

189 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman;
Mark C. Christie, David Rosner,
Lindsay S. See and Judy W. Chang

New York Power Authority
New York Independent System Operator, Inc.

Docket No. ER25-198-000

ORDER ON TARIFF REVISIONS AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued December 23, 2024)

1. On October 24, 2024, pursuant to section 205 of the Federal Power Act (FPA)¹ and part 35 of the Commission's regulations,² New York Independent System Operator, Inc. (NYISO), on behalf of New York Power Authority (NYPA), submitted revisions to section 14.2.3.1 of Attachment H of the NYISO Open Access Transmission Tariff (OATT) to amend the return on equity (ROE) contained in the NYPA transmission formula rate template (Formula Rate), which calculates NYPA's net annual transmission revenue requirement (ATRR), to 10.98%.³ Notwithstanding its non-jurisdictional status, NYPA commits to making appropriate refunds for any collection based on the ATRR that exceeds what the Commission accepts as just and reasonable.⁴ As discussed below, we accept NYPA's proposed OATT revisions, to be effective November 1, 2024, as requested, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. NYPA is a corporate municipal instrumentality and a political subdivision of the State of New York, organized under the laws of the state, and operating pursuant to Title 1 of Article 5 of the New York Public Authorities Law.⁵ NYPA states that it is a

¹ 16 U.S.C. § 824d.

² 18 C.F.R. pt. 35 (2024).

³ See NYISO, NYISO Tariffs, NYISO OATT, attach. H (Annual Transmission Revenue Requirement for Point-To-Point Transmission Service and Network Integration Transmission Service), §§ 14.2.3-14.2.3.1 (NYPA Formula Rate) (14.0.0).

⁴ Transmittal at 9.

“municipality” within the meaning of FPA section 3(7) and is a “state instrumentality” within the meaning of FPA section 201(f).⁶ NYPA generates, transmits, and sells electric power and energy at wholesale and retail throughout New York. 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 and recovered in NYPA’s Formula Rate.⁷

3. NYPA states that its over \$4.5 billion investment in constructing and expanding its transmission infrastructure and generation from 2024 to 2030 is instrumental to achieving the requirements of New York State’s Climate Leadership and Community Protection Act (CLCPA).⁸ Additionally, NYPA states that the Accelerated Renewable Energy Growth and Community Benefit Act requires New York State to provide for the construction of expanded transmission and distribution infrastructure sufficient to ensure that new renewable energy generation projects used to meet the CLCPA requirements can be timely and cost-effectively delivered to load.

II. NYPA’s Filing

4. NYPA states its current 8.95% base ROE is the result of a 2016 settlement, which NYPA has used in its Formula Rate since 2016.⁹ NYPA asserts that current economic conditions are far different than those that applied in 2016.¹⁰ NYPA states that it expects to invest over \$4.5 billion to construct and expand clean energy transmission infrastructure, generation facilities, and supporting plant through 2030 and that additional capital spending in renewable generation may materialize in light of NYPA’s expanded

⁵ *Id.* at 2.

⁶ *Id.* (citing 16 U.S.C. §§ 796(7), 824(f)).

⁷ *Id.* at 2 (referencing NYISO, NYISO Tariffs, NYISO OATT, attach. H (Annual Transmission Revenue Requirement), § 14.2.2 (NYPA Transmission Adjustment Charge) (1.0.0), § 14.2.2.2).

⁸ *Id.* at 2-3.

⁹ *Id.* at 4-5 (citing *N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,043 (2017)).

¹⁰ *Id.* at 5 & app. C (Direct Testimony of Joshua C. Nowak), at 8-18 (Nowak Test.).

legislative authority enacted by New York State in 2023.¹¹ NYPA explains that it plans to finance these investments through internally-generated funds and debt markets.

5. NYPA argues that the proposed base ROE of 10.98% is just and reasonable.¹² NYPA explains that 10.98% is the median value and within the zone of reasonableness calculated under the Commission's two-model method, which averages the two-step Discounted Cash Flow (DCF) model and Capital Asset Pricing Model (CAPM), identifying a zone of reasonableness from 8.87% to 12.32%. NYPA also explains that an ROE of 10.98% is within the zone of reasonableness calculated under the three-model method, which averages the two-step DCF, CAPM, and Risk Premium models, identifying a zone of reasonableness from 8.80% to 12.25%. NYPA adds that its DCF and CAPM analyses are based on cost of equity estimates for a proxy group established by NYPA's testimony.¹³ NYPA explains that it is appropriate to adopt the two-model method because, in October 2024, the Commission determined that inclusion of the Risk Premium model could not be justified.¹⁴ NYPA states that it presented the results of both the two-model method and the three-model method because the Commission has relied upon the Risk Premium model in other recent decisions, and the October 2024 MISO Order did not entirely foreclose using the Risk Premium model in future proceedings.¹⁵

6. NYPA contends that ROE plays a critical role in determining access to capital because investors will only invest in opportunities where they are able to receive a return that is commensurate with the associated risks.¹⁶ NYPA adds that the Commission

¹¹ Transmittal at 5 & app. D (Prepared Direct Testimony of Scott Tetenman on Behalf of New York Power Authority), at 7 (Tetenman Test.).

¹² Transmittal at 4-8.

¹³ *Id.* at 4; Nowak Test. at 36-39.

¹⁴ Transmittal at 4 (citing *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 189 FERC ¶ 61,036, at PP 1, 19-24 (2024) (October 2024 MISO Order)).

¹⁵ *Id.* (citing *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175, at PP 1, 20, 266 (2022); *DATC Path 15, LLC*, Opinion No. 879, 177 FERC ¶ 61,115, at PP 24, 212-213 (2021); *Constellation Mystic Power, LLC*, 176 FERC ¶ 61,019, at PP 15, 176 (*Mystic*), *order on reh'g*, 177 FERC ¶ 61,106 (2021), *order on reh'g*, 178 FERC ¶ 61,116 (2022); *Entergy Ark., Inc.*, Opinion No. 575, 175 FERC ¶ 61,136, at PP 244-245, *order on reh'g*, 176 FERC ¶ 61,155 (2021)).

¹⁶ *Id.* at 6.

should recognize that the risk to NYPA from its transmission investments is determined by the type of investment at issue rather than NYPA's status as a municipal utility.¹⁷

7. NYPA states that it employs a national proxy group composed of 28 electric utilities with investment grade credit ratings from S&P Global Ratings (S&P) or Moody's Investor Service (Moody's) (Proxy Group) for its DCF and CAPM calculations.¹⁸ NYPA asserts that it selected investor-owned companies in the Proxy Group that reflect a risk similar to that faced by NYPA for its investments in transmission facilities. NYPA maintains that government utilities like NYPA can propose a proxy group of companies that have equity securities traded on the marketplace.¹⁹ NYPA states that it is appropriate to include all investment grade companies in the Proxy Group and relax the usual standard of confining the Proxy Group only to companies one notch above or below NYPA's credit rating because there are no companies that Value Line investment research classifies as "Electric Utilities" within one notch of NYPA's AA S&P and Aa1 Moody's ratings.²⁰

8. Additionally, NYPA states that, although it does not affect its ROE analysis, its current capital structure contained in its Formula Rate of 50% debt and 50% equity should allow NYPA to achieve a reasonable rate of return and allow access to capital markets for significant borrowings that are expected over the next five years.²¹ According to NYPA, because its capital structure for transmission ratemaking purposes is conservative relative to NYPA's actual equity ratio of 64% common equity (i.e., its net position), customers benefit from NYPA's credit profile, which allows NYPA to access debt at lower rates.

9. NYPA requests that the Commission accept the proposed base ROE to become effective, without suspension or hearing, on November 1, 2024, consistent with its status as a non-jurisdictional utility.²² NYPA requests waiver of the Commission's notice

¹⁷ *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,219, at P 31 (2004), *order on reh'g*, 112 FERC ¶ 61,351 (2005); *AES Power Inc.*, 74 FERC ¶ 61,220, at 61,745, *order on reh'g*, 76 FERC ¶ 61,165 (1996)).

¹⁸ *Id.* at 6-7; Nowak Test. at 18-19, 21-24.

¹⁹ Transmittal at 6; Nowak Test. at 21-22 (referencing *City of Vernon*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, 112 FERC ¶ 61,207 (2005), *vacated in part*, *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (*TANC*)).

²⁰ Transmittal at 7; Nowak Test. at 18-19, 21-24.

²¹ Transmittal at 8.

requirements to allow the earliest practicable recognition in transmission rates of the increased cost of capital facing NYPA and to avoid the complexity of administering a partial month of revenue collection that would result from an implementation date that would normally apply to a 60-day order. NYPA states that it commits to making appropriate refunds if the resolution of the base ROE in this proceeding results in NYPA collecting revenues in excess of that which would apply using a base ROE ultimately determined to be just and reasonable, consistent with its past practice under its Formula Rate. In addition, NYPA requests waiver from compliance with any requirements of section 35.13 of the Commission's regulations not otherwise satisfied by this filing, consistent with the Commission's established practice with respect to non-jurisdictional utilities, and any additional waivers required in connection with this filing.²³

III. Notice of Filing and Responsive Pleadings

10. Notice of NYPA's filing was published in the *Federal Register*, 89 Fed. Reg. 86793 (Oct. 31, 2024), with interventions and protests due on or before November 14, 2024. Timely motions to intervene were filed by City of New York (New York City), Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc., Multiple Intervenors,²⁴ Municipal Electric Utilities Association of New York (MEUA), New York Association of Public Power (NYAPP), and New York Transco, LLC. The New York State Public Service Commission (New York Commission) filed a notice of intervention. On November 14, 2024, MEUA, New York Commission, and NYAPP filed protests and New York City and Multiple Intervenors (together, Consumer Advocates) filed a joint protest.

11. NYPA filed a motion for leave to answer and answer to the protests on November 27, 2024.

A. Protests

12. NYAPP argues that setting NYPA's base ROE at the median of the zone of reasonableness is unjust and unreasonable and that NYPA's ROE should be set at 8.87%,

²² *Id.* at 1, 8-9 (citing *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, at PP 2, 31, 33 (2012)).

²³ *Id.* at 9-10 (citing *N.Y. Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,004, at P 55 (2022); *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268, at PP 69-70 (2016); *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240 at PP 36-37).

²⁴ 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. Consumer Advocates Protest at n.3.

the lowest value in the two-model method zone of reasonableness.²⁵ NYAPP argues that NYPA's Proxy Group does not conform to the Commission guidelines, which include selecting companies with credit ratings that are within one notch of the firm under review. NYAPP asserts that NYPA's AA S&P rating and Aa1 Moody's rating is higher than all potential proxy group companies and reflects NYPA's perceived low financial risk. NYAPP contends that NYPA ignores the lack of risk by including all electric utilities with an investment grade in its Proxy Group. NYAPP also notes that, in another recent proceeding involving a utility with a lower credit rating than NYPA's, NYPA expert Nowak submitted a proxy group analysis that included only utilities within two notches of the filer's credit rating—suggesting that NYPA's decision to include all investment grade electric utilities in its Proxy Group may be unreasonable.²⁶ NYAPP also states that NYPA excludes five companies because of merger-related activity but does not provide information regarding what those activities are.²⁷

13. NYAPP contends that NYPA's DCF analysis contains a flawed estimation of the long-term growth component because: (1) the Commission does not use Blue Chip Financial Forecasts to calculate the long-term gross domestic product (GDP) growth rate component that NYPA uses; (2) NYPA uses the 2023 Social Security Administration's Old-Age, Survivors, and Disability Insurance (OASDI) Trustees Report data rather than the 2024 data; and (3) the time periods for estimating long-term GDP rates are incorrect.²⁸

14. NYAPP also claims that NYPA uses a flawed application of the Commission's CAPM methodology to determine the market risk premium by:²⁹ (1) using incorrect Value Line beta values instead of Bloomberg beta values;³⁰ (2) averaging Institutional Brokers' Estimate System (IBES) earnings growth rates with Value Line earnings growth rates instead of using the IBES rates alone;³¹ (3) erroneously calculating the S&P 500

²⁵ NYAPP Protest at 2-3, 6.

²⁶ *Id.* at 3 (citing San Diego Gas & Elec. Co. (SDG&E) (Prepared Direct Testimony of Joshua C. Nowak), Ex. SDG&E-005, Docket No. ER25-270-000, at 17 (filed Oct. 30, 2024) (Nowak SDG&E Test.)).

²⁷ *Id.* at 3 (citing Nowak Test., Schedule 1).

²⁸ *Id.* at 4.

²⁹ *Id.* at 5-6

³⁰ *Id.* at 5 (citing *Mystic*, 176 FERC ¶ 61,019 at P 85).

³¹ *Id.* (citing *Mystic*, 176 FERC ¶ 61,019 at P 70).

estimated market return by adjusting the weighted average dividend yield by one-half of the earnings growth rates, as in the Commission's DCF model, even though the Commission's market risk premium analysis does not include this adjustment; and (4) failing to indicate the source of this size premium data.

15. The New York Commission maintains that NYPA's proposed total ROE of at least 11.48%, inclusive of the previously-granted 50 basis-point "RTO Participation Adder," would result in unjust and unreasonable rates—and that, given NYPA's ability to seek additional ROE incentives, it is impossible to conclude that NYPA's ultimate ROE would be within the zone of reasonableness.³² The New York Commission also suggests that, with respect to NYPA's Proxy Group, a narrow credit risk band should be applied, resulting in the elimination of several companies that have weaker credit ratings. Additionally, the New York Commission argues that the determination of a just and reasonable rate requires more than just assessing whether the proposed rate falls with the zone of reasonableness³³ and that an evidentiary hearing is needed to allow the parties an opportunity to cross examine NYPA's witness on their factual claims with respect to the requested ROE.

16. MEUA argues that NYPA lacks the factual foundation for directly estimating an assumed cost of equity applying the DCF method because it does not have requisite dividend and stock price data.³⁴ MEUA also objects to NYPA's calculation of the applicable risk premiums using the CAPM method because it asserts that NYPA disregards the comparable risk requirement in its cost of equity analyses. Additionally, MEUA asserts that NYPA's DCF and CAPM analyses systematically overstate a reasonable approximation of NYPA's cost of equity by failing to link NYPA's presumed cost of equity to comparably risky utilities. MEUA contends that NYPA must establish a reasoned basis for its 50% equity and 50% long-term debt structure. Additionally, MEUA argues that, based on NYPA's reliance on highly rated tax-exempt debt, NYPA should employ an assumed equity ratio no higher than 40% for NTAC purposes rather than its implied equity ratio of 64%. MEUA also asserts that NYPA has failed to demonstrate that an update to its presumed cost of equity is required at all for it to continue to attract sufficient capital and maintain its bond ratings.

³² New York Commission Protest at 2-4.

³³ *Id.* at 2-3 (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,038, at PP 12, 14 (2008) (*Bangor*)).

³⁴ MEUA Protest at 4-6.

17. Consumer Advocates assert that NYPA's proposed base ROE of 10.98% is excessive and that there are numerous flaws in NYPA's testimony supporting the ROE.³⁵ Consumer Advocates argue that the determination of a just and reasonable ROE requires more than merely assessing whether the proposed ROE falls within the zone of reasonableness.³⁶ Consumer Advocates assert that they calculate a median CAPM ROE of 8.56% by deriving the asset beta for each Proxy Group company, re-levering the asset beta using NYPA's target 50% debt and 50% equity capital structure, and then employing the re-levered beta in the CAPM formula to yield the ROE for a 50% debt and 50% equity capital structure.³⁷ Consumer Advocates also oppose NYPA's proposed "small size premium," which they argue inflates the CAPM results and has not been justified.

18. Consumer Advocates also aver that NYPA's DCF analyses rely on a proxy group that includes businesses with vastly different, and far riskier, profiles than NYPA's transmission business. Consumer Advocates recommend that only companies with an S&P credit rating of AA- or A- be included for the purpose of the DCF analysis.³⁸ In addition, Consumer Advocates recommend that NYPA extend the study period used for its DCF analyses to at least one year, rather than two quarters of dividend data, to provide a more comprehensive data set. Consumer Advocates argue that interested parties should be permitted to further investigate the undisclosed number of years of annual dividend cash inflows used in the DCF analysis, among other inputs to the ROE calculations.³⁹

19. Consumer Advocates also claim that the relevance of NYPA's potential future investment in transmission and other infrastructure raise factual issues that warrant further development.⁴⁰ According to Consumer Advocates, an evidentiary hearing is needed to provide parties an opportunity to cross examine NYPA on its factual claims with respect to its base ROE, including the different approach that NYPA witness Nowak

³⁵ Consumer Advocates Protest at 3-5.

³⁶ *Id.* (citing *Bangor*, 122 FERC ¶ 61,038 at PP 12, 14).

³⁷ *Id.* at 5-6 & app. A (Testimony of Michele Chait on Behalf of the City of New York and Multiple Intervenors), at 5-8 (Chait Test.).

³⁸ Consumer Advocates Protest at 6-10; Chait Test. at 11-12.

³⁹ Consumer Advocates Protest at 9; Chait Test. at 17-18.

⁴⁰ Consumer Advocates Protest at 10.

employed in testimony filed within the same week of NYPA's and the possible implications if applied to NYPA.⁴¹

B. Answer

20. NYPA argues that the Commission should dismiss the protests because they contain flawed arguments and ignore Commission precedent.⁴² NYPA first asserts that its proxy group selection is appropriate and follows the Commission's policies given NYPA's status as a public power entity and NYPA's credit ratings. NYPA notes that no companies are within three notches of NYPA's S&P credit rating or within four notches of NYPA's Moody's credit rating, and that, given the need to expand the usual Commission rule of only including the proxy group companies that have a credit rating within one notch of the credit rating of the subject company, the line between including a company within four credit notches versus six credit notches is arbitrary. NYPA claims that the New York Commission fails to explain the effect of its suggested narrow credit risk band or how it would reconcile divergent S&P and Moody's credit ratings for potential proxy companies.⁴³ NYPA argues that Consumer Advocates' proposed DCF analysis does not apply the proposed DCF proxy group selection criteria to their CAPM analysis and ignores Moody's ratings, thereby excluding several proxy companies with Moody's ratings closer to NYPA's rating than the companies selected.⁴⁴ NYPA adds that MEUA conflates credit ratings with equity risk assessment and ignores the reality that there are no publicly traded investor-owned utilities with credit ratings within one notch of NYPA's.⁴⁵ NYPA explains that its expert used a different approach in the SDG&E proceeding because it was possible there to select a proxy group of companies within one credit notch of SDG&E but that Mr. Nowak nevertheless proposed a modification to Commission guidelines to achieve a more robust proxy group that would better predict the ROE in the SDG&E case.⁴⁶ NYPA notes, however, that the difference in screening approaches accounts for a difference in only two companies out of the 28 selected and that excluding these companies from NYPA's proxy group would increase the estimated ROE by one basis point from 10.98% to 10.99%. In addition, NYPA clarifies that it excludes CenterPoint Energy Resources Corp. (CenterPoint) and Eversource Energy due

⁴¹ *Id.* at 8-9; Chait Test. at 12 (referencing Nowak SDG&E Test. at 17).

⁴² NYPA Answer at 2, 4-8.

⁴³ *Id.* at 5 (citing New York Commission Protest at 4).

⁴⁴ *Id.* at 5-6 (citing Consumer Advocates Protest at 8).

⁴⁵ *Id.* at 6 (citing MEUA Protest at 4).

⁴⁶ *Id.* at 6-7 (citing Nowak SDG&E Test. at 17).

to merger-related activities given Bernhard Capital Partners Management, LP's agreement to acquire CenterPoint's Louisiana and Mississippi Natural Gas LDC Businesses and Eversource Energy's plans to sell its 50% stake in the South Fork Wind and Revolution Wind projects to Global Infrastructure Partners.

21. Second, NYPA affirms that its DCF analysis is consistent with Commission precedent.⁴⁷ NYPA states that Blue Chip Financial Forecasts are a trusted and reliable industry resource used to calculate the long-term GDP growth rate component. NYPA adds that use of the 2024 rather than 2023 Social Security Administration's OASDI Trustees Report data would provide more current information but would not affect its ROE recommendation. NYPA also argues that Consumer Advocates' entire DCF analysis should be disregarded because they use an incorrect selection of proxy companies, as described above.

22. Third, NYPA argues that its CAPM analysis is consistent with Commission precedent.⁴⁸ NYPA claims that Consumer Advocates' proposed CAPM analysis proposes changes to the Commission's accepted approach, including removal of the size adjustment and use of Hamada adjusted betas. NYPA adds that its use of Value Line betas is consistent with several recent Commission decisions, including the October 2024 MISO Order,⁴⁹ and that Value Line and Bloomberg betas rely on correlated reference indices. NYPA also notes that the Commission in Opinion No. 569-A contemplated use of growth rate data sources besides only IBES short-term growth rate data,⁵⁰ and using IBES-only data as NYAPP proposes would increase the median CAPM result from 11.75% to 12.06% and NYPA's estimated ROE from 10.98% to 11.14%.⁵¹ In addition, NYPA claims that estimating market return using the same adjustment to the dividend yield used in the DCF analysis has been consistently affirmed by the Commission. NYPA adds that it relied upon six-month average market capitalization data for the proxy companies to determine the size premium decile adjustment as provided by the 2024 Duff

⁴⁷ *Id.* at 8-9.

⁴⁸ *Id.* at 9-10

⁴⁹ *Id.* at 9 (citing October 2024 MISO Order, 189 FERC ¶ 61,036).

⁵⁰ *Id.* at 9-10 (citing *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019), *order on reh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154, at P 79, *order on reh'g*, Opinion No. 569-B, 173 FERC ¶ 61,159 (2020), *vacated sub nom.*, *MISO Transmission Owners v. FERC*, 45 F.4th 248 (D.C. Cir. 2022), *order on remand*, October 2024 MISO Order, 189 FERC ¶ 61,036).

⁵¹ *Id.* at 10 (citing NYAPP Protest at 5).

& Phelps Cost of Capital Navigator - Size Premium: Annual Data as of 12/31/2023, consistent with Commission precedent.⁵²

23. Last, NYPA argues that the median of the zone of reasonableness is the appropriate place for NYPA's ROE given that no party has demonstrated that NYPA's transmission investment risk profile is lower than that of the proxy companies.⁵³ NYPA emphasizes that its transmission infrastructure projects, expected to cost hundreds of millions of dollars, face substantial siting and construction risk and cost cap provisions. NYPA also explains that, while upward adjustment was warranted to reflect SDG&E's above-average wildfire risk, no downward adjustment is warranted to reflect NYPA's minimal wildfire risk because that minimal risk is consistent with the majority of the proxy companies. NYPA also contests Consumer Advocates' claims that other factors reduce NYPA's risk,⁵⁴ arguing that: (1) NYPA only used the construction work in progress (CWIP) incentive for its portion of the now completed Segment A of the AC Projects, which comprises less than 5% of the NYPA ATRR; (2) Consumer Advocates fail to show that true-up mechanisms, which NYPA asserts are present in all formula rates, reduce risk or that the proxy companies do not have formula rates; and (3) the Commission considers lack of retail transmission businesses and distribution facilities to increase risk compared to the proxy companies.⁵⁵

IV. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2024), the New York Commission's notice of intervention and the

⁵² *Id.* (citing Opinion No. 569, 169 FERC ¶ 61,129; Opinion No. 569-A, 171 FERC ¶ 61,154; Opinion No. 569-B, 173 FERC ¶ 61,159; *Entergy Ark., Inc.*, Opinion No. 575, 175 FERC ¶ 61,136, *order on reh'g*, 176 FERC ¶ 61,155; *DATC Path 15, LLC*, Opinion No. 879, 177 FERC ¶ 61,115; *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175).

⁵³ *Id.* at 11-12.

⁵⁴ *Id.* at 12 (citing Consumer Advocates Protest at 7; Chait Test. at 10-11).

⁵⁵ *Id.* (citing *Martha Coakley, Mass. Att'y. Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 149, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 149 FERC ¶ 61,032 (2015), *vacated*, *Emera Me. v. FERC*, 854 F.3d 9 (D.C. Cir. 2017), *order directing briefs*, 165 FERC ¶ 61,030 (2018)).

timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2024), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept NYPA's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Standard of Review

26. The Commission has addressed the standard of review to be applied to petitions involving non-jurisdictional transmission revenue requirements in an opinion reviewing the transmission revenue requirement filed by the City of Vernon, California (Vernon).⁵⁶ In Opinion No. 479, the Commission recognized that, as a municipally owned utility, Vernon was not subject to the Commission's jurisdiction under FPA section 205.⁵⁷ However, the Commission noted that, because Vernon voluntarily submitted its transmission revenue requirement as a component of the California Independent System Operator Corporation's (CAISO) jurisdictional rate, Vernon's transmission revenue requirement was "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."⁵⁸ The Commission explained that, in *Pacific Gas & Electric Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission had statutory authority to review Vernon's transmission revenue requirement "to the extent necessary to ensure that the CAISO rates are just and reasonable."⁵⁹

27. Subsequently, in *TANC*, the court upheld the Commission's decision that subjecting the transmission revenue requirements of non-jurisdictional utilities (such as Vernon) to a full section 205 review is "the *only* way to ensure that CAISO's rate is just and reasonable."⁶⁰ However, the court rejected the Commission's authority to order Vernon to pay refunds under FPA section 205.⁶¹ The court held that the structure of the

⁵⁶ See Opinion No. 479, 111 FERC ¶ 61,092.

⁵⁷ *Id.* P 44.

⁵⁸ *Id.*

⁵⁹ *Id.* P 43 (quoting *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

⁶⁰ *TANC*, 495 F.3d at 672.

FPA clearly reflected Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority under FPA section 205 over wholesale electric energy sales.⁶² The court reasoned that FPA section 201(f) exempts from Part II of the FPA "any political subdivision of a state."⁶³

28. Therefore, while NYPA is not within the Commission's jurisdiction under FPA section 205, we find that, based on the precedent cited above, it is appropriate to apply the just and reasonable standard of FPA section 205 to NYPA's proposed transmission rates, which are a component of NYISO's jurisdictional rates. To determine the justness and reasonableness of such rates, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

29. Furthermore, NYPA is not subject to the Commission-imposed rate suspension and refund obligations under FPA section 205.⁶⁴ However, we note that NYPA has voluntarily committed to making appropriate refunds for any collection based on the ATRR that exceeds what the Commission accepts as just and reasonable.⁶⁵ We accept NYPA's commitment to make appropriate refunds to customers, consistent with NYPA's past practice under its formula rate.

2. Proposed OATT Revisions

30. Our preliminary analysis indicates that NYPA's OATT revisions have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. NYPA's filing raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we accept NYPA's filing, effective November 1, 2024, as requested, subject to refund, and establish hearing and settlement judge procedures.

31. While we are setting these matters for a trial-type evidentiary hearing,⁶⁶ we encourage efforts to reach settlement before hearing procedures commence. To aid

⁶¹ *Id.* at 673.

⁶² *Id.* at 673-74.

⁶³ *Id.* at 674 (quoting 16 U.S.C. § 824(f)).

⁶⁴ See *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268 at P 66; *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240 at PP 28-30.

⁶⁵ Transmittal at 9.

⁶⁶ Trial Staff is a participant in the hearing and settlement judge procedures. See

settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁶⁷ If parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.⁶⁸ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge on the status of settlement discussions. Based on this report, the Chief Judge shall provide additional time to continue settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

32. In addition, we grant NYPA's requested waiver of section 35.13 of the Commission's regulations consistent with Commission practice for non-jurisdictional utilities.⁶⁹ Because NYPA is not subject to FPA section 205, it is not subject to the Commission's cost of service regulatory filing requirements. 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.⁷⁰

18 C.F.R. § 385.102(b), (c) (2024).

⁶⁷ 18 C.F.R. § 385.603 (2024).

⁶⁸ If parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<https://www.ferc.gov/available-settlement-judges>).

⁶⁹ See Opinion No. 479, 111 FERC ¶ 61,092 at P 44 & n.55; see also *N.Y. Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,004 at P 55; *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268 at P 69; *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240 at P 36.

⁷⁰ See, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,004 at P 55; Opinion No. 479, 111 FERC ¶ 61,092 at n.55; *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,268 at P 69.

The Commission orders:

(A) NYPA's proposed OATT revisions are hereby accepted for filing, to become effective November 1, 2024, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of NYPA's proposed OATT revisions, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of participants' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge

is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Secretary.