii. Commission Determination

25. As the Commission found in the Abandoned Plant Incentive Order,⁴⁰ we find here that the Project does not qualify for the Order No. 679 rebuttable presumption because it

³⁴ *Id.* at 18.

³⁵ *Id.* at 18-19.

³⁶ *Id.*

³⁷ *Id.* at 13-15.

³⁸ *Id.* at 15; *see N. Y. Power Auth.*, 169 FERC ¶ 61,125 (2019).

³⁹ *Id.*

⁴⁰ Abandoned Plant Incentive Order, 178 FERC ¶ 61,172 at P 26.

has neither been approved in a regional planning process nor received state construction approval. Although NYPA argues that the designation of the Project as a Priority Project by the New York Commission should qualify the Project for the rebuttable presumption, we find that NYPA did not sufficiently demonstrate that this process considered whether the Project ensures reliability or reduces the cost of delivered power by reducing the cost of congestion, as contemplated by section 219 and Order No. 679.⁴¹

26. Additionally, NYPA has not provided the Commission with the necessary evidentiary support to determine that the Project ensures reliability or reduces the price of delivered power by reducing congestion as required by Order No. 679.⁴² While NYPA enumerates the reliability and congestion benefits of the Project, it did not submit evidence, such as separate reports or affidavits, supporting these claims. Accordingly, we find that NYPA has not provided substantial evidence showing that the Project satisfies the reliability or congestion criteria of section 219.

27. However, the Commission has previously found, including in the Abandoned Plant Incentive Order, that it is appropriate to consider projects that are still undergoing state approval and make any requested incentive rate treatment contingent upon construction approval by the state commission or siting authority.⁴³ In this case, state construction approval is pending in the form of the New York Commission Certificate of Need application, which may be an appropriate basis for finding that the section 219 criteria are met. Because the New York Commission Certificate of Need process may adequately consider the reliability and congestion-relieving impacts of the Project, we authorize the ROE Risk Adder and Performance-based ROE Incentive, as discussed below, conditioned upon the New York Commission issuing a Certificate of Need for the Project that addresses reliability and congestion in the manner contemplated by section 219. We direct NYPA to submit a compliance filing within 30 days of issuance of the Certificate of Need for the Project by the New York Commission. NYPA must demonstrate in its compliance filing that the Certificate of Need process adequately considered and found that the Project will ensure reliability or reduce the cost of delivered power by mitigating congestion consistent with Order No. 679-A.⁴⁴

⁴¹ Order No. 679-A, 117 FERC ¶ 61,345 at PP 41, 46.

⁴² Abandoned Plant Incentive Order, 178 FERC ¶ 61,172 at P 27.

⁴³ Abandoned Plant Incentive Order, 178 FERC ¶ 61,172 at P 28 (citing *Xcel Energy Servs., Inc.*, 121 FERC ¶ 61,284, at P 53 (2007); *N. Y. Reg'l Interconnect, Inc.*, 124 FERC ¶ 61,259, at P 36 (2008)).

⁴⁴ See Order No. 679-A, 117 FERC ¶ 61,345 at P 49. See also *Cent. Me. Power Co.*, 125 FERC ¶ 61,182, at P 57 (2008) (directing further filing).

b. Order No. 679 Nexus

28. In addition to satisfying the section 219 requirement of ensuring reliability and/or reducing the cost of delivered power by reducing congestion, Order No. 679 requires an applicant to demonstrate that there is a nexus between the incentive sought and the investment being made.⁴⁵ In Order No. 679-A, the Commission clarified that the nexus test is met when an applicant demonstrates that the total package of incentives requested is “tailored to address the demonstrable risks or challenges faced by the applicant.”⁴⁶ The Commission requires a project-specific demonstration of the nexus between the requested incentives and the risks and challenges of the project.⁴⁷ Applicants must provide sufficient support to allow the Commission to evaluate each element of the package and the interrelationship of all elements of the package.⁴⁸ The Commission noted that this nexus test is fact-specific and requires the Commission to review each application on a case-by-case basis.⁴⁹ We address the nexus test below for each incentive and for the total package of incentives requested.

i. ROE Risk Adder Incentive

(a) NYPA’s Request

29. NYPA requests a 50-basis point ROE Risk Adder to address the risks and challenges in developing its portion of the Project. NYPA asserts that it satisfies the four showings expected under the Commission’s 2012 Incentives Policy Statement to obtain the ROE Risk Adder: (1) an explanation of the specific risks and challenges of the Project; (2) a demonstration that the applicant is taking appropriate steps and using appropriate mechanisms to mitigate risks during project development; (3) a demonstration that alternatives to the Project have been, or will be, considered in the relevant transmission planning process; and (4) an explanation of whether the applicant is committed to limiting the application of the ROE Risk Adder for risks and challenges to a cost estimate.⁵⁰

⁴⁵ Order No. 679, 116 FERC ¶ 61,057 at P 48.

⁴⁶ Order No. 679-A, 117 FERC ¶ 61,345 at P 40.

⁴⁷ See 18 C.F.R. § 35.35(d) (2021).

⁴⁸ 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 10 (quoting Order No. 679-A, 117 FERC ¶ 61,345 at P 27).

⁴⁹ Order No. 679, 116 FERC ¶ 61,057 at P 43.

⁵⁰ Filing at 24; 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at PP 20-30.

30. For the first showing of risks and challenges, NYPA states that there are financial risks and challenges because of the size of NYPA's proposed investment, \$641.3 million for its share of the Project, compared to its current average annual transmission investment.⁵¹ NYPA states that the Project is the single largest expenditure in NYPA's 2021-2025 capital plan, representing almost 20% of NYPA's total capital investments, and NYPA will experience a significant cash drain during the Project's construction.⁵² NYPA also notes environmental, regulatory, and siting risks and the possibility of legal challenges and regulatory challenges, including the need to obtain approval through the New York Commission Article VII certification and other permitting processes.⁵³ NYPA emphasizes the uncertainty in obtaining existing rights-of-way from incumbent public utilities, governmental entities, and private landowners.⁵⁴ NYPA further identifies execution risks related to the COVID-19 pandemic and the current political environment that include material procurement risks, labor shortages, and construction risks.⁵⁵ NYPA states that the numerous system outages that will need to be coordinated may impact the Project timeline, which could impose additional costs.

31. NYPA further claims that the Project qualifies as two of the three types of projects that the Commission anticipated may face the types of risks and challenges that would not be addressed by either the base ROE or risk-reducing incentives.⁵⁶ NYPA states that the project will (1) unlock location constrained generation resources and (2) relieve chronic and severe congestion. Specifically, NYPA states that the Project will provide significant reliability benefits by facilitating a more robust transmission system in northern New York and enabling an additional 1,000 MW of transfer capability for clean energy from northern New York and Canada to load downstate that will be necessary to meet the CLCPA Requirements.⁵⁷ Additionally, NYPA states that the Project will eliminate 7.5 TWh of renewable curtailments per year and result in congestion cost savings of \$450 million per year in the northern New York region.⁵⁸

⁵¹ *Id.* at 19.

⁵² *Id.* at 19, 28.

⁵³ *Id.* at 21-22.

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 23-24.

⁵⁶ *Id.* at 25 (citing 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 21).

⁵⁷ *Id.* at 18.

⁵⁸ *Id.* at 26.

32. NYPA argues that the Project's full risks are not identified by its requested Abandoned Plant Incentive, asserting that the incentive only addresses the risks regarding cancellation of the project beyond NYPA's control and not the financial risks and challenges of the Project.⁵⁹ NYPA also asserts that the Project's risks and challenges are not already accounted for by NYPA's 8.95% base ROE because the risks of the Project are greater than typical investment in new infrastructure.

33. For the second showing set forth in the 2012 Incentives Policy Statement, NYPA states that it is taking appropriate steps to minimize risks and challenges including utilizing its Formula Rate in accordance with existing procedures set forth in NYPA's Formula Rate Implementation Protocols.⁶⁰ NYPA adds that it selected Niagara Mohawk as joint developer to mitigate the risk associated with the size of its own capital outlay and the risk associated with having to obtain rights-of-way from Niagara Mohawk. NYPA states that it requested the Abandoned Plant Incentive to mitigate the risks of Project cancellation beyond NYPA's control and will utilize best in class project management practices to reduce risks.

34. For the third showing that alternatives to the project were considered in the relevant transmission planning process, NYPA states that the Commission has determined that this showing can be satisfied where an applicant's project was considered by a local regulatory body, such as a state utility commission, that evaluated alternatives to the proposed project and determined that the proposed project is preferable to the alternatives evaluated.⁶¹ NYPA states that the New York Commission process under AREGCBA considered alternatives to the Project and determined that the Project is preferable to alternative projects because it is likely to be placed in-service earlier.⁶²

35. For the fourth showing, NYPA states that its application of an ROE Risk Adder will be limited to a cost estimate.⁶³ NYPA states that its proposed cost-containment and risk-sharing mechanism commits it to limiting the application of the ROE Risk Adder for risks and challenges to a cost estimate.⁶⁴ NYPA further states that the mechanism is similar to cost-containment and risk-sharing mechanisms previously approved by the Commission for LS Power Grid New York Corporation I (LSPG-NY) and NYPA as it relates to their investment in the Alternating Current (AC) Transmission Public Policy

⁵⁹ *Id.* at 26-27.

⁶⁰ *Id.* at 28 (citing NYISO OATT, attach. H, § 14.2.3.2.7).

⁶¹ *Id.* at 29 (citing 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 12).

⁶² *Id.* at 30.

⁶³ *Id.* (citing 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 28).

⁶⁴ *Id.* at 32.

Transmission Need project (Segment A Project).⁶⁵ NYPA states that it is adopting an 80/20 cost-containment mechanism, under which NYPA will earn no ROE for 20% of the equity portion of the costs that are greater than the cost estimate.

(b) Commission Determination

36. We grant the requested 50-basis point ROE Risk Adder for risks and challenges for the Project, conditioned upon the New York Commission issuing a Certificate of Need for the Project and a compliance filing as discussed above.

37. The Commission stated in Order No. 679-A that it would authorize incentive ROEs for new transmission projects that demonstrate particular risks and challenges. In the 2012 Incentives Policy Statement, the Commission offered additional guidance for applicants seeking an incentive ROE adder based on a project's risks and challenges and identified four showings an applicant is expected to make to justify the need for an incentive ROE adder based on a project's risks and challenges. First, an applicant is expected to demonstrate that the proposed project faces risks and challenges that are not either already accounted for in the applicant's base ROE or addressed through the risk-reducing incentives. The Commission elaborated on types of projects that it anticipated may face the types of risks and challenges that would not be addressed by either the base ROE or risk-reducing incentives:

- 1) projects that relieve chronic or severe congestion that have demonstrated cost impacts to consumers;
- 2) projects that unlock location constrained generation resources that previously had limited or no access to the wholesale electricity markets;
- 3) projects that apply new technologies to facilitate more efficient and reliable usage and operation of existing or new facilities.

38. Second, an applicant is expected to demonstrate that it has taken appropriate steps and implemented appropriate mechanisms to minimize its risks during project development. Third, an applicant is expected to demonstrate that alternatives to the project have been, or will be, considered in either a relevant transmission planning process or another appropriate forum. Fourth, an applicant is expected to commit to limit the application of such incentive ROE adder to a cost estimate.

39. We find that NYPA satisfies each of these expectations. As to the first showing, we find that the Project will unlock existing location-constrained generation resources in northern New York by increasing transfer capability by an additional 1,000 MW.⁶⁶

⁶⁵ *Id.* at 30 (citing the Segment A Project by NYPA and LSPG-NY in Docket Nos. ER21-2392 and ER20-716, respectively).

NYISO data shows that wind curtailments alone are significant, averaging more than 66 GWh per year from 2018-2020.⁶⁷ NYISO also previously determined that between 975 and 1,050 MW of increased transmission capability would be needed on the northern New York 230 kV and 115 kV systems to unbottle potentially curtailed location-constrained generation.⁶⁸

40. We also find that NYPA has satisfied the other three showings expected under the 2012 Incentives Policy Statement. As to the second showing, we find that NYPA has demonstrated that it is taking appropriate steps and using appropriate mechanisms to minimize risk during project development by (1) requesting the Abandoned Plant Incentive, which has been granted, (2) committing to using best-in-class project management practices, and (3) selecting a co-developer with relevant experience to spread the risk. As to the third showing on the consideration of alternatives, the Project was evaluated against alternatives in the New York Commission Priority Project proceeding. Finally, as to the fourth showing, as clarified below, we find that NYPA has committed to limiting the application of the ROE incentive to the Project's cost estimate.

41. For these reasons, we find that NYPA has sufficiently demonstrated that a 50-basis point ROE Risk Adder is warranted for the Project. NYPA's ability to implement the ROE Risk Adder is bounded by the upper end of the zone of reasonableness of its base ROE.

ii. Performance-based ROE Incentive

(a) NYPA's Request

42. NYPA states that it is seeking the Performance-based ROE Incentive as part of its cost-containment mechanism. NYPA contends that the Performance-based ROE Incentive acts to balance the competing interests of NYPA and New York electric customers.⁶⁹ First, NYPA contends that the cost-containment mechanism with the Performance-based ROE Incentive reinforces NYPA's engagement in cost effective

⁶⁶ *Id.* at 13.

⁶⁷ *Id.* at 7 (citing NYISO, *Power Trends 2021 – New York's Clean Energy Grid of the Future: The New York ISO Annual Grid & Markets Report*, at 16 (fig. 9) (2021)).

⁶⁸ *Id.* (citing *In re New York Independent System Operator, Inc.'s Proposed Public Policy Transmission Needs for Consideration for 2018*, Comments of the New York Independent System Operator, Inc., New York Commission Case 18-E-0623, at 6 (Jan. 22, 2019)).

⁶⁹ Deficiency Letter Response at 5.

practices by penalizing NYPA if it exceeds the cost cap,⁷⁰ and incentivizing NYPA for coming in under the adjusted cost cap.⁷¹ NYPA contends that the Performance-based ROE Incentive partially mitigates the risk NYPA assumes as a result of agreeing to the cost-containment mechanism by incentivizing NYPA's actual Project costs to be lower than estimated.⁷²

43. NYPA contends that the cost-containment mechanism with the Performance-based ROE Incentive is consistent with prior precedent and policy and should be approved in tandem with the requested ROE Risk Adder. NYPA states that the Performance-based ROE Incentive it requests here is substantially similar to Performance-based ROE Incentives the Commission accepted for LSPG-NY's and NYPA's transmission investment portions of the Segment A Project.⁷³ Specifically, NYPA states that it proposes to adopt an 80/20 cost-containment mechanism, under which NYPA will earn no ROE for 20% of the equity portion of the costs that are greater than the cost estimate.⁷⁴ NYPA states that for 80% of the equity portion of the costs that are greater than the cost estimate, NYPA will earn only its base ROE (i.e., NYPA will not earn the ROE Risk Adder, nor its approved adder for participation in a regional transmission organization).⁷⁵ NYPA states that like with LSPG-NY and NYPA's approved cost-containment

⁷⁰ Filing at 32-33. See Filing, Attachment E at 3, 15. NYPA states that the cost cap equals the Project cost estimate, prepared in mid-2021 for purposes of the State Article VII permitting process before the New York Commission, less allowance for funds used during construction (AFUDC) and less estimated interconnection and network upgrades resulting from the NYISO evaluation process, or \$568,041,000.

⁷¹ *Id.* at 34-35. See Filing, Attachment E at 15. NYPA states that the adjusted cost cap is the cost cap less 50% of the Project cost contingency included in the cost cap. The adjusted cost cap for NYPA's portion of the Project is \$535,548,000.

⁷² Deficiency Letter Response at 6.

⁷³ Deficiency Letter Response at 6 (citing *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,210 (2021) (order approving LSPG-NY Settlement), *N.Y. Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,159, at PP 46-53 (2020); *N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,211 (2021) (Commission letter order)).

⁷⁴ Filing at 32.

⁷⁵ *Id.* at 31-32 (citing *New York Indep. Sys. Operator, Inc.*, Offer of Settlement Docket No. ER16-835-000 at 3.1 (filed Sept. 30, 2016); *accord N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268, at P 21, *errata*, 155 FERC ¶ 61,027 (2016) (NYPA states that the 50-basis point ROE adder for participation in the NYISO applies to all investments included in the NTAC that was established at the start of NYPA's transmission formula rate in 2016)).

mechanism for the Segment A Project, if the project costs fall below the adjusted cost cap, NYPA will add additional ROE premiums onto the base ROE and ROE incentives through a sliding scale of up to 71 basis points.⁷⁶ NYPA also states that prior to approving the Performance-based ROE Incentives for LSPG-NY and NYPA's portions of the Segment A Project, the Commission approved, through orders on Settlements, Performance-based ROE Incentives as part of New York Transco, LLC's (NY Transco) investment in the AC Project and NextEra Energy Transmission New York, Inc.'s (NEET-NY) investment in its Empire State Line Project.⁷⁷

(b) Commission Determination

44. We grant the Performance-based ROE Incentive conditioned upon the New York Commission issuing a Certificate of Need for the Project and a subsequent compliance filing as discussed above.

45. In Order No. 679 the Commission did not adopt a generic approach to performance-based incentives and stated that it would continue to work with industry to evaluate performance-based proposals.⁷⁸ Here, NYPA proposes its Performance-based ROE Incentive as part of a package that includes an ROE Risk Adder Incentive, relying in part on the cost-containment mechanism associated with the Performance-based ROE Incentive to demonstrate that it has committed to limiting the application of the ROE Risk Adder Incentive to the Project's cost estimate. The cost-containment mechanism incorporated in NYPA's proposed Performance-based ROE Incentive both mitigates the risk of cost overruns for ratepayers and incentivizes NYPA to come in under the proposed cost cap. We thus find that NYPA has provided sufficient support for the Performance-based ROE Incentive to meet the nexus test. Any greater returns are balanced by decreased costs for the Project if the benchmarks are met, which would result overall in reduced costs for ratepayers.

46. Accordingly, we grant the requested Performance-based ROE Incentive conditioned upon the New York Commission issuing a Certificate of Need for the Project and a compliance filing as discussed above. Furthermore, we find that NYPA's ability to implement the Performance-based ROE Incentive is bounded by the upper end of the zone of reasonableness.⁷⁹

⁷⁶ *Id.* at 34-35. See Filing, Attachment E at 15.

⁷⁷ Deficiency Letter Response at 6 (citing *N. Y. Transco, LLC*, 161 FERC ¶ 61,161 (2017) (order approving NY Transco Settlement); *NextEra Energy Transmissions N. Y., Inc.*, 164 FERC ¶ 61,117 (2018) (order approving NEET-NY Settlement)).

⁷⁸ Order No. 679, 116 FERC ¶ 61,057 at P 272.

iii. Total Package of Incentives

(a) NYPA's Request

47. NYPA contends that the total package of incentives requested, including the Abandoned Plant Incentive that was already conditionally granted, are narrowly tailored to address the specific challenges faced by NYPA in developing the Project. NYPA states that the Abandoned Plant Incentive is warranted because the Project faces significant financial, regulatory, permitting, and other requirements that may result in the Project being terminated at no fault of NYPA.⁸⁰

48. NYPA states that the ROE Risk Adder is intended to address the additional risks associated with the Project that are not adequately addressed by the Abandoned Plant Incentive or the base ROE.⁸¹ NYPA states that authorization of the ROE Risk Adder is merited given the Project's significant scope and complexity, as well as its ability to relieve costs associated with severe and chronic congestion, consistent with the Commission's 2012 Incentives Policy Statement. NYPA states that the ROE Risk Adder will help to mitigate the risk of non-recovery of any investments that may be deemed non-recoverable in an abandonment filing with the Commission, such as pre-filing Project costs, in the event NYPA is forced to abandon all or part of the Project. Further, NYPA states that the risks and challenges of the Project are not adequately addressed by the base ROE. NYPA states that the Commission has already approved ROE Risk Adders for major transmission projects that are substantially similar, yet smaller in scope and investment as compared to the Project.

49. NYPA states that the Performance-based ROE Incentive mitigates the risk of significant cost overruns to New York electric customers by penalizing NYPA if actual Project costs exceed the cost cap while also mitigating the risk that NYPA incurred because of its agreement to the cost-containment mechanism by incentivizing NYPA to come in under an adjusted cost cap. NYPA asserts that the more the actual cost of the Project falls below the adjusted cost cap, the greater the benefit to customers – a benefit that far exceeds the benefit of the Performance-based ROE Incentive to NYPA.

⁷⁹ In order for NYPA's incentives to be consistent with section 205 of the FPA, the total ROE, inclusive of all ROE incentives, must be within the zone of reasonableness. *See* Order No. 679, 116 FERC ¶ 61,057 at PP 3, 93, 278.

⁸⁰ Filing at 37.

⁸¹ *Id.* at 37.

(b) Commission Determination

50. We find that the total package of incentives that we grant here is tailored to address the demonstrable risks and challenges that NYPA faces in undertaking the Project. As noted above, in Order No. 679-A, the Commission clarified that its nexus test is met when an applicant demonstrates that the total package of incentives requested is tailored to address the demonstrable risks or challenges faced by the applicant.⁸² Applicants must provide sufficient support to allow the Commission to evaluate each element of the package and the interrelationship of all elements of the package.⁸³ The Commission noted that this nexus test is fact-specific and requires the Commission to review each application on a case-by-case basis. The Commission has, in prior cases, approved multiple rate incentives for particular projects where appropriate.⁸⁴ This is consistent with Order No. 679 and our interpretation of FPA section 219 authorizing the Commission to approve more than one incentive rate treatment for an applicant proposing a new transmission project, as long as each incentive is justified by a showing that it satisfies the requirements of section 219 and is appropriate.

51. For the reasons discussed above, we find that NYPA has demonstrated that each of the requested incentives that we authorize here, and the incentives package as a whole, addresses the risks and challenges faced by NYPA in undertaking the Project.

2. Formula Rate

a. NYPA's Request

52. NYPA proposes tariff revisions to section 14.2.3.1 of Attachment H of the NYISO OATT, which contains NYPA's transmission Formula Rate, to implement the requested incentives. These include revisions to the Index, Schedule Summary, Schedule D2, Schedule F1, and Schedule F3 of its Formula Rate, as well as the addition of Work Paper BJ to its Formula Rate to incorporate the ROE Risk Adder and Performance-Based ROE Incentive to be used in connection with NYPA's recovery of the Project's costs.⁸⁵

⁸² Order No. 679-A, 117 FERC ¶ 61,345 at P 40; 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 10.

⁸³ 2012 Incentives Policy Statement, 141 FERC ¶ 61,129 at P 10 (quoting Order No. 679-A, 117 FERC ¶ 61,345 at P 40).

⁸⁴ Order No. 679, 116 FERC ¶ 61,057 at P 55; *see also Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,246, at P 35 (2015).

⁸⁵ Filing at 1-2, 35-36.

b. Commission Determination

53. We find that the proposed tariff revisions to NYPA's Formula Rate implementing the incentive rates that we conditionally authorize in this order are just and reasonable and we accept those revisions conditioned upon the New York Commission issuing a Certificate of Need for the Project and a subsequent compliance filing as discussed above.

3. Waiver Request

a. NYPA's Request

54. NYPA requests that, based on its status as a "municipality" within the meaning of section 3(7) of the FPA and as a "state instrumentality" within the meaning of FPA section 201(f), an exemption be granted from compliance with section 35.13 of the Commission's regulations.⁸⁶ NYPA also requests that the Commission grant waiver of any other requirements of its regulations as necessary.

b. Commission Determination

55. We grant NYPA's requested waiver of section 35.13 of the Commission's regulations. Prior Commission orders have granted to non-jurisdictional utilities, such as NYPA, waiver of the Commission's regulatory filing requirements because such utilities are not subject to section 205 of the FPA.⁸⁷ Nonetheless, in order to enable the Commission to conduct a section 205 evaluation of the justness and reasonableness of NYPA's proposed tariff revisions to its Formula Rate as discussed above, there must be a sufficient record developed in order to permit the Commission to make such an evaluation.

The Commission orders:

(A) NYPA's request for waiver from compliance with section 35.13 of the Commission's regulations are hereby granted.

(B) NYPA's proposed tariff revisions to its Formula Rate are hereby accepted, conditioned upon the New York Commission issuing a Certificate of Need for the Project, as discussed in the body of this order, with an effective date of July 6, 2022.

(C) NYPA's requests for the ROE Risk Adder and Performance-based ROE

⁸⁶ 18 C.F.R. § 35.13 (2021).

⁸⁷ *City of Vernon, Cal.*, 111 FERC ¶ 61,092 at P 44 & n.55 (2005); *see also N.Y. Indep. Sys. Operator*, 154 FERC ¶ 61,268 at P 69; *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, at P 36 (2012).

Incentive, are hereby granted, conditioned upon the New York Commission issuing a Certificate of Need for the Project, as discussed in the body of this order, with an effective date of July 6, 2022.

(D) NYPA is hereby directed to submit a compliance filing within 30 days of issuance of the Certificate of Need for the Project by the New York Commission, as discussed in the body of this order.

By the Commission. Commissioner Christie is concurring 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.
New York Power Authority

Docket No. ER22-1014-001

(Issued July 5, 2022)

CHRISTIE, Commissioner, *concurring*:

1. I concur in today's order because conditionally granting¹ NYPA's request for the ROE Risk Adder and the Performance-based ROE Incentive, along with the associated tariff revisions to its transmission Formula Rate, appears consistent with current Commission precedent and policy.² Moreover, and importantly, any costs that result from granting these incentives and related tariff revisions will not be paid by consumers in any state outside of New York.

2. I have made my views on this subject known in other proceedings, but it bears restatement here: The costs related to a public policy project – which the Smart Path Connect Project is³ – should be borne by the sponsoring state and not shifted to consumers in other states without the consent of responsible officials in those states, who can then be held accountable by the voters of that state for their decisions (as can officials in the sponsoring state). That is how democracy is supposed to work. As I noted in a recent NYISO-related order:

¹ Today's order finds that NYPA did not meet certain requirements of Order No. 679 or section 219 of the Federal Power Act and therefore approves the incentives contingent, *inter alia*, on "the New York Commission issuing a Certificate of Need for the Project that addresses reliability and congestion in the manner contemplated by section 219." *N.Y. Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,004, at P 27 (2022). NYPA is required by today's order to make a compliance filing "within 30 days of issuance of the Certificate of Need for the Project by the New York Commission. NYPA must demonstrate in its compliance filing that the Certificate of Need process adequately considered and found that the Project will ensure reliability or reduce the cost of delivered power by mitigating congestion consistent with Order No. 679-A." *Id.*

² See, e.g., *id.* at PP 18-19, 28, 36-41, 44-46, 50-51.

³ See, e.g., NYPA February 10, 2022 Filing at 2 ("The SPC Project was identified and selected by the New York State Public Service Commission ("NYPSC") as a 'priority transmission project' ("Priority Project"), the construction of which is needed 'expeditiously' to meet the State's clean energy goals.").

Here the record shows – *and this is critically important to my analysis* – that no one has suggested that this single-state ISO’s proposal to accommodate the resource decisions made by the New York legislature will harm consumers in other states. Thus, there being no evidence in this record that citizens of other states will be made to pay for New York’s policy decisions through the potential impacts of NYISO’s proposed tariff revisions, I conclude that any costs will be confined to New York. Based on the particular set of facts in this record, I do not find that the NYISO proposal “as-applied” results in rates that are “unjust, unreasonable and unduly discriminatory or preferential” under the FPA. *If the people and businesses of New York do not like the impacts of their new state laws, their recourse is to the ballot box.*⁴

⁴ *N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,102 (2022) (Christie, Comm’r, concurring at P 3 (emphasis in original) (available at <https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-nyiso-tariff-revisions-re-marginal-capacity>) (quoting *N.Y. Indep. Sys. Operator, Inc.*, 178 FERC ¶ 61,101 (2022) (Christie, Comm’r, concurring at PP 4-6) (available at <https://www.ferc.gov/news-events/news/item-e-2-commissioner-mark-c-christie-concurrence-regarding-new-york-independent>)); see also *NSTAR Elec Co.*, 179 FERC ¶ 61,200 (2022) (Christie, Comm’r, concurring at P 10) (“To reiterate, imposing the costs of a project driven by one state’s public policies onto another state that has not consented to such cost allocation would, in my view, presumably result in unjust and unreasonable rates.”) (available at <https://www.ferc.gov/media/e-13-er22-1247-000>); *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,110 (2021) (Christie, Comm’r, concurring at P 3) (“I also note that the NYISO is a single-state ISO and I have been able to locate no evidence in the record that the New York policies at issue in today’s order are causing cost-shifting onto consumers in other states. *If consumers in other states were disadvantaged, I may well view this matter differently.*”) (emphasis added) (available at <https://www.ferc.gov/news-events/news/item-e-2-commissioner-mark-c-christie-concurrence-regarding-new-york-state-public>); cf. Commissioner Mark C. Christie, Fair RATES Act Statement on PJM Minimum Offer Price Rule (MOPR) Revisions, Docket No. ER21-2582-000 at P 6 (Oct. 19, 2021) (“. . . I would have proposed that PJM formulate a replacement for the current MOPR based on three broad principles: (1) a state may designate specific or categorical resources as ‘public policy resources’ and such designated resources will be funded through a mechanism *chosen by the state* outside of the capacity market . . . and (3) *non-sponsoring state consumers would not be forced to pay for another state’s designated public-policy resources.*”) (footnotes omitted) (emphasis in the original and added) (available at <https://www.ferc.gov/news-events/news/commissioner-christies-fair-rates-act-statement-pjm-mopr>).

3. Here, there is no evidence in the record, nor is there any protest or comment to suggest, that consumers other than those in the state of New York will pay the costs associated with the incentives at issue in today's order.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner