

rules in the NYISO's Tariffs are unjust and unreasonable in requiring that Developers fund Upgrades identified in a Class Year Study because this results in Transmission Owners being required to own, operate, and maintain the Upgrades without the opportunity to recover a return on them. The Section 206 Filing requested that the Commission direct the NYISO to submit tariff revisions to fully implement the Filing TOs' proposed approach for a Transmission Owner to elect whether to initially fund the cost of Upgrades.

The NYISO requests that the Commission consider these comments in assessing the relief requested by the Filing TOs in this proceeding.⁵ The NYISO does not take a position concerning whether the Filing TOs have the authority to make the Section 205 Filing or whether their proposed revisions to Section 25.5.4 of Attachment S to the OATT are just and reasonable. The NYISO likewise takes no position at this time concerning the applicability, or potential application, of the United States Court of Appeals for the District of Columbia Circuit's 2018 *Ameren*⁶ decision to the NYISO's Tariffs.⁷ As an independent not-for-profit entity, the NYISO has generally not become involved in proceedings that concern Transmission Owners' rates or revenues.

Inc., Niagara Mohawk Power Corp. d/b/a National Grid, New York State Electric & Gas Corporation, Orange & Rockland Utilities, Inc., and Rochester Gas and Electric Corporation, Docket No. EL21-66-000 (April 9, 2021) ("Section 206 Filing").

⁵ These comments do not attempt to address any of the Filing TOs' claims in the Section 206 Filing. The NYISO is separately submitting an answer in that proceeding. The NYISO's silence with respect to any particular argument or assertion raised by either the Section 205 Filing or the Section 206 Filing should not be construed as acceptance or agreement.

⁶ *Ameren Serv. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) ("*Ameren*").

⁷ See *The New York Transmission Owners Answer Opposing Motions for Extension of Time*, Docket No. ER21-1647-000 at pp 3-5 (April 20, 2021) (arguing that the Filing TOs' submissions in this proceeding and in Docket No. EL21-66 are straightforward and "merely implement the current state of the law"). *But see Answer Motion for Extension of Time and Request for Expedited Treatment of the American Clean Power Association, Alliance for Clean Energy-New York, and the Natural Resources Defense Council*, Docket No. ER21-1647-000 at p 3 and n 9 (April 15, 2021) (citing recent concurring and dissenting opinions by individual Commissioners asserting that the Commission has not implemented the *Ameren* decision correctly and that the Filing TOs have raised novel legal issues).

However, if the Commission accepts the Filing TOs' proposed revisions in this proceeding (or in the near-contemporaneously filed Section 206 Filing proceeding), additional changes to the NYISO's Tariffs will be required to implement the Filing TOs' proposal in a just and reasonable manner. As described below, the current rules concerning Developers' responsibility to fund Upgrades are long-established and intertwined throughout the NYISO's Tariffs. Absent additional tariff changes, a Transmission Owner's election to fund Upgrades under the Filing TOs' proposed, limited revisions in Section 25.5.4 of Attachment S to the OATT would result in inconsistencies and uncertainties concerning the application of the NYISO's Tariffs.

Accordingly, if the Commission accepts the revisions to Section 25.5.4 in this proceeding or in the Section 206 Filing proceeding, the NYISO requests that the Commission direct it, in response to the Section 206 Filing, to make a compliance filing in no less than 120 days following a Commission Order to propose any additional revisions necessary to reflect, conform to, or implement the change to Section 25.5.4. The NYISO would make that compliance filing after giving stakeholders opportunities for input and review in order to promptly resolve the inconsistencies and uncertainties.

I. MOTION TO INTERVENE

The NYISO is the independent entity responsible for providing open access transmission service, maintaining reliability, and administering competitive wholesale markets for electricity, capacity, and ancillary services in New York State. The NYISO administers the interconnection process for the New York State Transmission System and Distribution System pursuant to its Commission-approved OATT. In this proceeding, the Filing TOs are seeking to amend the NYISO's OATT to revise the existing funding approach for Upgrades identified in the NYISO's

Class Year Study. The NYISO, therefore, has a unique interest in this proceeding that cannot be adequately represented by any other entity and requests that the Commission permit it to intervene with all the rights of a party.

II. BACKGROUND

A. NYISO's Current Upgrade Funding Methodology

The NYISO's existing approach under which Developers are responsible for funding Upgrades was established in 2001 as part of the NYISO's original cost allocation procedures to allocate the responsibility for the costs of interconnection facilities required for new generation and merchant transmission projects. Under this approach, the Developer of a proposed facility is allocated the "but for" costs of upgrades necessary to interconnect its proposed project. The Developer is responsible for obtaining funding or entering into financial arrangements necessary for the cost of Upgrades, as well as for posting Security for the estimated amount of the Upgrades in accordance with the provisions under Attachment S to the OATT. The Developer either pays the cost of constructing the Upgrades to the Transmission Owner as those costs are incurred or exercises the Developer's option to build the Upgrades pursuant to the terms and conditions of the *pro forma* interconnection agreements. Once the Upgrades are completed, the applicable Transmission Owner will own the Upgrades and is not required to compensate the Developer for the construction costs. Under certain specific circumstances, a Developer is allowed to receive well-defined, long-term capacity rights (as opposed to transmission credits) that are created by the Upgrades.

In response to Order No. 2003,⁸ the NYISO and the New York Transmission Owners, in a joint filing, proposed to retain the approach in the NYISO's Tariffs for the "but for" cost

⁸ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. 31,160 (2004), *order on reh'g*,

allocation of, and the funding of, Upgrades in the revised interconnection procedures.⁹ The Commission accepted the NYISO's cost allocation procedures as compliant with the directives of Order No. 2003.¹⁰ The NYISO has developed its Large Facility Interconnection Procedures ("LFIP"), its Small Generator Interconnection Procedures ("SGIP"), and its Transmission Interconnection Procedures ("TIP") in line with this funding approach for Upgrades.¹¹

B. Filing TOs' Initiative in NYISO Stakeholder Process

The Filing TOs recently raised concerns in the NYISO's stakeholder process regarding the existing funding approach in Attachment S to the OATT as it relates to their ability to earn a rate of return on Upgrades for which they bear ownership, operational, and maintenance responsibilities. They presented a proposed "TO Funding Mechanism" to NYISO stakeholders for informational purposes on February 23, March 1, and March 18 of this year. Their approach in this proceeding appears to be consistent with the approach that they proposed in their stakeholder presentations.

Order No. 2003-B, FERC Stats. & Regs. 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. 131,190 (2005), *affirmed sub nom. Nat'l Ass'n of Regulatory Util. Com'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) ("Order No. 2003").

⁹ See *New York Indep. Sys. Operator, Inc.*, Compliance Filing, Docket No. ER04-449-000 at pp 7-8 (Jan. 20, 2004). Order No. 2003 required Transmission Providers to include the Commission's interconnection crediting policy, but allowed Transmission Providers, which are independent entities flexibility in adopting their interconnection pricing policy, subject to Commission approval. See Order No. 2003 at PP 676, 698, 720. In their Order No. 2003 joint compliance filing, the NYISO and the New York Transmission Owners did not adopt the language in Articles 11.3 or 11.4 of the Commission's *pro forma* Large Generator Interconnection Agreement that provides the Commission's crediting policy and the option for a Transmission Provider or Transmission Owner to elect to fund upgrades. *New York Indep. Sys. Operator, Inc.*, Compliance Filing, Docket No. ER04-449-000 at Appendix IV.

¹⁰ See *New York Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,159 at PP 57-59 (2004).

¹¹ The LFIP, SGIP, and TIP are located in Attachments X and S, Z, and P, respectively, to the OATT. In the TIP, the upgrades necessary to reliability interconnect a Transmission Project, which are analogous to System Upgrade Facilities in the LFIP and SGIP, are referred to as "Network Upgrade Facilities."

III. COMMENTS

A. The NYISO Takes No Position at this Time Whether the Filing TOs' Unilateral Filing Falls Within the Scope of the Transmission Owners' Reserved Section 205 Filing Rights

The Filing TOs submitted the Section 205 Filing as a unilateral filing. The Filing TOs asserted that they have the right to make such a filing under certain Section 205 filing rights reserved to them under the Agreement Between New York Independent System Operator and Transmission Owners ("ISO-TO Agreement").¹² Specifically, the Filing TOs rely on Section 3.10(a) of the ISO-TO Agreement, which provides that each Transmission Owner reserves the right to "unilaterally . . . file pursuant to Section 205 of the Federal Power Act to change the ISO OATT . . . 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." The NYISO is not taking a position at this time as to whether the Filing TOs' proposed tariff revisions fall within the scope of their reserved rights.

B. The Filing TOs' Proposed Alternative Upgrade Funding Approach Would Require Additional Tariff Revisions Throughout the NYISO's Tariffs to Reduce Inconsistencies and Uncertainties and Potentially Avoid Future Disputes

The NYISO takes no position at this time concerning whether the Filing TOs' proposed revisions to Section 25.5.4 of Attachment S to the OATT are just and reasonable. However, the existing rules concerning Developers' responsibility to fund Upgrades are a fundamental, long-established component of the NYISO's interconnection procedures with related rules intertwined throughout the NYISO's Tariffs. The Filing TOs' proposed tariff revisions to Section 25.5.4 of Attachment S, if accepted, establish limited rules for a Transmission Owner to implement its

¹² *Agreement Between New York Independent System Operator and Transmission Owners*, at Section 3.10(a) (1999).

election to fund Upgrades. Absent additional tariff revisions, a Transmission Owner's election to fund Upgrades pursuant to Section 25.5.4 could inadvertently lead to complications in the interconnection process, including potential inconsistencies or uncertainties in the application of certain rules within the NYISO's Tariffs. Moreover, any implementation issues would have to be addressed by the NYISO, Transmission Owner, and/or Developer(s) on a project-by-project basis and would likely result in delays in the NYISO's interconnection processes and, potentially, disputes at the Commission.

If the Commission accepts the revisions to Section 25.5.4 in this proceeding, the NYISO requests that the Commission also direct it, in response to the Section 206 Filing, to evaluate its Tariffs and, after a reasonable period for stakeholder input and review, make a compliance filing to propose revisions necessary to reflect, conform to, or implement the proposed funding approach. The NYISO believes that a minimum of 120 days is required to develop, and vet with stakeholders, the tariff revisions required to fully address the Filing TOs' proposed approach. This time period could allow the adoption of new tariff rules in time to be implemented in the ongoing Class Year 2021 Study process.¹³ The NYISO believes that this request is consistent with applicable precedent and is necessary to allow the NYISO to resolve any tariff inconsistencies and uncertainties that might result from accepting the Filing TOs' proposed tariff revisions.

The NYISO has consistently taken steps to improve the timing and efficiency of its interconnection processes. These efforts would be negatively impacted by inconsistent or

¹³ The NYISO published an anticipated timeline for Class Year 2021 at a recent meeting of its Transmission Planning Advisory Subcommittee ("TPAS"). In that presentation, the NYISO advised that the targeted start of the Initial Decision Period would be approximately March 2022 after the presentation of the Class Year 2021 Study report to TPAS and the NYISO's Operating Committee in accordance with the provisions of Attachment S. Accordingly, the NYISO believes that there is sufficient time to enable it to carefully develop with its stakeholders and file with the Commission any proposed tariff revisions developed over a 120-day period.

uncertain tariff rules or the need to address resulting complications on a project-by-project basis. As described above, the NYISO's Tariffs currently provide that a Developer is responsible for funding Upgrades. This requirement is approximately 20 years old, and the requirements for the NYISO's LFIP, SGIP, and TIP have been developed in line with this funding approach. The Filing TOs' limited tariff revisions in this proceeding do not attempt to address all of the potential impacts of its proposed new Upgrade funding approach throughout the NYISO's Tariffs and reserves tariff revisions to implement the funding approach to the Section 206 Filing.

The NYISO understands that the Filing TOs' proposed approach would apply to the funding of Upgrades identified for proposed Class Year Projects that are subject to the Initial Decision Period in the Class Year Study. A Transmission Owner's election to fund such Upgrades could, however, create inconsistencies or uncertainties concerning the application of certain rules in the NYISO's unique Class Year Study process. For example, the new Upgrade funding approach may impact the application of the Security requirements set forth in Attachment S to the OATT, including Security posting requirements in the Class Year Study decision process and the manner in which Security is returned to Developer as discrete portions of Upgrades are completed.¹⁴ In addition, any stand-alone funding agreements entered into between the Transmission Owner and Developer could include requirements that are not consistent with the requirements in the NYISO's Tariffs or its *pro forma* interconnection agreements.

¹⁴ See, e.g., OATT § 25.8.5 (providing for Security for System Upgrade Facilities constructed by the Developer to be reduced after discrete portions of the System Upgrade Facilities have been completed, such reductions to be based on cost estimates from the Class Year Study); OATT § 25.8.5 (providing that for System Upgrade Facilities constructed by the Connecting Transmission Owner or Affected Transmission Owner, Security shall be reduced after discrete portions of the System Upgrade Facilities have been completed by the Transmission Owner and paid for by the Developer, on a dollar-for-dollar basis for payments made to the Connecting Transmission Owner or Affected Transmission Owner pursuant to an E&P Agreement or Interconnection Agreement, subject to the Connecting Transmission Owner's or Affected Transmission Owner's review and approval).

The Filing TOs identified many of the above-mentioned implementation issues, among others, that will need to be addressed in a subsequent tariff filing. Their Section 206 Filing proposed a number of potential tariff revisions to fully accommodate their proposed Upgrade funding mechanism. The NYISO believes that such additional tariff revisions are a good starting point for review and consideration. However, the NYISO, together with its stakeholders, will have to perform a detailed assessment of its interconnection procedures to appropriately determine what tariff revisions are required to fully address the modified Upgrade funding approach on a holistic basis across its interconnection procedures.

The Filing TOs point to the funding requirements and agreements adopted by the Midcontinent Independent System Operator, Inc. (“MISO”) and accepted by the Commission, as a guidepost for the NYISO. While such requirements may provide helpful guidance, they cannot be directly transplanted into the NYISO’s interconnection procedures. The MISO requirements were developed over a period of time among the stakeholders in the MISO region and through numerous proceedings at the Commission within the context of the specific MISO interconnection procedures. The Commission has consistently recognized that such regional differences can justify alternative rules in different regions.¹⁵ It should act consistent with Order No. 2003 and Order No. 845 and provide the NYISO with the flexibility to address this matter in the context of the its unique interconnection procedures.¹⁶ While the NYISO and its

¹⁵ See, e.g., *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,117 at P 14 (2020) (extending an independent transmission provider’s ability to argue that it qualifies for “independent entity variations” for pricing and non-pricing provisions that provides “greater flexibility to customize . . . interconnection procedures and agreements to fit regional needs” [citing Order No. 2003 at P 26]); *ISO New England Inc.*, 143 FERC ¶ 61,150 at P 4 (2013) (according transmission planning regions significant flexibility to tailor regional transmission planning and cost allocation processes to accommodate differences among the regions [citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 61]).

¹⁶ See Order No. 2003 at P 26 (granting “more flexibility to customize an LGIP and LGIA to meet [an independent transmission providers] needs” due to their independent status as well as existing regional practice, which applies to both term and conditions as well as pricing); see also *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 at PP 42, 556 (2018), *order on reh’g*, Order No.

stakeholders may conclude, following their review, that many of the Filing TOs' proposed implementing changes in their Section 206 Filing are reasonable and appropriate, the NYISO and its stakeholders should be allowed to fully investigate and consider the tariff revisions that are required to implement the proposed alternative Upgrade funding approach.

Further, the proposed tariff amendment in Section 25.5.4 of the OATT would apply only to Large Facilities¹⁷ being processed under the LFIP and a subset of Small Generating Facilities that are required to undergo a Class Year Study.¹⁸ The proposed change would not apply to the funding of Network Upgrade Facilities for Transmission Projects studied under the TIP in Attachment P to the OATT or Upgrades for Small Generating Facilities that are not required to go through the Class Year process for Energy Resource Interconnection Service and are studied in the SGIP in Attachment Z to the OATT.¹⁹ As a result, the proposed tariff changes may result in different funding approaches for the funding of similar upgrades identified in the NYISO's interconnection processes. If the Commission accepts the tariff revision to Section 25.5.4 of Attachment S to the OATT in this proceeding, the Commission should also clarify whether the modified funding approach should apply to funding of Upgrades for Small Generating Facilities that are not required to go through the Class Year process for Energy Resource Interconnection Service and are studied in the SGIP in Attachment Z to the OATT and/or Network Upgrade Facilities for Transmission Projects studied under the TIP in Attachment P to the OATT and direct conforming revisions in the Section 206 Filing accordingly.

845-A, 166 FERC ¶ 61,137 at PP 140-141 (2019) (allowing independent transmission providers to argue that they qualify for an independent entity variation on compliance).

¹⁷ A Large Facility includes either a Large Generating Facility or a Class Year Transmission Project. OATT § 30.1.

¹⁸ See generally, OATT § 32.3.5.3.2.

¹⁹ See generally, *id.*

For the above reasons, if the Commission accepts the Filing TOs' proposed revisions to Attachment S to the OATT in this proceeding, the NYISO requests that the Commission also direct the NYISO to make a compliance filing in no less than 120 days proposing additional tariff revisions necessitated by the change to Section 25.5.4 of Attachment S to the OATT in the Section 206 Filing proceeding.

IV. COMMUNICATIONS AND CORRESPONDENCE

Communications in this proceeding should be directed to:

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V. CONCLUSION

For the foregoing reasons, (i) the NYISO respectfully requests that the Commission consider these comments in assessing the proposed tariff revisions submitted by the Filing TOs in this proceeding, and (ii) if the Commission accepts the proposed revisions, the NYISO requests that the Commission also direct the NYISO to submit a compliance filing, in no less

²⁰ The NYISO respectfully requests waiver of 18 C.F.R. § 385.203(b)(3) (2019) to permit service on counsel in both Washington, D.C. and Richmond, VA.

than 120 days, proposing additional tariff revisions necessitated by the acceptance of the Filing TOs' proposed change to Section 25.5.4 of Attachment S to the OATT in the Section 206 Filing proceeding.

Respectfully Submitted,

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May 7, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 7th day of May, 2021.

/s/ Mohsana Akter

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