BALCH
& BINGHAM LLP

ANDREW W. TUNNELL
t: (205) 226-3439
f: (205) 488-5858
e: atunnell@balch.com

April 9, 2021

BY ELECTRONIC FILING

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: ***The New York Transmission Owners***,
Docket No. ER21-____-000
Amendment to NYISO OATT Adopting TO Funding Mechanism

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act ("FPA")[1] and Rule 205 of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] Central Hudson Gas & Electric Corporation ("Central Hudson"),[3] Consolidated Edison Company of New York, Inc. ("Con

[1] 16 U.S.C. § 824d.

[2] 18 C.F.R. § 385.205 (2020).

[3] Central Hudson is a corporation created and organized under the laws of New York, with its principal offices in Poughkeepsie, New York. Central Hudson is an electric and natural gas utility engaged in, among other things, the businesses of: (i) distributing natural gas for residential, commercial, and industrial use; and (ii) transmitting and distributing electric power to wholesale and retail customers, and transmitting electric power on behalf of third parties. Central Hudson's transmission of electric power in interstate commerce is regulated by the Commission. Central Hudson is a wholly owned subsidiary of CH Energy Group, Inc. and indirect subsidiary of Fortis Inc., a Canadian company located in St. John's Newfoundland and publicly traded on the Toronto stock exchange. Other than Central Hudson, none of its United States affiliates or subsidiary companies has issued shares of debt and only Fortis Inc., has issued equity securities to the public.

Edison"),[4] Niagara Mohawk Power Corporation d/b/a National Grid ("National Grid"), [5] New York State Electric & Gas Corporation ("NYSEG"),[6] Orange and Rockland Utilities, Inc. ("O&R"),[7] and Rochester Gas and Electric Corporation ("RG&E")[8] (collectively referred to herein as the "Transmission Owners," "TOs," or the "Companies") hereby file to amend the Open Access Transmission Tariff ("OATT") administered by the New York Independent System Operator, Inc. (the "NYISO") to revise the funding methodology thereunder for certain upgrades to their transmission systems caused by generator interconnections to comply with judicial and Commission precedent.[9]

---

[4] Con Edison is a regulated utility operating in New York City and Westchester County in New York and a wholly-owned subsidiary of Consolidated Edison, Inc. Con Edison is engaged in the generation, transmission, distribution and wholesale and retail sale of electric power in New York City, and Westchester County, the distribution and retail sale of natural gas in parts of New York City and Westchester County and the generation, distribution, and retail sale of steam in parts of New York City. Con Edison is a participant in the NYISO's electricity markets.

[5] National Grid is a subsidiary of National Grid USA, a registered public utility holding company with an electric and gas utility subsidiary operating in New York, and electric utility subsidiaries operating in Massachusetts, New Hampshire, Rhode Island, and Vermont. National Grid is National Grid USA's principal New York subsidiary that provides both electric transmission and electric distribution service to customers in New York. National Grid has divested all of its generation and power marketing assets and supplies electricity to approximately 1.5 million customers in New York solely as a Provider of Last Resort ("POLR") in accordance with state policy and law. National Grid also provides local gas distribution services (including POLR gas services) to approximately 550,000 retail customers in upstate New York.

[6] New York State Electric & Gas Corporation is a New York corporation and franchised electric and gas public utility regulated by both the Commission and the New York State Public Service Commission. NYSEG is engaged in, among other things, the business of purchasing, transmitting, generating, distributing and selling electric power and natural gas. NYSEG currently owns approximately 65 MW of generation, consisting primarily of hydroelectric facilities. NYSEG's transmission system is under the operational control of the NYISO. NYSEG provides transmission service and collects wholesale transmission charges pursuant to the NYISO OATT. NYSEG is a wholly owned indirect subsidiary of Avangrid Networks, Inc. ("Avangrid Networks").

[7] O&R is a wholly-owned subsidiary of Consolidated Edison, Inc. and is a regulated utility operating in Orange, Rockland and part of Sullivan counties in New York and in parts of New Jersey. O&R is engaged in the transmission, distribution and wholesale and retail sale of electric power and the distribution and retail sale of natural gas. O&R is a participant in the NYISO's electricity markets.

[8] Rochester Gas and Electric Corporation is an electric transmission and electric and gas distribution public utility organized and operating under the laws of the State of New York and a wholly owned indirect subsidiary of Avangrid Networks. RG&E serves retail and wholesale customers in western New York and owns approximately 57 megawatts of hydroelectric generation. RG&E is a Transmission Owner in the New York Control Area under the terms of the Independent System Operator – Transmission Owner Agreement by and among the New York Transmission Owners and the NYISO. RG&E owns facilities used in the provision of transmission and interconnection services under NYISO's OATT. NYSGE and RG&E each have unregulated affiliates that develop and operate renewable energy generation facilities in New York, that are planned and located entirely outside of NYSEG's and RG&E's Transmission Districts and do not directly interconnect to either companies' transmission system.

[9] The NYISO is submitting this filing in FERC's e-Tariff system on the TOs' behalf solely in the NYISO's role as the Tariff Administrator. The burden of demonstrating that the proposed tariff amendments are just and reasonable rests on the TOs, the sponsoring parties. If the NYISO has any comments on this filing, the NYISO will submit a separate pleading in this proceeding. Unless otherwise defined herein, capitalized terms used in this transmittal letter shall have the meanings ascribed to them in the NYISO OATT.

The TOs are filing to amend Section 25.5.4 of the NYISO OATT to provide the TOs the opportunity to fund the costs of System Upgrade Facilities ("SUFs")[10] and System Deliverability Upgrades ("SDUs")[11] (collectively, ("SUFs/SDUs")) caused by generator interconnections to earn a reasonable return on those assets (the "Core Amendment"). Under the existing funding approach in the NYISO OATT, Interconnection Customers fund the SUFs/SDUs and convey them to the TOs at nominal value to own, operate, and maintain (the "Existing Funding Approach"). The Existing Funding Approach fails to provide TOs an opportunity to recover a return. The Core Amendment is just and reasonable because it complies with current language in Section 25.5.4 that provides that the implementation and construction of the SUFs/SDUs is subject to the TOs' right to recovery of their costs plus a return. Moreover, the Core Amendment is necessary to satisfy the Supreme Court's requirements in *Hope*[12] and *Bluefield*,[13] as recognized by the recent *Ameren*[14] opinion and related Commission orders, that the TOs are entitled to earn a reasonable return on property used to provide jurisdictional service (including transmission facilities caused by generation interconnections) sufficient to assure confidence in their financial soundness, maintain credit and attract new capital.[15]

I. Executive Summary

The TOs are hereby filing to amend the Existing Funding Approach to adopt and implement the Core Amendment so that the TOs are provided the opportunity to fund the costs of the SUFs/SDUs and thereby earn a return associated with the investment in these assets that are thereby used to provide jurisdictional service. The current language of Section 25.5.4 provides that the construction and implementation of the SUFs/SDUs is subject to the TOs recovering their costs and earning a return, and the Core Amendment effectuates that right. Likewise, *Hope* and

[10] Attachment S of the NYISO OATT defines "System Upgrade Facilities" as "[t]he least costly configuration of commercially available components of electrical equipment that can be used, consistent with Good Utility Practice and Applicable Reliability Requirements, to make the modifications to the existing transmission system that are required to maintain system reliability due to: (i) changes in the system, including such changes as load growth, and changes in load pattern, to be addressed in accordance with Section 25.4.1 of this Attachment S; and (ii) proposed interconnections. In the case of proposed interconnection projects, System Upgrade Facilities are the modifications or additions to the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Minimum Interconnection Standard."

[11] Attachment S of the NYISO OATT defines "System Deliverability Upgrades" as "[t]he least costly configuration of commercially available components of electrical equipment that can be used, consistent with Good Utility Practice and Applicable Reliability Requirements, to make the modifications or additions to Byways and Highways and Other Interfaces on the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Deliverability Interconnection Standard at the requested level of Capacity Resource Interconnection Service."

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

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

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

[15] Contemporaneously with the instant filing the TOs are also filing a complaint under FPA Section 206 seeking a Commission order requiring the NYISO to submit on compliance broader changes to the NYISO OATT to fully implement the Core Amendment ("Implementing Amendments"), as described more fully below.

Bluefield establish that a regulated utility is entitled to a reasonable return on the value of the property used to provide jurisdictional service[16] commensurate with returns on investments in other enterprises having corresponding risks and sufficient to maintain its financial integrity and attract capital.[17] The recent *Ameren* opinion makes clear that this Supreme Court precedent specifically applies to the costs of network upgrades caused by generation interconnection (*i.e.,* SUFs/SDUs). As explained in *Ameren*, not allowing a regulated utility to earn a return on such network upgrades raises the concern that the utility assumes certain risks for owning, operating, and maintaining the upgrades for which it is never compensated. This results in the utility operating that portion of its business on a non-profit basis, which creates the risks that new capital investment will be deterred.

On remand from *Ameren*, the Commission re-instated the right of transmission owners in the Midcontinent Independent System Operator, Inc. ("MISO") control area to unilaterally elect whether to fund the capital cost of generator-caused, network upgrades (the "MISO TO Funding Mechanism").[18] In so doing, the Commission found that it had previously erred by failing to adequately address MISO transmission owners' contention that eliminating the MISO TO Funding Mechanism would: (1) "force them to construct and operate Generator Up-Front Funded network upgrades on a non-profit basis,"[19] (2) force "their investors ... to accept risk-bearing additions to their network with zero return,"[20] and (3) affect "the ability of transmission businesses to attract future capital."[21] The Commission also found, among other things, that evidence in the record was not sufficient to overcome the MISO TOs' arguments "(1) that they have at least some uncompensated risks associated with Generator Up-Front Funded upgrades, and (2) that transmission owners should not be required to accept the potential increased reliability and litigation risk that Generator Up-Front Funded network upgrades may pose to their systems with no return."[22]

The adoption of the Core Amendment is especially appropriate for the Transmission Owners to address the non-profit problem recognized in *Ameren.* This problem has become particularly acute in New York due to the increasing volume of new generator interconnections

---

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

[17] *Hope*, 20 U.S. at 603.

[18] *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, P 32 (2018), *order on briefing, compliance and reh'g*, 169 FERC ¶ 61,233 (2019) ("*Ameren* Remand Order").

[19] *Id.* at P 28.

[20] *Id.*

[21] *Id*.

[22] *Id*. at P 31. And while concerns of undue discrimination have been expressed in certain dissenting and concurring Commission opinions related to implementing the similar MISO TO Funding Mechanism because most of the MISO TOs are vertically integrated public utilities or have affiliated generation interests, that concern does not apply to the TOs. The Transmission Owners, with only limited exceptions, are vertically disaggregated and do not have affiliated generation operating within their respective footprints to which they could provide an undue preference. *See infra* at p. 25. Moreover, it bears emphasizing that even though one of the MISO TO petitioners owned affiliated generation, the *Ameren* court found no basis for a finding of undue discrimination.

and resulting SUFs/SDUs that are expected in the current planning horizon. The State of New York ("New York") has adopted nation-leading emissions reduction targets to address climate change, and the TOs are committed to attain these goals. This dynamic has resulted in a significant number of new renewable generation and energy storage resources that are, or will be, interconnecting to the TOs' systems, causing the need for the significant addition of new SUFs/SDUs. For example, while for Class Year 2011 NYISO studied six interconnection requests resulting in the identification of approximately $320 million of SUFs/SDUs, for Class Year 2019 NYISO studied 78 interconnection requests resulting in the identification of over $1.2 billion in SUFs/SDUs,[23] a nearly four-fold increase in terms of costs. Impacts to individual utilities also demonstrate this trend. National Grid has seen interconnection requests in its service territory grow from 10 interconnection requests in Class Year 2015 to 127 requests in Class Year 2021. These higher levels are expected to continue for the foreseeable future as New York achieves its clean energy goals. Again, while the TOs would have to own, operate, and maintain that initially estimated $1.2 billion in SUFs/SDUs (for the 2019 Class Year alone) should all the pertinent Interconnection Customers proceed with their projects, the TOs currently are prevented from recovering any rate of return for that increasingly significant portion of their business.

The Core Amendment is also needed to compensate the TOs for certain risks and costs they incur for the SUFs/SDUs for which they are not compensated under the Existing Funding Approach.[24] As the Prepared Direct Testimony of Mr. Josh Nowak attached hereto as Attachment 3 (the "Nowak Testimony") demonstrates, the TOs currently face, at a minimum, numerous uncompensated risks associated with these SUFs/SDUs. Specifically, the TOs face regulatory risks, reliability risks, cybersecurity risks, environmental risks, and operational risks for the SUFs/SDUs, but for which the TOs currently recover no return. As explained by Mr. Nowak, an investor requires compensation, through a higher return, to make an investment having a greater risk relative to other investments.[25] With regulated utilities generally unable to earn above their authorized return, "any increase in risks - - or increase in potential losses - - must be recognized in the authorized return to investors."[26]

The Core Amendment, thus, is just and reasonable because it would allow the TOs to fund the costs of the SUFs/SDUs and thereby be allowed to earn a reasonable return for those assets used to provide jurisdictional service. The Existing Funding Approach would continue to apply in that generators would remain responsible for the costs of the SUFs/SDUs. However, the Core Amendment would provide that if a TO elects to fund an SUF/SDU, then the TO and the Interconnection Customer would enter into a Facilities Service Agreement ("FSA"), pursuant to which the TOs would provide such funding and recover those costs and an appropriate rate of

[23] *See infra* at pp. 8–9. To date, the Interconnection Customers have accepted responsibility for $248,797,424 of the SUFs and associated headroom identified for Class Year 2019. *See* N.Y. Indep. Sys. Operator, Inc., Notice of Class Year 2019 Completion (Feb. 9, 2021). Information regarding the commitments for SDUs (and their associated SUFs) for Class Year 2019 has not yet been made available.

[24] *See*, *e.g.*, *Ameren*, 880 F.3d at 580; *see infra* at p. 16.

[25] Nowak Testimony, p. 10.

[26] *Id.*, p. 11.

return from the Interconnection Customer (referred to herein as the "TO Funding Mechanism"), consistent with the Commission's *MISO* precedent.[27] In addition to providing this elemental right to earn a reasonable rate of return for the SUFs/SDUs, the TOs also propose in the Core Amendment to voluntarily adopt a deadline by which they will determine whether to elect to fund the SUFs/SDUs so as not to delay the generator interconnection process, further demonstrating the reasonableness of the Core Amendment.

The TOs are making this filing under FPA Section 205 in accordance with filing rights expressly reserved to them in the Independent System Operator – Transmission Owner Agreement ("NYISO TO Agreement"). In the NYISO – TO Agreement, the TOs reserved the right "at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the ISO OATT, a Service Agreement under the ISO OATT, or the ISO Agreement to the extent necessary … to recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT…."[28] The Existing Funding Approach requires the TOs to incur the risks and costs of owning, operating and maintaining SUFs/SDUs needed to provide interconnection service to generators without a reasonable return. Accordingly, the Core Amendment will enable recovery of each TO's "reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT[.]"[29] Pursuant to this reserved Section 205 right, the Core Amendment implements the NYISO OATT provision governing the cost allocation and related requirements associated with the SUFs/SDUs to provide the elementary right of the TOs to fund the SUFs/SDUs, earn a rate of return of and on that investment, and establishes a deadline by which they must exercise this option.[30]

In conjunction with this filing, the TOs are also contemporaneously herewith filing pursuant to FPA Section 206 to request that the Commission direct NYISO to make additional changes to the NYISO OATT so as to more fully and smoothly implement the addition of the Core Amendment (the "Implementing Amendments.") And while the TOs consider the combined effect

---

[27] *See Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075 (2020) ("*MISO*") (accepting for filing MISO's *pro forma* FSA). While generators in the MISO proceedings argued that the adoption of the transmission owner funding mechanism in MISO would greatly increase costs, the TOs do not foresee the incorporation of the TO Funding Mechanism having a significant impact on costs in the aggregate because the TOs often have a lower cost of capital than generation developers. *See* Nowak Testimony, pp. 67–75 (noting, among other things, that the weighted average cost of capital for the proxy generators included in the Net CONE studies for NYISO, PJM, and ISO-NE exceed that of the TOs). That said, *Hope, Bluefield,* and *Ameren* all establish that the TOs have the right to earn a reasonable return, irrespective of whether this return increases or decreases developer costs. Indeed, the balancing of interests between consumers and the utility described in *Hope* is a consideration in the amount of a return, not whether the utility should be allowed a return. *See Hope*, 320 U.S. at 603 ("By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.").

[28] *N.Y. Indep. Sys. Operator Inc.,* 162 FERC ¶ 61,107, P 134 (2018) (quoting N.Y. Indep. Sys. Operator, Inc., Compliance with Order Nos. 741 and 741-A, Attachment VII, Agreement Between New York Independent System Operator and Transmission Owners, Docket No. ER11-3951-001 (Apr. 30, 2012) (accepted in *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,110 (2012)) ("NYISO-TO Agreement")).

[29] NYISO-TO Agreement, Section 3.10(a).

[30] As discussed herein, the TOs are committed to satisfying the aggressive climate goals established by the State of New York. *See infra* at p. 9.

of this FPA Section 205 filing and the separate FPA Section 206 filing that is being contemporaneously filed to be interrelated as they permit an ordered transition to incorporate the TO Funding Mechanism into the NYISO OATT, each of the FPA Section 205 and FPA Section 206 filings could, if necessary, stand alone. Specifically, this FPA Section 205 filing establishes the core right in the NYISO OATT, providing the TOs the right to fund the SUFs/SDUs and identifying the FSA as the contractual mechanism though which the TOs would provide the funding and recover the costs plus a return from the Interconnection Customer. If the Core Amendment were accepted for filing under FPA Section 205 but the Implementing Amendments under the FPA Section 206 filing were not, the TOs could submit to the Commission non-conforming filings of FSAs and affected Large Generator Interconnection Agreements ("LGIAs") and Small Generator Interconnection Agreements ("SGIAs") until the appropriate conforming NYISO OATT changes to those arrangements are made. While such a limited implementation would not be optimal, it would nonetheless be consistent with the *MISO* precedent where the MISO's transmission owner option to fund (the "MISO TO Funding Mechanism") was implemented in stages: that is, the core right was first readopted on remand from the *Ameren* opinion in Docket No.EL15-68 *et al.;* then the MISO TO Funding Mechanism was reconciled with the Developer's option to build stand-alone upgrades in MISO's compliance filings to Order No. 845 in Docket No. ER19-1960 *et al.*; then MISO adopted a *pro forma* Facilities Service Agreement in Docket No. ER20-359 to provide a standardized and uniform contractual mechanism; and even more subsequently MISO addressed the relationship between "Shared Network Upgrades" and the MISO TO Funding Mechanism in Docket No. ER21-402.

The significant increase in the volume of SUFs/SDUs necessitates prompt adoption and implementation of the Core Amendment. With New York having adopted a "cluster" approach for studying generator interconnections collectively on a class year basis, the TOs request that the TO Funding Mechanism be adopted and implemented before the commencement of the Initial Decision Period for the next generator class year (*i.e.*, the 2021 Class Year) - likely to occur in late 2021 or early 2022. Moreover, the sooner that it can be implemented the better so that market participants may be made aware of its requirements. Accordingly, the TOs request the Core Amendment be made effective on June 9, 2021.

II. Background

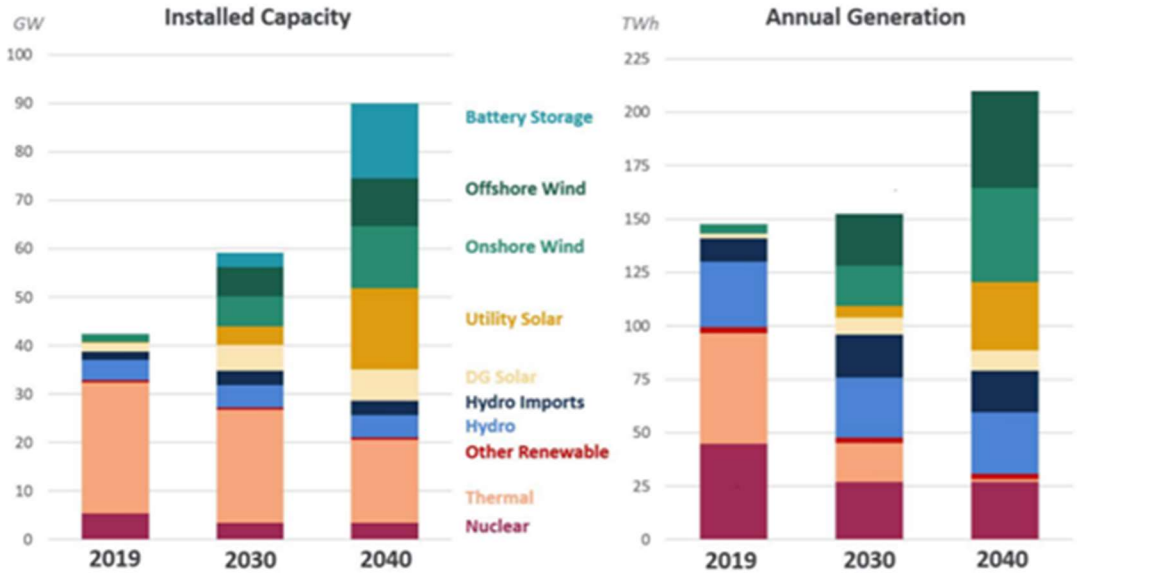
A. New York's Nation-Leading Climate Targets are Resulting in Growing the Renewable Generation Interconnections and Corresponding SUFs/SDUs

The TOs support and are a major catalyst for achieving New York's nation-leading climate targets. New York's Climate Leadership and Community Protection Act[31] ("CLCPA") requires an unprecedented transformation of the TOs' collective electric grid to achieve: 100% zero-emitting electricity sector by 2040, 70% renewable energy by 2030; 9,000 MWs of offshore wind by 2035, 3,000 MW of energy storage by 2030, and 6,000 MW of solar by 2025. As demonstrated graphically in the Zero Emissions Study prepared for the New York State Public Service

[31] N.Y. Statutes, Chapter 106 of the laws of 2019 (July 18, 2019).

Commission ("NYSPSC") and New York State Energy Research and Development Authority ("NYSERDA"), part of the state's *Power Grid Study,*[32] a significant amount of new renewable generation and battery storage are expected within the current planning horizon to satisfy these requirements. Recent NYISO studies corroborate this trend.[33]

FIGURE 17. INITIAL SCENARIO: CAPACITY AND GENERATION BY TECHNOLOGY IN 2030 AND 2040



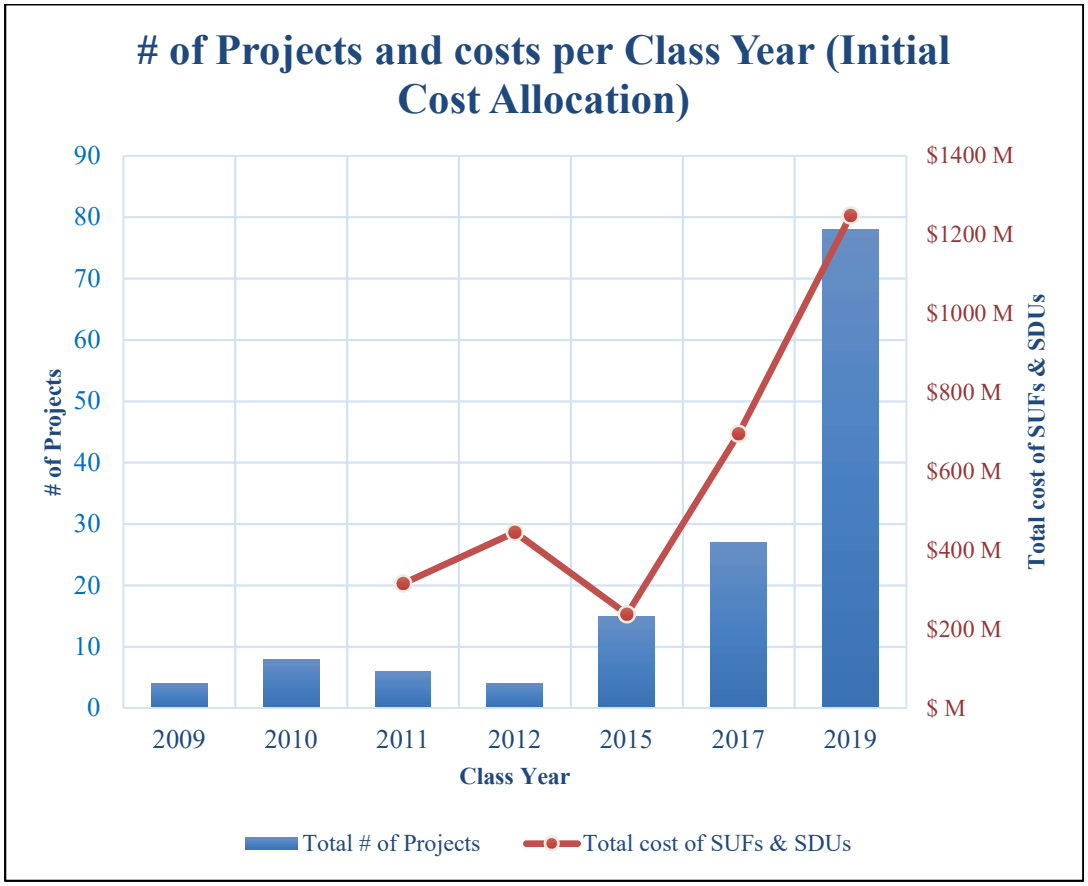
Sources: 2030 and 2040 values: Zero Emissions Study, Section 4.1.2, Table 4-1 and Section 4.2.1, Table 4-3; 2019 values are from the 2020 NYISO Gold Book.
Notes: *"Thermal" burns regular natural gas in 2030 and renewable natural gas in 2040. Legacy hydro imports are included in chart and assumed to have an effective capacity of 1,690 MW.

A significant expansion of the transmission grid will be required to integrate this new wave of renewable generation. One recent NYISO study assumes approximately 110 sites of land-based wind, offshore wind, and utility-scale solar being added to the TOs' collective electric grid to

[32] The Brattle Group and Pterra Consulting, *Initial Report on the New York Power Grid Study*, p. 80 (Jan. 19, 2021), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bE41D6A17-1EA5-47D3-90E8-A4E981705FE3%7d.

[33] *See, e.g.*, Analysis Group, Climate Change Impact and Resilience Study – Phase II, p. 8 (Sept. 2020), https://www.nyiso.com/documents/20142/15125528/02%20Climate%20Change%20Impact%20and%20Resilience%20Study%20Phase%202.pdf/89647ae3-6005-70f5-03c0-d4ed33623ce4; N.Y. Indep. Sys. Operator, Inc., *Reliability and Market Considerations for a Grid in Transition*, pp. 5–6 (Dec. 2019), https://www.nyiso.com/documents/20142/2224547/Reliability-and-Market-Considerations-for-a-Grid-in-Transition-20191220%20Final.pdf/61a69b2e-0ca3-f18c-cc39-88a793469d50; N.Y. Indep. Sys. Operator, Inc., *2019 CARIS Report, Congestion Assessment and Resource Integration Study*, pp. 65–68 (July 2020), https://www.nyiso.com/documents/20142/2226108/2019-CARIS-Phase1-Report-Final.pdf/bcf0ab1a-eac2-0cc3-a2d6-6f374309e961.

satisfy these requirements.[34] The TOs have already started to see a significant increase in the number of generator interconnection requests and the resulting SUFs/SDUs to the TOs' systems necessary to integrate those resources. The following interconnection-related data provided by NYISO is illustrative:[35]



*This chart represents the initial cost estimations and number of System Upgrade projects from Class Year 2009 to 2019. It does not reflect the final costs of SDUs and SUFs accepted by project developers.[36]

**For Class Year 2019, the initial cost estimates for SDUs were not studied in the initial 2019 Class Year report, therefore the values used are from the latest SDU reports presented at NYISO as of 3/10/2021.

As demonstrated above and by a review of the NYISO's data, while NYISO studied six interconnection requests resulting in the identification of approximately $320 million of SUFs/SDUs for Class Year 2011 in its initial notice, these amounts increased for Class Year 2019,

[34] *2019 CARIS Report,* p. 5.

[35] This number of interconnection requests and the cost data for the resulting Upgrades for the pertinent class years is obtained from the NYISO's Interconnection Queue and "Notices to Participants" regarding its Interconnection Process, which are posted at: https://www.nyiso.com/interconnections.

[36] *See supra* at n. 17.

with the NYISO having studied 78 interconnection requests resulting in the identification of over $1.2 billion in SUFs/SDUs in its initial notice.[37]

B. The TOs Strongly Support New York's Ambitious Climate Targets

The TOs support New York's clean energy targets and are committed to working with New York to meet them and to leading and delivering the clean energy transition for customers. The TOs have committed, for example, to incorporate in their transmission capital planning clean energy drivers along with reliability-based drivers to prepare the TOs' local transmission systems to integrate new clean energy generation resources. Similarly, in an initial step to help New York achieve its energy storage goals, pursuant to a NYPSC Order,[38] in 2019 each Transmission Owner issued a solicitation to procure dispatch rights of up to 10 MW (or in Con Edison's case, up to 300 MW) of bulk electric storage. As a result of such solicitations, Con Edison announced the signing of a contract for dispatch rights to a 100 MW/400 MWh energy storage system, and National Grid has signed two contracts for dispatch rights to a combined total of 30 MW/60MWh of energy storage systems. The TOs have also successfully advocated for reforms to remove market barriers to the deployment of new technologies. These efforts are demonstrated by, among other things, the fact that New York was one of the first regions to establish a model for the participation of Distributed Energy Resources and Energy Storage Resources in New York's wholesale markets.[39]

C. The TOs Have the Ongoing Risks of Owning, Operating and Maintaining the SUFs/SDUs But are Not Allowed to Earn a Return under the Existing NYISO OATT.

The NYISO OATT adopts the Existing Funding Approach for the allocation of the costs of the SUFs/SDUs in Attachment S (*i.e.*, Section 25) to the NYISO OATT. Under it, the costs of the SUFs/SDUs necessary to reliably and efficiently interconnect and integrate new generation are borne by the Interconnection Customers that are determined by NYISO's transmission planning processes to have driven the need for such SUFs/SDUs.[40] Under this approach, Interconnection Customers pay for the capital costs of constructing and installing an SUF/SDU, and the SUF/SDU is then transferred to be owned, operated and maintained by the pertinent TO. The NYISO OATT does not provide the TOs a means to recover a reasonable rate of return for the capital costs associated with the SUF/SDU, nor do the TOs include such assets in their rate base as a capital asset for recovery from customers (the operation and maintenance ("O&M") associated with

---

[37] *See supra* at pp. 8–9.

[38] *See* Case No. 18-E-0130, *In the Matter of Energy Storage Deployment Program*, Order Establishing Energy Storage Goal and Deployment Policy (Dec. 13, 2018).

[39] *See N.Y. Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,225 (2019) (accepting in part and rejecting in part NYISO's Order No. 841 compliance filing); *order on reh'g*, 172 FERC ¶ 61,119 (2020) (accepting NYISO's second Order No. 841 compliance filing); *see also, e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, Letter Order, Docket No. ER19-467 (Oct. 23, 2020) (accepting for filing NYISO's compliance filing regarding energy storage resources).

[40] *See N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,347 (2005) (approving NYISO's Existing Funding Approach).

SUFs/SDUs are generally recovered from native load customers through retail rates). By not allowing the TOs to earn a return on the capital investment associated with the SUFs/SDUs they own and operate (and for which they bear corresponding risks), the TOs are made less attractive to investors by increasingly being compelled to operate as non-profit entities, as explained in the Nowak Testimony and as recognized by the *Ameren* court[41] and the Commission.[42] This structure will increasingly inhibit "[t]he Companies' ability to raise capital necessary to continue to provide safe and reliable service and maintain the financial soundness of the Companies' operations."[43]

Accordingly, the TOs seek herein to incorporate in the NYISO OATT the Core Amendment to permit them to recover a reasonable rate of return of and on the capital investment associated with the transmission facilities that comprise SUFs/SDUs to align the NYISO OATT process with recent judicial and Commission precedent.

III. The TOs' Authority to Make this Filing and the Relationship between this Section 205 Filing and the Section 206 Filing that is Being Contemporaneously Submitted.

A. The TOs' Unilateral Section 205 Filing

Each TO is authorized to make unilateral FPA Section 205 filings to recover its costs and a return for the provision of jurisdictional service.[44] Specifically, while the TOs turned over certain of their filing rights to the NYISO as part of its formation, they retained certain salient rights to make filings under FPA Section 205. Included in those reserved FPA Section 205 rights is the following:

> Each Transmission Owner shall have the right at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the ISO OATT, a Service Agreement under the ISO OATT, or the ISO Agreement to the extent necessary: (i) to recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT….[45]

As discussed further below and in the supporting Nowak Testimony, the addition of the SUFs/SDUs to the TOs' respective systems is resulting in uncompensated risks and costs.[46] The

---

[41] *Ameren*, 880 F.3d at 581–582.

[42] *Ameren* Remand Order at P 32.

[43] Nowak Testimony, p. 4.

[44] NYISO-TO Agreement, Section 3.10(a). The significance of this unilateral Section 205 right is demonstrated by the fact that it is one of only a few provisions in the NYISO-TO Agreement subject to *Mobile-Sierra* protections. Further, the NYISO-TO Agreement expressly supersedes the NYISO OATT and other agreements in the event of conflict. *Id.*, Section 6.09.

[45] *Id.,* Section 3.10(a)

[46] *See* Nowak Testimony, pp. 13–14 ("the incremental risks associated with SUFs/SDUs represent a reduction in investors' expected returns on the enterprise. As such, investors will require a higher return to invest in the

Core Amendment provides the TOs the opportunity to make the upfront capital investment necessary for the development and construction of SUFs/SDUs and the opportunity to earn a reasonable rate of return of and on that investment. In addition, these uncompensated risks and costs, and the opportunity to fund the capital costs associated with the SFUs/SDUs are the result of the TOs, in conjunction with NYISO, providing generation interconnection service under the NYISO OATT, meaning that these uncompensated costs are "related to services under the ISO OATT."[47] Therefore, each TO has the unilateral right to make a FPA Section 205 filing to establish the appropriate mechanism to recover these uncompensated costs plus a return.[48]

B. The Contemporaneous Section 206 Filing

The FPA Section 206 Complaint that is being contemporaneously filed demonstrates how certain portions of the NYISO Tariffs are inconsistent with *Hope, Bluefield,* and *Ameren*, and thus are unjust and unreasonable. That filing also requests that the Commission direct the NYISO on compliance to file a replacement just and reasonable rate, in the form of the Implementing Amendments, to correct the otherwise unjust and unreasonable portions of the NYISO Tariffs.

IV. The Core Amendment is Just and Reasonable and Not Unduly Discriminatory

A. The Core Amendment is Just and Reasonable

The adoption of the Core Amendment is just and reasonable.[49] To be just and reasonable, a jurisdictional rate must not be confiscatory,[50] meaning that it must "yield a reasonable return on the value of property used at the time it is being used to render the service."[51] The Commission must "balance[e] [] the investor and the consumer interests" in establishing rates within a zone of reasonableness, [52] and the resulting rate must "fairly compensate investors for the risks they have assumed…."[53] In evaluating whether a Section 205 filing to amend an OATT is just and

enterprise resulting in a higher cost of capital that is uncompensated by the authorized return on rate base. The incremental risks therefore result in an uncompensated cost to the TOs."); *see also id.*, p. 17 ("'Fundamentally, rate of return and risk go hand-in-hand: the higher the risk, the higher the required rate of return ….'") (quoting *El Paso Nat. Gas Co.*, 145 FERC ¶ 61,040, P 693 (2013) ("Opinion No. 528")); *see also infra* at pp. 16–17.

[47] NYISO-TO Agreement, Section 3.10(a).

[48] *See PJM Transmission Owners*, 125 FERC ¶ 61,021 (2008) (accepting a unilateral Section 205 filing by the PJM Transmission Owners to address cost recovery for accelerating certain project schedules).

[49] *See* 16 U.S.C. § 824d.

[50] A confiscatory rate effectuates an uncompensated taking for purposes of the Fifth and Fourteenth Amendments and is, thus, unconstitutional. *See Bluefield*, 262 U.S. at 690.

[51] *Id.; see also Jersey Cent. Power & Light Co. v FERC,* 810 F.2d 1168, 1175 (D.C. Cir. 1987).

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

[53] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

reasonable, the Commission also considers whether the amendment is consistent with or superior to the Commission's *pro forma* OATT.[54]

As discussed *supra*, each TO individually and collectively hereby requests pursuant to FPA Section 205 to amend Section 25.5.4 of the NYISO OATT.[55] In addition, because the TOs are committed to New York attaining its ambitious climate goals and seek to facilitate the generator interconnection process, the TOs voluntarily commit through this filing to a deadline by which they will exercise their rights under the Core Amendment to not delay the interconnection process.

The Core Amendment revises Section 25.5.4 in Attachment S of the NYISO OATT to read as follows (changes shown in redline):

> **25.5.4 Transmission Owners' Cost Recovery**
>
> Any Connecting or Affected Transmission Owner implementation and construction of (i) System Upgrade Facilities as identified in the Annual Transmission Baseline Assessment or Annual Transmission Reliability Assessment, or (ii) System Deliverability Upgrades as identified in the Class Year Deliverability Study, shall be in accordance with the ISO OATT, Commission-approved ISO Related Agreements, the Federal Power Act and Commission precedent, and therefore shall be subject to the Connecting or Affected Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, all reasonably incurred costs, plus a reasonable return on investment. Such a Connecting or Affected Transmission Owner shall provide the NYISO with written notice, prior to the commencement of the Initial Decision Period, as that period is defined in Section 25.8.2 of Attachment S, if the Connecting or Affected Transmission Owner, as the case may be, elects to fund the capital costs of any System Upgrade Facilities and/or System Deliverability Upgrades identified in the underlying study(ies); otherwise, such facilities, if any, shall be funded solely by the Developer(s). In the event that the Connecting or Affected Transmission Owner elects to fund the capital costs of any System Upgrade Facilities and/or System Deliverability Upgrades, then the Connecting or Affected Transmission Owner, as the case may be, and affected Developer shall enter into a Facilities Service Agreement or, if unable to agree to the terms and conditions, the Transmission Owner shall file the Facilities Service Agreement with

[54] *See, e.g., PacifiCorp*, 173 FERC ¶ 61,016, n.46 (2020) (clarifying that in a FPA Section 205 proceeding, "the Commission considers whether a section 205 proposal is just and reasonable, including whether it is consistent with or superior to the *pro forma* OATT" (citations omitted)).

[55] *See supra* at p. 2.

> the Commission on an unexecuted basis. Such a Facilities Service Agreement shall provide for the Connecting or Affected Transmission Owner's recovery of its funded costs, plus a reasonable return on investment.

The Existing Funding Approach is set forth in Attachment S (*i.e.*, Section 25) to the NYISO OATT. By way of background, Attachment S sets forth the NYISO's rules for the allocation of costs among the TOs, Load Serving Entities, and Interconnection Customers that are required for the reliable interconnection of generation identified through the NYISO's class year study process.[56] In general, Attachment S sets forth the Existing Funding Approach whereby Interconnection Customers are allocated the costs of the SUFs/SDUs that are determined through the NYISO's planning processes to have not been needed but for the need to reliably interconnect the Interconnection Customers' respective generation projects.[57] The Commission accepted the Existing Funding Approach in Attachment S (which provides for "participant funding") as an acceptable variation from the crediting approach that was otherwise adopted in the Commission's Order No. 2003.[58]

1. The Core Amendment is Authorized by the Existing Language in Section 25.5.4

Incorporating the Core Amendment is just and reasonable for several reasons. First, it accords with, and is authorized by, the express language of the existing Section 25.5.4 of the NYISO OATT. As quoted immediately above, this section provides that the obligation to implement and construct SUFs/SDUs "shall be subject to the Connecting or Affected Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, all reasonably incurred costs, plus a reasonable return on investment." Incorporating the Core Amendment is consistent with this current OATT provision because the Core Amendment provides that the "appropriate financial arrangements" for the TOs' recovery of its costs plus a return shall be an FSA. Specifically, the Core Amendment provides that if a TO elects to fund an SUF/SDU, then the parties will enter into a Facilities Service Agreement.[59] As established in *MISO*, an FSA is the contract pursuant to which, among other appropriate governing terms, a transmission owner provides the funding for generation interconnection –caused upgrades and then recovers those costs, including a return, over a 20-year

---

[56] NYISO OATT, Section 25.1.1 ("Purpose of the Rules").

[57] *See NYISO*, 108 FERC ¶ 61,159 at P 50 (explaining that under Attachment S, "if an interconnection requires [SUFs/SDUs] above and beyond those that would have been built anyway, *i.e.,* [SUFs/SDUs] that would not be constructed 'but for' the Interconnection Request at issue, the [Interconnection Customer] is responsible for paying for those upgrades.").

[58] *Id.* at PP 57–59.

[59] Should the parties be unable to reach an agreement, then the Core Amendment provides that the TO would file the FSA with the Commission on an unexecuted basis.

period from the Interconnection Customer.[60] Therefore, and in accordance with the existing provisions in Section 25.5.4, the Core Amendment establishes that the FSA will be the vehicle (i.e., "the agreement or Commission-approved tariff") by which the TOs may, by funding the SUFs/SDUs (i.e., by "appropriate financial arrangements"), recover their costs plus a reasonable return.[61]

2. The Core Amendment Complies with Supreme Court Precedent.

Judicial and Commission precedent makes clear that a regulated utility is entitled to the opportunity to earn a reasonable return for their assets used to provide jurisdictional service. The Core Amendment is just and reasonable by providing the TOs the opportunity to do so by providing them the option to fund the SUFs/SDUs. The Supreme Court has held:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.[62]

The Supreme Court has also held that the fixing of a "just and reasonable" rate involves a balancing of investor and consumer interests to arrive at rates that provide the public utility and its investors a reasonable rate of return without being exploitive to consumers. Implicit in that holding is the acceptance that the rates will provide a return to the public utility and its investors. In construing the similarly worded provisions of the Natural Gas Act, the Supreme Court has held:

> The rate-making process under the Act, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that 'regulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By

[60] *See MISO*, 171 FERC ¶ 61,075 at PP 8–86. The TOs note that they are not filing a *pro forma* FSA as part of this Section 205 filing. Instead, in the contemporaneous Section 206 filing, the TOs seek a Commission order that, among other things, request that the Commission issue an order directing the NYISO, the administrator of the NYISO OATT, to develop, among other things, an appropriate *pro forma* FSA on compliance in time to permit its use for the 2021 NYISO Class Year. Should such a *pro forma* FSA not be in place by that time, the TOs would develop FSAs on an *ad hoc* basis until such a *pro forma* is adopted. This is precisely what occurred in MISO before the Commission approved its *pro forma* FSA. *See id.* at P 17 ("MISO explains that transmission owners will no longer have to negotiate the terms of each FSA separately…").

[61] *See* NYISO OATT, § 25.5.4.

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

> that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[63]

Precedent thus requires that a return be recoverable. Because the Core Amendment provides for such a return, it is just and reasonable.

3. The Core Amendment Complies with the *Ameren* Opinion and the Commission Orders on Remand

While the foregoing Supreme Court precedent makes clear that public utilities in general are entitled to a reasonable return that is commensurate with returns on investments having comparable risks and that is sufficient to maintain its credit and attract capital, the recent *Ameren* opinion and related Commission orders affirm the holdings' application to a transmission owner's right to earn a reasonable return for the uncompensated risks and costs associated with its ownership, operation and maintenance of network upgrades. In *Ameren*, several of the MISO TOs challenged certain Commission orders that abrogated the MISO TO Funding Mechanism, thereby depriving the MISO TOs of the opportunity to earn a return on their equivalent of the SUFs/SDUs. Upon review, the D.C. Circuit held that the foregoing requirement that the rates be sufficient to allow the regulated utility a return sufficient to attract capital necessarily means that investors do not expect "to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return" and that investors "invest in entire enterprises, not just portions thereof."[64] By forcing the MISO TOs "to act, at least in part, as a nonprofit business…. FERC's orders … create a risk that new capital investment will be deterred."[65] In addition, the *Ameren* Court held that the Commission had failed to meaningfully respond to the MISO TOs' arguments that they assume certain risks and costs for owning, operating, and maintaining their network upgrades for which they are never compensated.[66]

While the *Ameren* Court emphasized that FERC precedent, in particular, does not provide compensation for certain of the risks identified by the MISO TOs,[67] the court vacated the underlying Commission orders and remanded the proceedings to the Commission for further proceedings. The court did so because the Commission had failed to respond to the foregoing arguments by the MISO TOs. The court directed the Commission on remand to "explain[] whether all risks are truly 'baked in,' respond[] to the transmission owners 'entire enterprise' argument,

---

[63] *Hope*, 320 U.S. at 603 (citations omitted).

[64] *Ameren*, 880 F.3d at 581.

[65] *Id.*

[66] *Id.* at 580.

[67] *Id.* at 583.

and address[] the effect of these orders on the ability of transmission businesses to attract future capital."[68]

On remand, the Commission agreed with the *Ameren* court's analysis and reversed the Commission's prior orders that had disallowed the MISO TOs' from having a MISO TO Funding Mechanism. The Commission held that in its prior orders:

> [T]he Commission erred in failing to (1) adequately address transmission owners' contention that the Commission's vacated orders would force them to construct and operate Generator Up-Front Funded network upgrades on a non-profit basis; (2) adequately address transmission owners' concerns that their investors would be forced to accept risk-bearing additions to their network with zero return; (3) offer sufficient evidence or economic theory to support the Commission's finding of discrimination by transmission owners' among their customers; and (4) address the effect of the Commission's orders on the ability of transmission businesses to attract future capital.[69]

The Core Amendment is just and reasonable because it provides the TOs the opportunity to recover a return for the risks and uncompensated costs associated with owning, operating, and maintaining SUFs/SDUs that are necessary for them to provide jurisdictional interconnection service. It is further just and reasonable because it would allow the TOs to earn a return (1) to compensate them for the real risks they incur for the SUFs/SDUs, including regulatory risks, reliability risks, cybersecurity risks, environmental risks and operational risks; and/or (2) attract capital, as opposed to having to continue to own, operate, and maintain SFUs/SDUs as non-profit appendages to their respective businesses. Indeed, the TOs address below each of the issues the *Ameren* court remanded to FERC for further consideration in the event the Commission considers such a showing, notwithstanding its actions in the Remand Order, to be required as part of the TOs' burdens of proof.[70]

a) The Core Amendment Compensates TOs for Risks and Costs Borne for the SUFs/SDUs

The Core Amendment is further just and reasonable because it would provide the TOs a return to compensate them for the real risks and costs that are associated with the SUFs/SDUs. In

[68] *Id.* at 582.

[69] *Ameren* Remand Order at P 28.

[70] The TOs recognize that Chairman Glick and Commissioner Clements have indicated in certain dissenting and concurring opinions that the Commission should have engaged in further inquiry on remand from *Ameren*. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019) (Glick, Comm'r, dissenting); *Midcontinent Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,084 (2021) (Clements, Comm'r, concurring). As provided below, and in the attached expert testimony, the TOs address each of the issues the *Ameren* court remanded to the Commission for further inquiry.

this regard, the *Ameren* court held that the Commission had failed to address the MISO TOs' arguments that they face risks and costs for their network upgrades for which they are never compensated and remanded this issue to the Commission.[71] The Commission on remand found for the MISO TOs.[72] As explained by Joshua Nowak, an investor requires "compensation, through a higher return, to make an investment with greater risk relative to other investments with lower risks. Therefore, as a company's risk increases, investors require a higher rate of return."[73] Further, as regulated utilities are not typically allowed to earn above authorized rates, "any increase in risks - - or increase in potential losses - - must be recognized in the authorized return to investors."[74] As the SUFs/SDUs only expose investors to expected risks and losses since there is currently no return, "the incremental risks associated with SUFs/SDUs represent a reduction in investors' expected returns on the enterprise … result[ing] in an uncompensated cost to the TOs."[75]

In general, there is nothing special or unique about SUF or SDU facilities in that the NYISO studies conducted to reliably interconnect and integrate electricity generated by the Developers' new power plants can identify any type of transmission facility as being required. SUFs and SDUs are virtually indistinguishable from the TOs' general transmission plant. Accordingly, the risks associated with SUFs/SDUs are generally the same as that associated with the TOs' general transmission plant.[76] However, as Nowak's testimony explains, the incremental addition of an ever-increasing amount of SUFs/SDUs increases the TOs' overall risk profile by adding additional elements to their respective electric systems.[77]

As the Nowak Testimony describes, the TOs face numerous, real risks relating to their ownership, operation and maintenance of SUFs/SDUs, for which they and their investors are not compensated. These risks include:

> **(1) Regulatory Risks**
>
> Regulatory Risk: As regulated utilities, the TOs rely on the ratemaking process to provide timely recovery of their costs. However, that recovery is not guaranteed. The operation and maintenance of electric transmission assets entails the possibility

[71] *Ameren*, 880 F.3d at 580.

[72] *Ameren* Remand Order at P 28.

[73] Nowak Testimony, p. 10.

[74] *Id.*, p. 11.

[75] *Id.*, p. 13.

[76] Of course, the relevant difference is that while the TOs earn a return on the rest of their utility plant, they do not do so for the SUFs/SDUs.

[77] *Id., pp. 18-19.*

> that the TOs may not recover some or all their costs, including costs associated with SUFs/SDUs.[78]

As further explained by Mr. Nowak, the TOs expressly identify in their investor disclosure filings this regulatory risk, and the rating agencies "heavily weigh" this risk in evaluating regulated utilities.[79] Mr. Nowak's analysis determined that the TOs' have tended to underearn relative to the state-level authorized returns.[80] Mr. Nowak also analyzed relevant data in the Regulatory Research Associates ("RRA") rate case database, and based on the 113 fully litigated electric rate cases decided since January 1, 2010, non-return reductions were ordered by regulators in 104 of these cases, resulting in reductions exceeding $2.4 billion.[81] Further, Mr. Nowak noted several examples of where a state regulator denied a utility's request for cost recovery, thereby directly shifting costs to shareholders.[82]

In conclusion, the TOs are subject to regulatory risk associated with their own, operating, and maintaining SUFs/SDUs because of the regulatory risk that a regulator may deny some or all of those costs, with that risk exacerbated by the potential for regulatory lag of different regulators applying different cost recovery standards.[83]

(2) Reliability Risks

Reliability Risk:

> The TOs are required to meet a variety of mandatory reliability standards, including those established by the North American Electric Reliability Corporation ("NERC"), the New York State Reliability Council, LLC, the New York Public Service Commission ("NYPSC"), and other regulators. If the TOs fail to comply with those requirements (whether or not they are at fault), they could incur compliance costs, fines and other assessments or penalties….The incremental investments associated with SUFs/SDUs increase the obligations for reliability compliance and the potential for such penalties.[84]

As recognized by the D.C. Circuit, reliability risks are very real, as:

---

[78] Nowak Testimony, p. 14.

[79] *Id.*, p. 23.

[80] *Id.,* pp. 24–25.

[81] *Id.*, p. 27.

[82] *Id.*, p. 28–30.

[83] *Id.*, pp. 33–34.

[84] *Id.*, p. 15.

> FERC's precedents do not provide compensation for several of the classes of risks that Petitioners allege will accompany construction and operation of the network upgrade facilities. For example, fines and penalties for violations of mandatory reliability standards and environmental regulations are generally charged directly to the utility, not passed through to customers via rate increases.[85]

In fact, as owners of the bulk electric system, the TOs potentially could be subject to penalties of $1.3 million per violation per day should they be found to violate NERC's mandatory reliability standards. The TOs have been subject to NERC penalties. For example, in 2019, Avangrid self-reported six transmission operational reliability standards for three of its subsidiaries. While no harm is known to have occurred because of these violations, Avangrid agreed to pay $450,000 in penalties and committed to several mitigation measures.[86] On a national level, Duke Energy was recently penalized $10 million for security violations, and Florida Power & Light Co. agreed in 2009 to pay a civil penalty of $25 million resulting from a 2008 loss of service that affected millions of customers.[87]

On the state level, the TOs are held to strict service quality, reliability, and safety standards and are subject to a negative revenue adjustment ("NRA") for any shortfall and may be incurred without any finding of negligence. These potential NRAs are provided in the Nowak Testimony, and all of the TOs incur them. To illustrate, National Grid is subject to several customer service quality, electric reliability, and safety performance metrics with corresponding maximum NRAs.[88] These penalties were triggered without any determination of fault. Similarly, NYSEG has recorded $17.5 million in NRAs over the last three years relative to its system average interruption frequency index ("SAIFI") and customer average interruption duration index.[89] Central Hudson's 2018 Rate Order changed various performance mechanisms for electric, natural gas and customer service. For electric reliability, the Central Hudson's SAIFI target was raised to 1.38 for 2018 and lowered to 1.34 for 2019, respectively. In 2019, for the 2018 reliability performance, Central Hudson's shareholder saw a negative revenue adjustment of $2 million.[90] The TOs disclose these reliability risks to their investors.[91]

---

[85] *Ameren,* 880 F.3d at 583 (citation omitted).

[86] Nowak Testimony, p. 36.

[87] *Id.*, p. 37.

[88] *Id.*, pp. 37–38.

[89] *Id.*, pp. 38–39.

[90] *Id.*, p. 39.

[91] *Id.*, p. 35.

In conclusion, the TOs owning, operating, and maintaining the SUFs/SDUs increases the degree of reliability risks without being able to earn a return results in the TOs bearing risks without compensation.[92]

(3) Cybersecurity Risk

> Cybersecurity Risk: As the owners of critical energy infrastructure, the TOs face the risk that their equipment could be subject to a cyberattack, which could disrupt operations, cause property damage, or create substantial response costs. SUFs/SDUs often add to the system's overall complexity and must integrate with the balance of the system, creating potentially greater opportunities for cyber-attacks.[93]

The TOs disclose these cybersecurity risks to their investors.[94] Credit rating agencies have acknowledged these cybersecurity risks. Moody's suggests that utilities that have disaggregated, such as the TOs, have a higher cybersecurity risk than vertically integrated utilities, indicating that cybersecurity risk is particularly acute for the TOs.[95] In addition, "the risks and potential costs of a cyber-attack are increasing as electric transmission grids are becoming more complex, 'intelligent,' and interconnected," with the more complex the system, the more vulnerable to potentially costly cyber-attack.[96] Utilities incur costs with cyber-attacks. Indeed, NERC assessed a $2.7 million penalty for a self-reported data breach that was not even directly caused by the utility but by a vendor's non-compliance.

As increased components to the TOs' systems, the SUFs/SDUs increase the TOs' exposure to cyber risks.[97]

(4) Environmental Risk

> Environmental Risk: Severe weather events are predicted to become more frequent due to the effects of climate change. Those events may damage transmission equipment, resulting in service disruptions and repair costs. Further, the Companies are exposed to potential environmental risks and liabilities, such as those related to contaminated property, oil-filled equipment, and air emissions in their ordinary course of doing business. By expanding their systems

---

[92] *Id.*, p. 41.

[93] *Id*., p. 15.

[94] *Id.*, pp. 42–43.

[95] *Id*., p. 43.

[96] *Id.,* pp. 43–44.

[97] *Id.*, p. 45–46.

> through SUFs/SDUs, the potential for environmental liabilities or equipment failure from weather events will increase.[98]

Certainly, investors consider climate risks when making investment decisions. According to a 2019 McKinsey and Company report, utilities are becoming increasingly vulnerable to extreme weather events and, unless utilities increase their resiliency to extreme weather events, they will face increased physical and financial risk.[99] The same report references a 2018 National Climate Assessment report that stated "utilities could see negative impacts from increased temperatures and heat waves, as well as sea level rises even in the absence of storms. This will increase the financial cost to utilities of climate change and increase the benefits of being prepared."[100] Indeed, many of the TOs have already incurred significant costs in responding to extreme weather events.[101] Likewise, the Commodity Futures Trading Commission has published a report concluding that climate change is a risk to the overall financial system.[102] Given the reality of these risks, the TOs disclose these environmental risks to their shareholders.[103]

In addition to the risks associated with severe weather events, regulated utilities routinely deal with environmental contamination in the course of installing, repairing, or otherwise maintaining their assets. Managing this contamination can result in a range of costs, from specialized workers and personal protective equipment, to soil sampling, contaminant disposal and remediation. Although these costs are subject to recovery through the ratemaking process, recovery is by no means guaranteed.[104]

SUFs/SDUs increase the TOs' exposure to environmental risks since they increase the amount of transmission assets for which the TOs bear responsibility.[105]

(5) Operational Risk

> Operational Risk: Operating and maintaining electric transmission property is inherently hazardous, exposing the TOs to the possibility of being held liable in the event of an accident, encroachment, or

---

[98] *Id.*, pp. 15–16.

[99] *Id*., p. 51.

[100] *Id.* (quoting McKinsey and Co., *Why, and how, utilities should start to manage climate change risk*, p. 3 (Apr. 2019)).

[101] *Id*., pp. 52–53.

[102] *Id*., pp. 51–52.

[103] *Id.*, pp. 48–49.

[104] *Id.*, p. 55. For instance, NIMO recently incurred costs for structure replacements, multiple rounds of soil characterization testing, repair of a landfill cap, disposal of contaminated soils, and legal support while completing a transmission line rebuild in an area with PCB contamination. *Id*., p. 54.

[105] *Id.*, p. 55.

> incursion. That liability may not be fully insurable and may be subject to substantial deductibles.[106]

The TOs face numerous risks associated with financial harms resulting from a physical accident involving their assets and whether insurance may or may not cover such risks. The TOs disclose these operational risks to their investors.[107] While each of the TOs maintain insurance consistent with sound utility practice, coverage is generally limited and may not fully insure against all significant losses.[108] In addition, certain regulators have excluded insurance deductibles for injuries and damages from rate recovery.[109]

SUFs/SDUs are integrated facilities that intrinsically carry similar operational risks, and their addition to the system increases the amount of operational risks that the TOs' bear.[110]

(6) Other Risks

In addition to the foregoing, readily identifiable risks, there is also always the real possibility that a TO will face a future event without precedent that creates substantial risks for ratepayers, referenced by Mr. Nowak as "unknown unknowns."[111] Examples include the recent extreme cold in Texas, Superstorm Sandy, and California wildfires, and possibilities in the future might include other climate-related events or possibly cyber-attacks or pandemics.[112] The related uncertainty attaches to the TOs' owning, operating, and maintaining SUFs/SDUs and, thus, creates risks to investors.[113]

Therefore, the Core Amendment is just and reasonable because it would allow the TOs an opportunity to earn a return and thereby compensate them for these real risks and costs they incur for the SUFs/SDUs.

b) Compulsory Generator Funding Compels TOs to Increasingly Operate as Non-Profits, Impeding Their Ability to Attract Capital.

Mr. Nowak further addresses the *Ameren* court's directive on remand to FERC to "respond[] to the transmission owners' 'entire enterprise' argument, and address[] the effect of

---

[106] *Id.,* p. 16.

[107] *Id.,* p. 56–57.

[108] *Id.*, pp. 57–58.

[109] *Id.,* p. 58.

[110] *Id.*, p. 59.

[111] *Id*.

[112] *Id.*, pp. 60–62.

[113] *Id.*, p. 62.

these orders on the ability of transmission businesses to attract future capital."[114] As explained by Mr. Nowak, requiring transmission owners to operate, in part, as nonprofits fundamentally changes the investor-owned utility business model and impacts investor assessment of their required return, since investors must invest in a utility's entire enterprise, including any nonprofit appendages.[115]

The effect of the Existing Funding Approach (which excludes SUFs/SDUs from the utility "plant" on which a return is earned) is that the "authorized rate of return is insufficient relative to the risks borne by investors for both rate base and SUFs/SDUs."[116] SUF/SDUs constitute incremental risks beyond those faced by other utilities that are not required to bear the risk of comparable nonprofit operations. This elevated risk level may drive investors to seek alternative investments that provide comparable returns but have lower levels of risk. Deterring new capital investment in this manner compromises the TOs' ability to provide safe and reliable service and maintain financially sound operations.[117]

Moreover, the *Ameren* court recognized that while

> [T]he non-profit innovation might remain bearable so long as the generator-funded upgrades growing inside the grid remain tiny relative to their host…. [I]f more and more of a transmission owner's business is to be owned and operated on a non-profit basis, these additions would likely deter investors and diminish the ability of the transmission grid to attract capital for future maintenance and expansion.[118]

As explained previously,[119] absent the Core Amendment, an ever-increasing amount of the TOs' respective business will continue to be owned, operated, and maintained on a non-profit basis. Added SUFs/SDUs will further drive "[a]n increase in the level of nonprofit operations [that] will only serve to exacerbate the issues related to capital attraction and financial integrity discussed above."[120] The Core Amendment is necessary to address these infirmities recognized by the courts; it is therefore just and reasonable.

---

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

[115] Nowak Testimony, p. 63; *see also Ameren*, 880 F.3d at 581 ("Investors … invest in entire enterprises, not just portions thereof.").

[116] Nowak Testimony, p. 64.

[117] *Id*., p. 65.

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

[119] *See supra* at p. 16.

[120] Nowak Testimony, p. 66.

4. Adopting the Core Amendment is Consistent with or Superior to the Commission's *pro forma* OATT

In evaluating whether a Section 205 filing to amend an OATT is just and reasonable, the Commission considers whether the amendment is consistent with or superior to the Commission's *pro forma* OATT.[121] As discussed above, the Commission approved the Existing Funding Approach as an acceptable deviation from the Commission's crediting approach in its *pro forma* OATT in NYISO's compliance filing to Order No. 2003.[122] The Core Amendment is consistent with or superior to the crediting policy in the Commission's *pro forma* OATT because under both the *pro forma* OATT's crediting approach and the Core Amendment, the affected transmission owners are provided the opportunity to earn a return for the network upgrade(s) caused by generator interconnection(s). Specifically, under the Commission's *pro forma* crediting approach, the costs of such network upgrades ultimately get rolled into the transmission owner's ratebase,[123] resulting in that transmission owner earning a reasonable return for those upgrades. Likewise, under the Core Amendment, the Connecting or Affected TO would be afforded the opportunity to earn a reasonable return for such upgrades (*i.e.,* SUFs/SDUs) by funding them and then recovering their costs, including a return, through the FSA.

The Core Amendment is further consistent with or superior to the crediting approach in the Commission's *pro forma* OATT because both the Core Amendment and crediting approach are consistent with judicial and Commission precedent, as opposed to the Existing Funding Approach that is not. Specifically, the court in *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*[124] upheld Order No. 2003, including the crediting policy. And the *Ameren* decision and the *Ameren* Remand

---

[121] *PacifiCorp*, 173 FERC ¶ 61,016, n.46 (2020) (clarifying that in a FPA Section 205 proceeding, "the Commission considers whether a section 205 proposal is just and reasonable, including whether it is consistent with or superior to the *pro forma* OATT"); *Terra-Gen Dixie Valley, LLC*, 135 FERC ¶ 61,134, P 12 (2011) (stating "[t]he Commission will only find that deviations from the *pro forma* OATT are just and reasonable if the filing party explains how the deviations in the proposed OATT are consistent with or superior to the *pro forma* OATT...."); *Commonwealth Edison Co.*, 83 FERC ¶ 61,274, 62,143 (1998) (explaining that "the 'consistent with, or superior to' test does not supplant and is not inconsistent with the standard of Section 205 [but] … is a test for determining whether proposed revisions to the *pro forma* tariff are just and reasonable and not unduly discriminatory or preferential."); *N.Y. State Elec. & Gas Corp.*, 82 FERC ¶ 61,209, n.4 (1998) (stating "the 'consistent with or superior to' standard is a test for determining whether proposed revisions to the *pro forma* tariff are just and reasonable and not unduly discriminatory or preferential" and that in determining whether a proposed revision meets the statutory criteria, "the 'consistent with or superior to' test is a tool for ensuring that a proposed tariff revision will still meet the standards of the FPA.").

[122] *See supra* at p. 13 (discussing *NYISO,* 108 FERC ¶ 61,159 at PP 57–59).

[123] *See Order on Rehearing and Clarification*, *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845-B, 168 FERC ¶ 61,092, P 4 (2019) ("Order No. 2003 also established a mechanism that explicitly allows transmission providers to include the costs of interconnection-customer-funded network upgrades in their transmission rates to the extent that the transmission provider has provided credits to the interconnection customer. When the transmission provider includes the cost of the network upgrade in its transmission rate base, the transmission provider earns a return on the costs of this facility.").

[124] 475 F.3d 1277 (D.C. Cir. 2007).

Order confirm the imperative to adopt the Core Amendment to bring the Existing Funding Approach in compliance with law.

5. The Core Amendment's TO Funding Deadline Further Demonstrates the Reasonableness of the Core Amendment

The Core Amendment is further just and reasonable because in it, the TOs voluntarily commit to a deadline by which to exercise their funding right within the class year process to not delay the NYISO's interconnection process. While adherence to this deadline is not required to accept the Core Amendment as just and reasonable (for example, the MISO TOs were not required to adopt such a deadline),[125] the TOs do so to facilitate prompt interconnection of new resources, further evidencing the reasonableness of the TOs' filing. Adhering to this deadline would require the TOs to exercise their funding option before the commencement of the "Initial Decision Period." As defined in the NYISO OATT, this Initial Decision Period is generally the 30-day period after the NYISO issues its pertinent class year studies identifying the SUFs/SDUs necessary to interconnect and integrate that class year's interconnection requests and identifying the resulting cost allocations to each affected Developer. Establishing the TOs' deadline before the commencement of that decision period informs Developers of the applicable TO's decision before that TO is required to commit to pay for their allocation of SUF/SDU costs. The Developer's decision can thus be appropriately informed, and the Core Amendment is inserted into the existing interconnection process timeline, causing no delay.

B. The Core Amendment is Not Unduly Discriminatory or Preferential.

The *Ameren* court held that concerns of undue discrimination associated with the MISO TOs' having the MISO TO Funding Mechanism were misplaced because all but one of the MISO TO petitioners in that appeal had divested and no longer had affiliated generation interests to which they could provide an undue preference.[126] In any case, the court found that the Commission neither provided evidence of *actual* discrimination nor relied on economic theory for potential discrimination. On remand, in response to concerns that additional MISO TOs remained vertically integrated, the Commission held that concerns of undue discrimination remained misplaced because an aggrieved Developer could always seek relief from the Commission.[127]

Notwithstanding, several Commissioners have repeated concerns regarding the potential for undue discrimination in MISO where vertically integrated transmission owners remain.[128] Whatever the standard for assessing undue discrimination issues in MISO (actual or potential), adopting the Core Amendment raises no such concerns in NYISO. Since the 1990s, the energy markets in New York have been deregulated. Long divested of their generation, neither the TOs

---

[125] *See Ameren* Remand Order.

[126] *Ameren*, 880 F.3d at 578.

[127] *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 at P 38.

[128] *See supra* at n.64.

nor their affiliates own or develop affiliate generation within the affiliate TO's transmission district in New York, with only minor exceptions.[129] As a result, there is no reasonable opportunity for a TO to treat third party generation and affiliate-owned generation in a manner that is unduly discriminatory.

C. Adopting the Core Amendment is Consistent with Commission Precedent

The justness and reasonableness of incorporating the Core Amendment into the NYISO Tariff is supported by Commission precedent. As repeatedly discussed, the Commission has authorized the MISO TOs to adopt the Core Amendment. There is simply no rational basis for the Commission to approve adoption of a TO funding mechanism in MISO but deny its adoption TOs in NYISO.[130]

For the foregoing reasons, revising the NYISO OATT to adopt the Core Amendment is just and reasonable and not unduly discriminatory or preferential. Accordingly, the Core Amendment should be accepted for filing.

V. Requested Effective Date for Core Amendment

The TOs respectfully request that the Commission permit the Core Amendment to become effective as of June 9, 2021, sixty-one days after the date of this submission.[131]

VI. Request for Waiver of Filing Requirements

The TOs request that the Commission grant any additional waivers of its rules and regulations as necessary to accept the Core Amendment for filing and grant other such relief

---

[129] Con Edison was allowed to retain generation necessary to produce steam for its steam customers, and NYSEG/RG&E were allowed to retain certain hydroelectric generating facilities. In addition, the New York Power Authority ("NYPA"), a New York State instrumentality not participating in this filing, was not required to divest its generation assets during New York's energy restructuring and thus retains large hydropower plants, including a pumped storage facility and various fossil fuel power plants, the last of which was built in 2006. While no undue discrimination concerns should therefore exist in New York, it bears emphasizing that the *Ameren* court found that a single TO's affiliated generation ownership was not material for purposes of undue discrimination analysis. *See Ameren*, 880 F.3d at 578.

[130] *E.g.*, *Airmark Corp. v. Fed. Aviation Admin.*, 758 F.2d 685, 692 n.25 (D.C. Cir. 1985) ("when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law") (quoting *Columbia Broadcasting System, Inc. v. Fed. Commc'ns Comm'n*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). In fact, as noted above, there is arguably greater reason to permit New York's TOs the TO Funding Mechanism because the concern of undue discrimination raised in MISO does not exist here.

[131] 18 C.F.R. § 35.13(b)(2) (2020).

requested therein.[132] Cost support associated with the costs of exercising the TO Funding Mechanism in any particular instance would be submitted in conjunction with any FSA or other applicable agreement.[133]

VII. List of Documents

The following is a list of documents[134] submitted with this filing:

1. A clean version of the proposed revisions to Section 25.5.4 of the OATT (Attachment 1);

2. A redlined version of the proposed revisions to Section 25.5.4 of the OATT (Attachment 2);

3. The Prepared Direct Testimony of Joshua C. Nowak (Attachment 3, also labeled as Exhibit NYT-0001)

    - Exhibit NYT-0002, Joshua Nowak Professional and Educational Background
    - Exhibit NYT-0003, Catalog of Risks
    - Exhibit NYT-0004, Risk Disclosures of the TOs
    - Exhibit NYT-0005, Potential Negative Revenue Adjustments of the TOs

VIII. Correspondence and Communications

All correspondence and communications concerning the above-captioned proceedings should be addressed to the following persons:[135]

[132] 18 C.F.R. § 35.11 (2020).

[133] The TOs note that a similar waiver request was made and granted in the proceeding in Docket No. ER08-137 involving the PJM TOs' exercise of their unilateral Section 205 right to address responsibility where a service request called for the acceleration of a local or regional upgrade in PJM's RTEP. *See* PJM Transmission Owners, PJM Open Access Transmission Tariff Revisions, Docket No. ER08-1378 (Aug. 8, 2008).

[134] 18 C.F.R. § 35.13(b)(1).

[135] The TOs request waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.203(b)(3) (2020), to the extent necessary to permit more than two persons to be included on the official service list on their behalf in this proceeding.

For Central Hudson:

John Borchert
Senior Director of Energy Policy and
Transmission Development
Central Hudson Gas & Electric Corporation
284 South Avenue
Poughkeepsie, NY 12601
jborchert@cenhud.com

For Con Edison and O&R:

Susan J. LoFrumento
Associate Counsel
Consolidated Edison Co. of New York, Inc.
Orange and Rockland Utilities, Inc.
4 Irving Place
New York, NY 10003
lofrumentos@coned.com

For National Grid:

Christopher J. Novak
Senior Counsel
Niagara Mohawk Power Corporation
d/b/a/ National Grid
40 Sylvan Road
Waltham, MA 02451-1120
chris.novak@nationalgrid.com

For NYSEG and RG&E:

Nicholas J. Cicale
Attorney
Avangrid Service Company
New York State Electric & Gas Corporation
and
Rochester Gas and Electric Corporation
180 Marsh Hill Road
Orange, CT 06477
nicholas.cicale@uinet.com

For TOs:

Andrew W. Tunnell
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 226-3439 (telephone)
atunnell@balch.com

David Martin Connelly
Balch & Bingham LLP
601 Pennsylvania Avenue, N.W.
Suite 825 South
Washington, DC 20004
(202) 661-6341 (telephone)
dconnelly@balch.com

IX. Persons on Whom this Filing is Being Served

Copies of this filing have been served on all customers under the NYISO OATT and the NYPSC.[136] This filing also will be posted in conformance with the Commission's regulations.[137]

[136] 18 C.F.R. § 35.13(b)(3) (2020).

[137] 18 C.F.R. § 35.2(e) (2020).

X. Miscellaneous

There are no expenses or costs included in this filing that have been alleged or judged in any administrative or judicial proceeding to be illegal, duplicative, or unnecessary costs that are demonstrably the product of discriminatory employment practices.[138]

The Core Amendment is an amendment pursuant to the TOs FPA Section 205 filing rights that are more fully set forth in the NYISO –TO Agreement. As a result, it is unnecessary to obtain requisite agreement.[139]

XI. Conclusion and Relief Requested

For the reasons provided herein, the Transmission Owners respectfully submit that the Core Amendment is just and reasonable and not unduly discriminatory or preferential and should be accepted for filing effective as of June 9, 2021.

If you have any questions or if additional information is required concerning this filing, it is requested that the undersigned attorney be contacted at the earliest possible date so that such information can be supplied expeditiously.

Sincerely,

/s/ Andrew W. Tunnell
Andrew W. Tunnell
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 226-3439 (telephone)
(205) 488-5858 (fax)
atunnell@balch.com

David Martin Connelly
Balch & Bingham LLP
601 Pennsylvania Avenue, N.W.
Suite 825 South
Washington, DC 20004
(202) 661-6341 (telephone)
(866) 237-7419 (fax)
dconnelly@balch.com

Attorneys for the New York Transmission Owners

[138] 18 C.F.R. § 35.13(b)(7), (d)(3) (2020).

[139] 18 C.F.R. § 35.13(b)(6) (2020).

/s/ John Borchert
John Borchert
Senior Director of Energy Policy and
Transmission Development
Central Hudson Gas & Electric Corporation
284 South Avenue
Poughkeepsie, NY 12601
jborchert@cenhud.com

/s/ Susan J. LoFrumento
Susan J. LoFrumento
Associate Counsel
Consolidated Edison Co. of New York, Inc.
Orange and Rockland Utilities, Inc.
4 Irving Place
New York, NY 10003
lofrumentos@coned.com

/s/ Christopher J. Novak
Christopher J. Novak
Senior Counsel
Niagara Mohawk Power Corporation
d/b/a/ National Grid
40 Sylvan Road
Waltham, MA 02451-1120
chris.novak@nationalgrid.com

/s/ Nicholas J. Cicale
Nicholas J. Cicale
Attorney
Avangrid Service Company
New York State Electric & Gas Corporation
and
Rochester Gas and Electric Corporation
180 Marsh Hill Road
Orange, CT 06477
nicholas.cicale@uinet.com