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July 8, 2021

**BY ELECTRONIC FILING**

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

**Re: New York Independent System Operator, Inc.**
**Central Hudson Gas & Electric Corporation**
**Consolidated Edison Company of New York, Inc.**
**Niagara Mohawk Power Corporation**
**New York State Electric & Gas Corporation**
**Orange and Rockland Utilities, Inc.**
**Rochester Gas and Electric Corporation**

**Docket No. ER21-1647-000**
**Amendment to NYISO OATT Adopting TO Funding Mechanism**
**Deficiency Letter Response**

Dear Secretary Bose:

Central Hudson Gas & Electric Corporation ("Central Hudson"), Consolidated Edison Company of New York, Inc. ("Consolidated Edison"), Niagara Mohawk Power Corporation d/b/a National Grid ("National Grid"), New York State Electric & Gas Corporation ("NYSEG"), Orange and Rockland Utilities, Inc. ("O&R"), and Rochester Gas and Electric Corporation ("RG&E") (collectively referred to herein as the "Transmission Owners," "TOs," or the "NYTOs") hereby respond to the Deficiency Letter issued by the Staff of the Federal Energy Regulatory Commission ("Commission" or "FERC") on June 8, 2021 (the "Deficiency Letter").[1] The NYTOs appreciate this opportunity to respond to the questions posed by Staff.

[1] 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 NYTOs, 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.

## I. Background

As discussed in the NYTOs' initial filing made in this proceeding on April 9, 2021[2] and in the companion Section 206 filing[3] made by the NYTOs on that same date in Docket No. EL21-66 (the "Section 206 Proceeding"), the NYTOs are seeking to amend the NYISO's Open Access Transmission Tariff (the "NYISO OATT") and the Market Administration and Control Area Services Tariff to provide the NYTOs the option to fund ("TO Self-Funding") System Upgrade Facilities ("SUFs") and System Deliverability Upgrades ("SDUs") (collectively, "SUFs/SDUs" or "System Upgrades"[4]) caused by generator interconnections so as to earn a reasonable return on those assets. Adopting TO Self-Funding is needed to conform NYISO's existing participant funding approach (pursuant to which interconnecting generators are allocated the costs of SUFs/SDUs caused "but for" their respective interconnections, which the NYTOs own and operate without earning a return (the "Existing Funding Approach")) to governing legal requirements. Specifically, the Existing Funding Approach fails to provide the NYTOs a proper return for their SUFs/SDUs required to provide generator interconnection service under the NYISO OATT. This failure is inconsistent with the Supreme Court's holdings in *Hope*[5] and *Bluefield*,[6] as recognized by the recent *Ameren*[7] opinion and related Commission orders,[8] which establish that the TOs are entitled to earn a reasonable return on their property used to provide jurisdictional service (including transmission facilities caused by generation interconnections).[9] The Existing Funding Approach is also inconsistent with the existing language in Section 25.5.4 of the NYISO OATT, which states that a TO's implementation and construction of SUFs and SDUs 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*

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[2] Cent. Hudson Gas & Elec. Corp. et al., Amendment to NYISO OATT Adopting TO Funding Mechanism, Docket No. ER21-1647 (Apr. 9, 2021) (the "Section 205 Filing").

[3] Cent. Hudson Gas & Elec. Corp. et al., Complaint Requesting Fast Track Processing, Docket No. EL21-66 (Apr. 9, 2021) (the "Section 206 Filing" or the "Complaint") (collectively, the Section 205 Filing and the Section 206 Filing are hereby referenced as the "Section 205 and 206 Filings").

[4] The NYTOs note that the Deficiency Letter uses the term "System Upgrades" to reference the network upgrades caused by the generator interconnections that the NYTOs seek to adopt a self-funding option, while the NYTOs' Section 205 and 206 Filing used the terms SUFs/SDUs in an effort to remain consistent with the definitions in the NYISO OATT. As provided above, this Response proposes to define SUFs/SDUs and System Upgrades to have the same meaning.

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

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

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

[8] *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, P 32 (2018), *order on briefing, compliance and reh'g*, 169 FERC ¶ 61,233 (2019).

[9] *See* Section 205 Filing, pp. 15-27; *see also* Section 206 Filing, pp. 14-30.

*incurred costs, plus a reasonable return on investment*."[10] In other words, granting the relief here will confirm a right that the NYISO tariff already recognizes.

In addition, and as demonstrated in the Prepared Direct Testimony of Joshua C. Nowak submitted as part of the Section 205 and 206 Filings ("Direct Nowak Testimony"), the NYTOs face uncompensated regulatory risks, reliability risks, cybersecurity risks, environmental risks, and operational risks in owning, operating and maintaining the SUFs/SDUs for which they currently recover no return.[11] The non-profit construction and operation of SUFs/SDUs renders the NYTOs incremental investment risks and costs because, 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.[12] Thus, TO Self-Funding provides a mechanism to appropriately compensate investors for the potential financial losses associated with the incremental risks and costs incurred to own and operate these facilities.[13]

Time is of the essence to adopt TO Self-Funding. As recognized in *Ameren*, failing to provide a transmission owner the opportunity to earn a return on such generator-caused upgrades that the transmission owner will own and operate results in that transmission owner increasingly becoming a non-profit, which diminishes its opportunity to attract capital, in contravention of *Hope* and *Bluefield.*[14] This nonprofit problem is particularly acute in New York due to the increasing volume of new generator interconnections 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 attaining 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. This ever-increasing problem is detailed and graphically demonstrated by the NYTOs' response below to the Deficiency Letter's Question 6.a.[15] As shown in that response, the final costs of the SUFs/SDUs accepted by Interconnection Customers significantly rose from the 2009 Class Year to the 2019 Class Year.

To adopt TO Self-Funding, the Section 205 Filing proposes to amend Section 25.5.4 of the NYISO OATT to provide the NYTOs the opportunity to fund the costs of SUFs/SDUs caused by generator interconnections to earn a reasonable return on those assets (the "Core Amendment").[16] In addition, the NYTOs also propose in the Core Amendment to voluntarily

[10] NYISO OATT, § 25.5.4 (emphasis added); *see also* NYTOs' Answer, pp. 24-25.

[11] Direct Nowak Testimony, pp. 14-16.

[12] *Id.*, p. 10

[13] Section 205 Filing, pp. 17-23, Section 206 Filing, pp. 19-27.

[14] *Ameren*, 880 F.3d at 581-82; *see also* Section 205 Filing, pp. 23-24, Section 206 Filing, pp. 27-28.

[15] *See also* Section 205 Filing, pp. 7-10; Section 206 Filing, pp. 8-10.

[16] Section 205 Filing, pp. 12-27.

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.[17] In the companion Section 206 Filing, the NYTOs request that the Commission direct NYISO to make additional changes to the NYISO OATT so as to more fully and smoothly implement the Core Amendment (the "Implementing Amendments.").[18] Because it is imperative to have TO Self-Funding effective and implemented by the commencement of the Initial Decision Period for Class Year 2021, the NYTOs requested that the Section 205 Filing be made effective June 9, 2021,[19] and expedited treatment and an order by that date in the Section 206 Filing.[20]

In addition to the NYISO's Answer, on May 7, 2021, numerous comments and protests were filed in response to the Section 205 and 206 Filings.[21] The NYTOs filed an Answer in these proceedings to those filings on May 24, 2021(the "NYTOs' Answer").

On June 8, 2021, the Commission issued the Deficiency Letter.

## II. Response to Deficiency Letter

The Deficiency Letter contains 8 questions (some with subparts), each of which are answered below.

1. *The NYTOs state that the Core Amendment is just and reasonable and not unduly discriminatory because it would allow transmission owners the right to elect to fund the costs*

[17] *Id*., pp. 13-14, 26.

[18] Section 206 Filing, pp. 28-38.

[19] Section 205 Filing, p. 7.

[20] Section 206 Filing, pp. 7-8. In the Section 206 Filing, the NYTOs further requested that the NYISO be directed to make a compliance filing providing the Implementing Amendments within 90 days of the resulting order should it be issued by June 9, 2021 or within 60 days if the resulting order should be issued later. In making this request, the NYTOs had assumed that the Initial Decision Period for Class Year 2021 would commence in late 2021 or early 2022. The NYISO's Answer clarified, however, that the Initial Period for Class Year 2021 is to commence approximately in March 2022, and requested that the NYISO be provided 120 days to make a compliance filing in response to any order issued in the Section 206 Proceeding. *See* Central Hudson Gas & Elec. Corp. *et al*. v. NYISO, Answer of the New York Independent System Operator, Inc., Docket No. EL21-66, pp. 11-13 (May 7, 2021) (the "NYISO's Answer"). The NYTOs' Answer stated no objection to this requested 120-day compliance period provided that Fast Track processing is afforded to the Section 206 Filing such that the compliance filing will be made in advance of the commencement of the referenced Initial Decision Period. *See* NYTOs' Answer, p. 29.

[21] In addition to the NYISO's Answer, Comments in support were filed by WIRES and the Edison Electric Institute, and Protests and other Comments were filed by the following entities: NextEra Energy Resources, LLC; Invenergy Renewables LLC; the New York State Department of State Utility Intervention Unit; the American Clean Power Association, Alliance For Clean Energy-New York, Independent Power Producers of New York, New York Battery and Energy Storage Technology Consortium and Energy Storage Association (the "NY Interconnection Customers"); the City of New York, Natural Resources Defense Council, Sustainable FERC Project and Multiple Intervenors; and the New York State Public Service Commission and the New York State Energy Research and Development Authority and NYISO.

*of the System Upgrades and thereby be allowed to earn a reasonable return for those assets.*[22] *The NYTOs add that the Core Amendment is further just and reasonable because in it, the NYTOs voluntarily commit to a deadline by which to exercise their funding right within the Class Year process to not delay NYISO's interconnection process.*[23]

*a. The proposed revisions to section 25.5.4 provide that the transmission owner shall provide NYISO with written notice, prior to the commencement of the Initial Decision Period, as defined in the NYISO OATT, if the transmission owner elects to fund the capital costs of any System Upgrade.*[24] *Please describe the criteria for the decision-making process transmission owners will use to determine whether to exercise the transmission owner self-funding option.*

**Response**

The NYTOs may each consider exercising TO Self-Funding for any particular SUF/SDU should the respective NYTO have sufficient business flexibility and access on a reasonable basis to capital to finance the SUF/SDU. To the extent that a NYTO has the business flexibility and financing ability within these strictures to fund a particular SUF/SDU, then the intent is for that NYTO to elect to self-fund the SUF/SDU.

*b. Please provide details on how the Core Amendment can be applied in a not unduly discriminatory manner.*

**Response**

The NYTOs have no intention, ability, or incentive to apply the Core Amendment in a manner that is unduly discriminatory. First, as previously noted in the NYTOs' Section 205 and 206 Filings and the NYTOs' Answer, the NYTOs do not (with only minor exception) have affiliated generation;[25] as such, they are not able to confer an advantage to their affiliates or disadvantage to others through their exercise or waiver of TO Self-Funding. Indeed, the *Ameren* Court held that a transmission owner divested of generation does not have an economic incentive to discriminate.[26] Moreover, and as discussed in the NYTOs' earlier Section 205 and 206

[22] Section 205 Filing, pp. 5, 12.

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

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

[25] *See* Section 205 Filing, pp. 26-27 & n.129; *see also* NYTOs' Answer, p. 20 & n.79.

[26] *Ameren*, 880 F.3d at 578. Moreover, the *Ameren* Court further held that the fact that one of the transmission owners in that proceeding owned generation did not result in a finding of undue discrimination [*id.*], with the Commission holding on remand that the fact that "a majority of [MISO TOs] also own affiliated generation is not adequate by itself to demonstrate that there is undue discrimination, nor does it justify requiring all transmission owners … to bear the risks of Generator Up-Front Funding." Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 40 (May 3, 2021) (citations omitted). Accordingly, to

Filings, the NYTOs' analysis demonstrates that TO Self-Funding will not significantly alter any interconnecting customers' economics in one direction or the other.[27]

In the highly unlikely event that an interconnecting customer believes it to have been the victim of undue discrimination as a consequence of a TO's exercise of the TO Self-Funding, it retains the right to seek redress before the Commission. The Commission has already dispelled any lingering concerns by squarely holding that any concerns of undue discrimination associated with TO Self-Funding can be addressed on such a case-by-case basis. On remand from *Ameren*,

> The Commission further found that any concerns about potential undue discrimination stemming from the use of Transmission Owner Funding could be adequately addressed on a case-by-case basis, through the generator's ability to challenge any purportedly unreasonable financing costs before the Commission.[28]

2. *The NYTOs state that they make 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). The NYTOs explain that the NYISO-TO Agreement states that the transmission owners 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*

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the extent that there are limited exceptions where the NYTOs own certain generation, such limited exceptions should not result in a finding of undue discrimination.

[27] Transmission owners typically have a lower cost of capital than generation developers. Section 205 Filing, n.27 (citing Direct Nowak Testimony, pp. 67-75); *accord Chehalis Power Generating, LP*, 123 FERC ¶ 61,038, P 167 (2008) (transmission provider's cost of capital was lower than a interconnecting generator's cost of capital due to its lower relative risk profile). In addition, network upgrade costs associated with generator interconnections comprise only a small portion of total project costs. Thus, the overall impact of TO Self-Funding is likely to be minimal. Further, while TO Self-Funding may provide modestly improved financing terms than are otherwise available to some Interconnection Customers and be modestly less advantageous to others, such differences in financial impact are a consequence of the Interconnection Customers' financing capability (and associated cost of capital); they have nothing to do with, and in no way result from or indicate, undue TO discrimination. *See Cities of Newark, et al. v. FERC*, 763 F.2d 533, 546 and 547 (3d Cir. 1985) (stating "[i]t is well settled, however, that differences in rates are justified where they are predicated upon factual differences between customers and that these differences may arise from differing costs of service or otherwise" and stating that the question before the court "is whether there has been an *undue* discrimination, which is what § 205(b) proscribes") (emphasis in original); *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984); *Pub. Serv. Co. v. FERC*, 575 F.2d 1204, 1211 (4th Cir. 1978). Moreover, and as noted in the NYTOs' Answer, casting any difference in financing costs as "undue discrimination" would essentially require that all generators maintain identical financing costs. NYTOs' Answer, p. 20. This is not the standard.

[28] Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 40 (May 3, 2021) (citations omitted).

*services under the ISO OATT…"*[29] *The NYTOs' answer adds that the provisions are intended to ensure that the utilities receive their authorized regulated return and to grant the utilities the right to file to receive that authorized return whenever they are deprived of it.*[30]

a. *Please explain and provide support for how the transmission owners' obligation to own, operate, and maintain System Upgrades can be considered an "investment related to services under the ISO OATT."*

**Response**

The NYISO-TO Agreement provides that the Transmission Owners are entitled to make unilateral Section 205 filings to recover their costs, plus a "return on investment" (sometimes referred to as an ROI or ROE) for services rendered under the OATT. The NYTOs provide these services by, among other things, owning, operating, and maintaining the SUFs/SDUs and incurring risks and costs to do so. The NYTOs' "investment" for which they are entitled to file to recover comprises the capital costs associated with SUFs/SDUs caused by an Interconnection Customer's request for interconnection service on the transmission system, which includes a return based on the risks and costs of owning, operating and maintaining the SUFs/SDUs – the same risks and costs the NYTOs bear for their investment and operation of assets on the rest of their transmission system for all other customers as to which they are entitled to a return. Indeed, the addition of the SUFs/SDUs to the TOs' systems results in uncompensated risks that increases the TOs' costs.[31] These uncompensated risks and costs are, thus, "investments" (as well as "costs") for which the NYISO-TO Agreement provides the TOs the unilateral Section 205 filing right to address.

These investments are made by the NYTOs to accommodate Interconnection Customer requests for open access to deliver generation output to the transmission system. Open access does not entitle Interconnection Customers to make investments on the transmission system; by the same token, transmission service required by wholesale and retail customers also does not entitle load customers to make investments on the transmission system. Accordingly, neither should an Interconnection Customer's bearing of the costs of its generator interconnection service nor a wholesale or retail customer's bearing of the costs of its transmission service be considered an investment in the TOs' electric systems; instead, it is a bearing of the costs of the regulated service that the customer is taking. The New York State Transmission System is comprised of transmission property owned and operated by the NYTOs who make capital investments to accommodate customer requirements for service on the transmission system that

[29] Section 205 Filing, p. 6 (quoting NYISO, NYISO Agreements, Foundation Agreements, ISO-TO Agreement (0.0.0), § 3.10(a)).

[30] NYTOs' Answer, p. 24.

[31] *See id.*, p. 25 ("as a company's risk increases, investors require a higher rate of return," which increases its cost of capital). *See also* Direct Nowak Testimony, p. 10. Of course, FERC precedent recognizes that higher the risks, the higher the required return: "'[f]undamentally, rate of return and risk go hand-in-hand: the higher the risk, the higher the required rate of return.'" *Id.*, p. 17 (quoting *El Paso Nat. Gas Co.*, 145 FERC ¶ 61,040, P 693 (2013) ("Opinion No. 528")).

is owned and operated by the NYTOs. These transmission services include meeting the requirements of *all* customers who request transmission service, including the grant of open access and provision of interconnection service, which at times require investments that the transmission owner has the exclusive right to make. Therefore, the NYTOs are entitled to recover a reasonable rate of return commensurate with *Hope* and *Bluefield* to compensate for the risks attendant to the needed facilities for which the NYTOs elect to invest that are required for the grant of open access and provision of interconnection service on the New York State Transmission System. The transmission assets required by one customer are not severable from the transmission assets required of another, for all these assets together form one integrated transmission system.

While the foregoing addresses the specific question raised by request item 2.a., the NYTOs respectfully submit that the question itself evinces an overly narrow construction of the NYISO-TO Agreement's express language. The NYISO-TO Agreement provides that each NYTO shall have the unilateral Section 205 filing right to "recover all of its reasonably incurred costs, plus a reasonable return on investment related to services under the ISO OATT." In the context of the SUFs/SDUs, this language should be construed to mean that each NYTO is entitled to make unilateral Section 205 filings to "recover all of its reasonably incurred costs, plus a reasonable return on investment [in the NYTOs' SUFs/SDUs] related to [generator interconnection] services under the OATT."[32] To further emphasize, the NYTOs provide generator interconnection services under the NYISO OATT by, among other things, owning, operating, and maintaining the SUFs/SDUs needed to reliably interconnect the Interconnecting Customer's project. Indeed, without the TOs' continued ownership, operation and maintenance of these Interconnection Upgrades, the Interconnection Customer's project could not be possible because it would not meet the reliability and deliverability requirements under the NYISO OATT. The NYISO-TO Agreement provides that the TOs are entitled to file with the Commission so as to be compensated, including a reasonable return for providing those services; *Hope, Bluefield* and *Ameren* lend legal support to the NYISO-TO Agreement's and OATT Section 25.5.4's requirements for compensation; and TO Self-Funding enables that compensation.

3. *The NYTOs state that the Core Amendment is just and reasonable because it will provide transmission owners with a return to compensate them for certain risks and costs associated with the ownership, operation, and maintenance of System Upgrades. Specifically, the NYTOs state that the transmission owners face regulatory, reliability, cybersecurity, environmental, operational, and other unknown risks for the System Upgrades.*[33] *The NYTOs also state that the increasing amount of System Upgrades in turn increases a transmission owner's overall risk profile by adding additional elements to their respective electric systems.*[34]

[32] *See* Section 205 Filing, pp. 15-17 (quoting and citing *Hope*, *Bluefield*, and *Ameren*).

[33] *Id.*, p. 5 & pp. 17-23; Direct Nowak Testimony, pp. 14-60.

[34] Section 205 Filing, p. 18; Direct Nowak Testimony, pp. 18-19.

*a. Please explain and support what rate of return the NYTOs intend to use under the Core Amendment. Also explain how applying the chosen rate of return to an initial capital investment in System Upgrades under the Core Amendment is the appropriate return necessary to compensate for the purported increasing regulatory, reliability, cybersecurity, environmental, operational and other expected risks and losses associated with owning and operating System Upgrades.*

**Response**

The NYTOs will make one or more Section 205 filings to establish an appropriate ROE(s) for TO-Self Funding subsequent to the Commission's acceptance of these tariff revisions.[35]

With regard to this question's direction to "*explain how applying the chosen rate of return to an initial capital investment in System Upgrades under the Core Amendment is the appropriate return necessary to compensate for the purported increasing regulatory, reliability, cybersecurity, environmental, operational and other expected risks and losses associated with owning and operating System Upgrades,"* the NYTOs note again that the appropriate ROE(s) would be that determined by the Commission to be just and reasonable. With that said, it bears emphasizing that a fundamental tenet of utility ratemaking is that "[i]nvestors… invest in entire enterprises, not just portions thereof."[36] Because the investor does not have the option to invest only in a portion of the public utility's business, the Commission looks to determine the return that a reasonable investor would require to invest in the public utility's entire enterprise.[37] Accordingly, it would not be appropriate to establish a return for the SUFs/SDUs that is unique or distinct from the Commission's usual transmission ratemaking practices that determines a public utility's ROE based upon the value and risks of the utility's entire enterprise. Reinforcing this conclusion that SUFs/SDUs should be treated in a similar manner for ratemaking purposes (including ROE) as any other aspect of the utility's entire enterprise is that SUFs/SDUs are transmission plant involving the same risks and concerns as does any other aspect of the TOs' transmission plant, as explained in the Section 205 Filing and the Direct Nowak Testimony.[38]

*b. Also, provide support that the NYTOs' approved retail and transmission rates have not already incorporated the risk of owning, maintaining, and operating the transmission*

[35] MISO employs a region-wide ROE that is used for purposes of the MISO TOs' self-funding option. Accordingly, each TO could file separately to establish TO-specific ROEs or the TOs could pursue a region-wide ROE.

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

[37] *See, e.g., Utah Power & Light Co.*, Opinion No. 293, 41 FERC ¶ 61,308 (1987) (ROE determination appropriately considers the risks and returns of Utah Power & Light's entire enterprise, not just contracts for which return was alleged to be too low); *Bangor Hydro-Electric Co.*, 117 FERC ¶ 61,129, P 70 (2006) (ROE determination is not limited to consideration of transmission project risks); *see also* Hope, 320 U.S. at 603 (returns must be sufficient to ensure confidence in the financial integrity of the enterprise); *Am. Tel. & Tel. Co. v. Fed. Commc'ns Comm'n*, 836 F.2d 1386, 1392 (D.C. Cir. 1988) ("Investors in a carrier, after all, must invest in the carrier as a whole, and not just in one or another of its business segments.").

[38] Section 205 Filing, p. 18, Direct Nowak Testimony, p. 12, NYTOs' Answer, pp 12-13.

*system with the System Upgrade additions. Please describe the conditions under which transmission owners may not recover some or all their operations and maintenance costs, including costs associated with System Upgrades.*

**Response**

This response item asks questions pertaining to: 1) whether the NYTOs' approved retail rates already incorporate the risk of owning, maintaining, and operating the transmission system with the System Upgrades; 2) whether the TOs' approved transmission rates already incorporate the risk of owning, maintaining, and operating the transmission system with the System Upgrades; and 3) the conditions under which transmission owners may not recover some or all their operations and maintenance costs, including costs associated with System Upgrades. To facilitate the Commission's analysis of the matters raised, the following response addresses each of these three items separately.

**1. Retail Rates do Not Incorporate the Risk of Owning, Maintaining and Operating the Transmission System with the System Upgrades.**

As discussed further below in the discussion of recovery of O&M costs, retail level recovery compensates the NYTOs for their *projected* out-of-pocket O&M expense for the SUFs/SDUs,[39] but it does not provide a capital return. Pass through recovery of anticipated O&M versus the recovery of a return expenditures are two very different things.[40] While the risks associated with owning and operating the SUFs/SDUs is the same as those for the NYTOs' other transmission plant in that SUFs/SDUs are ordinary transmission plant, this does not mean that the NYTOs' retail revenue requirements compensate the NYTOs for the risks associated with the SUFs/SDUs. To the contrary, the rate of return in the retail rate cases is applied only to the NYTOs' retail rate base, which does not include the costs of the SUFs/SDUs. As discussed in the Supplemental Testimony of Joshua C. Nowak attached to this Response, and incorporated herein in its entirety by reference,

> [T]he determination of the authorized return is set by reference to the risks associated with investing in the rate base. In this way, capital may be efficiently allocated, with each business segment earning a return based on its own unique set of risks and business characteristics. Since SUFs/SDUs are not included in rate base, the return authorized for retail rates or transmission rates does not account for risks associated with SUFs/SDUs.[41]

[39] As discussed in the response to the O&M related questions in Question 3.b. below, retail level recovery compensates the NYTOs for their projected O&M expenses but not on a present value basis due to regulatory lag because such costs, if they are deemed recoverable, are recovered through retail rates on a projected basis without true-up.

[40] NYTOs' Answer, p. 19.

[41] Supplemental Nowak Testimony, pp. 3-4.

The retail ROEs, thus, are not applied to the assets (*i.e.*, the SUFs/SDUs) causing the incremental risks. In addition, there is no other indication in the NYPSC orders identifying that any adder or other type of incremental compensation has been provided for the incremental risks associated with the addition of the ever-increasing amounts of SUFs/SDUs to the NYTOs' systems.[42] Because the NYTOs do not earn a return in their state retail rates for the SUFs/SDUs that comprise a part of their systems, such retail rates do not already incorporate the risk of owning, maintaining and operating the transmission system with them.

**2. Transmission Rates under the NYISO OATT do Not Incorporate the Risk of Owning, Maintaining and Operating the Transmission System Associated with the SUFs/SDUs.**

The NYTOs understand this request seeks information pertaining to their respective FERC-jurisdictional transmission rates under the NYISO OATT. The Transmission Service Charge ("TSC") is found at Attachment H, Section 14 of the NYISO OATT. As provided in Section 14.1.1. of the NYISO OATT, the TSC applies to wholesale service for wheel throughs[43] and most export transactions[44] and to serve load within the New York Control Area, except that the TSC does not apply to a TO's use of its own system "to provide bundled retail service to its Native Load Customers pursuant to a retail service tariff…"[45] among other important exceptions. Accordingly, with this exclusion for bundled retail, the vast majority of the NYTOs' revenue requirements are recovered through their respective retail rates, and for the NYTOs who have only limited wholesale customers, the TSC largely applies only to wheel throughs and export transactions. For example, for Consolidated Edison, the TSC governs only approximately 2% of its total transmission revenue requirement, with the remainder addressed at retail. At the opposite end of the spectrum, National Grid serves multiple wholesale customers under the TSC,

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[42] *See Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules, and Regulations of Consol. Edison Co. of N.Y., Inc. for Electric Charges, et al.*, pp. 24-26 (N.Y.P.S.C. Jan. 16, 2020) (discussing the establishment of Consolidated Edison's ROE, with no reference to network upgrades caused by generator interconnections at wholesale under the NYISO OATT) (the "Con Ed 2020 Retail Rate Order"); *Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules, and Regulations of Orange and Rockland Utilities, Inc. for Electric Service, et al.*, pp. 21-22 (N.Y.P.S.C. Mar. 14, 2019) (discussing same with regard to O&R); *Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules, and Regulations of Niagara Mohawk Power Corp. d/b/a/ Nat'l Grid for Electric Service, et al.*, pp. 36-39 (N.Y.P.S.C. Mar. 15, 2018) (discussing same with regard to National Grid); *Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules and Regulations of N.Y. State Electric & Gas Corp. for Electric Service, et al.*, pp. 64-66 (N.Y.P.S.C. Nov. 19, 2020) (discussing same with regard to NYSEG and RG&E); *Proceeding on Motion of the Comm'n as to the Rates, Charges, Rules and Regulations of Cent. Hudson Gas & Electric Corp. for Electric Service, et al.*, pp. 35-40 (N.Y.P.S.C. June 14, 2018) (discussing same regarding Central Hudson).

[43] NYISO OATT, Section 14.1.1.1.

[44] *Id.*, Section 14.1.1.2.

[45] *Id.*, Section 14.1.1.3.1.

but even then only recovers approximately 9% of its transmission revenue requirements via the TSC.

Given the very limited reach of the scope of applicability of the TSC, the TSC cannot reasonably be construed to compensate the risks associated with owning and operating the transmission system with the SUF/SDU additions.

Further establishing that the TSC rates do not compensate the NYTOs for their respective risks and costs associated with owning and operating the SUFs/SDUs is that the TSC rates were established before the Commission even adopted standardized large generator interconnection practices in Order No. 2003 on July 24, 2003, and also before the concept of SUFs/SDUs was initially adopted in the NYISO OATT in 2001.[46] The stated rates set forth in Table 1 at Section 14.1.4 of Attachment H from which TSC charges are derived [47] were established in a settlement relating to the initial establishment of the NYISO, the NYISO OATT, and the initial charges under the NYISO OATT, which was filed with the Commission on November 17, 1999 in Docket Nos. ER 97-1523, OA97-470, and ER97-4234. In fact, Consolidated Edison's stated revenue requirement established in that settlement (of $385.9 million) has not changed over the intervening 20 years (even though SUFs/SDUs have since been added to its system) and remains that amount in the currently effective Table 1. Again, Consolidated Edison's stated rate was established before the Commission's *pro forma* interconnection process was established, and the terms "SUFs" and "SDUs" were even created.

And while some of the other TOs' revenue requirements for the TSC charges have been modified since their initial establishment in 1999 -- National Grid, for example, has since adopted a formula rate[48] -- there is no indication that any subsequent consideration of the risks associated with owning and operating SUFs/SDUs was given in the establishment of the resulting revenue requirements.[49] To the contrary, it is axiomatic [50] that the return used to derive

[46] Attachment S, which establishes the cost allocation rules for generator interconnection upgrades under the NYISO OATT and thereby creates the concept of SUFs/SDUs, was filed with the Commission nearly two years after establishment of the initial TSC revenue requirements, with the initial Attachment S filing having been made on August 29, 2001 in Docket No. ER01-2967.

[47] *See Member Systems of the N.Y. Power Pool*, 92 FERC ¶ 61,128 (2000) (approving Consolidated Edison's stated rate); *Alcoa Power Generating Inc.-Long Sault Div. et al.*, 165 FERC ¶ 61,094 (2018) (approving NYSEG's and RG&E's stated rates); *N.Y. Indep. Sys. Operator, Inc. et al.*, 166 FERC ¶ 61,122 (2019) (approving Central Hudson's stated rate).

[48] The TSC presumably provides for some recovery of the TOs' out-of-pocket transmission O&M expenses. As discussed previously, pass through recovery of O&M costs do not provide a return.

[49] As with retail rates, the wholesale TSC charge presumably provides for pass-through recovery of the TOs' O&M costs but does not provide for the recovery of a return on the costs of the SUFs/SDUs.

[50] *See* Supplemental Nowak Testimony, pp. 3-4.

those revenue requirements was only applied to the TOs' rate bases, which does not include the costs of the SUFs/SDUs.[51]

### 3. The NYTOs Face the Risk of Failure to Recover the O&M Costs for SUFs/SDUs

With regard to Staff's request that the NYTOs provide a description of "*the conditions under which transmission owners may not recover some or all their operations and maintenance ["O&M"] costs, including costs* associated *with System Upgrades*," as explained above, the NYTOs recover the vast majority of their revenue requirements through their retail rates, including recovery of projected O&M costs, which include projected O&M costs for SUFs/SDUs. As demonstrated in the Direct Nowak Testimony and the Supplemental Nowak Testimony, however, the NYTOs have consistently under-earned on their ROEs relative to their state-authorized ROEs.[52] As shown in Figure 1 of the Direct Nowak Testimony, from 2015-2019, the TOs have under-earned in each of those years, with average annual earnings ranging from 5% to 26% below earnings targets, resulting in an overall average under-earning of 12% below earnings targets for the NYTOs over that time period. And while numerous factors can contribute to a utility under-recovering its costs, rendering it not possible to isolate a single variable without making certain assumptions, "the consistent pattern of underearning demonstrated by five of the six TOs indicates that the TOs are not fully recovering their actual cost of service."[53]

Importantly, the nature of the retail ratemaking before the NYPSC provides no assurance for the recovery of all O&M costs associated with SUFs/SDUs. Specifically, retail rate plans typically include O&M based upon projections of each NYTO's revenue requirements.[54] However, a true-up of these projected costs is not performed except for specific O&M items, such as pension costs, that are subject to reconciliation. And while one might assume that the potential for under- and over-recovery of costs would even-out over time, the fact that the TOs consistently under-earn on their ROE demonstrates that the established trend is for the TOs to under-recover their costs to provide service. As discussed in the Supplemental Nowak Testimony, since the O&M for SUFs/SDUs is included in these multi-year retail rate plans, the

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[51] Furthermore, as those revenue requirements were established largely in black box settlements resulting in stated rates, it is not feasible to directly attribute specific costs incorporated in those settlement amounts to any particular item. *See Tri-State Generation and Transmission Ass'n, Inc. v. Pub. Serv. Co. of N. M.*, 143 FERC ¶ 61,226, P 21 (2013) (stating "[t]he Commission has found in other proceedings concerning black box settlements that it would be impossible to determine which cost components are included in current rates and which were excluded" (citing *El Paso Natural Gas Co.*, 132 FERC ¶ 61,139, at PP 81-82 (2010) (citing *United Gas Pipe Line Co.*, 56 FERC ¶ 61,214, at 61,855 n.7 (1991))). Even National Grid's currently effective formula rate ROE of 10.3% (used to calculate TSCs) was established by settlement filed on February 24, 2015 in Docket Nos. EL14-29 *et al* and does not earn a return for the SUFs/SDUs, as that return is applied to National Grid's transmission rate base (which excludes the costs of the SUFs/SDUs).

[52] Nowak Testimony, p. 24, Figure 1; Supplemental Nowak Testimony, pp. 4-6.

[53] Supplemental Nowak Testimony, p. 5.

[54] *See e.g.*, Con Ed 2020 Retail Rate Order, p. 2 ("This Order establishes three-year [projected] electric and gas plans effective from January 1, 2020 to December 31, 2022 (the Rate Plans)").

SUFs/SDUs "have contributed to the TOs underearning their allowed ROEs and failing to recover their full cost of service."[55] Accordingly, the NYTOs should be allowed an ROE to compensate them for this risk.[56]

4. *The NYTOs state that the transmission owners' inability to earn a return on the capital investment associated with the System Upgrades they own and operate will inhibit the transmission owners' ability to raise necessary capital.*[57]

   a. *Considering that the capital for System Upgrades is currently required to be provided by the interconnection customers, please explain if there are concerns specifically related to attracting capital to fund System Upgrades. If so, please explain how the capital attraction concerns arise.*

**Response**

As discussed in the Supplemental Nowak Testimony, the concern under the existing paradigm, is not specifically related to attracting the capital to fund the SUF/s SUDs since, as Staff points out, that funding is provided by the Interconnection Customers.[58] The concern is related to a NYTO's ability to raise capital to fund its utility operations and enterprise as a whole, including its on-going cost of owning and operating the SUFs/SDUs.[59] Investors do not have the option to invest in only a portion of a public utility but instead invest in the entire enterprise.[60] As discussed in the Direct Nowak Testimony and as recognized in *Ameren* and in the *Ameren* Remand Order, the addition of the SUFs/SDUs to the NYTOs' systems increases the proportion of a TO's businesses operated on a non-profit basis which deters investment.[61] This growing nonprofit segment deters investment because it contains no potential for a compensatory

[55] Supplemental Nowak Testimony, p. 6.

[56] *See Ameren*, 880 F.3d at 581 ("if Petitioners are conceptually correct that they bear these risks as owners of transmission lines, it supports their basic contention that they are entitled to be compensated *now* as owners for operating the upgrades.") (emphasis in original).

[57] Section 205 Filing, p. 11, Nowak Testimony, pp. 62-65.

[58] Supplemental Nowak Testimony, pp. 6-7.

[59] *Id.*, p. 7.

[60] Section 205 Filing, p. 16 (citing *Ameren*, 880 F.3d at 581); *see also* Supplemental Nowak Testimony, pp. 5-7, NYTOs' Answer, pp. 6-7.

[61] *See Ameren*, 880 F.3d at 581 (holding that under the *Hope* and *Bluefield* standards that rates be sufficient to allow the regulated utility a return sufficient to attract capital necessarily, 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."); *see also* Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 47 (May 3, 2021) (citing Remand Rehearing Order at P 32) (citing *Ameren*, 880 F.3d at 581-82)) (explaining that in the *Ameren* Remand Orders, "[t]he Commission acknowledged the Court-recognized concern that Generator Funding requires transmission owners to operate a portion of their systems as not-for-profit enterprises."); *see also* Direct Nowak Testimony, pp. 61-65.

incremental return and only the potential for financial loss.[62] By way of a simple example, consider a utility that owns and operates $100 million of transmission plant, and that earns a return commensurate with the risks inherent in ownership and operations of such plant. If an additional $20 million of transmission plant is funded by a 3rd party, and ownership then transferred to the utility with zero investment by the utility, the utility would now have the costs and risk associated with ownership and operation of $120 million in transmission plant, but only earn a return that is sufficient for the risks of ownership and operation of $100 million in transmission plant.

The current funding approach further exacerbates the NYTOs' ability to attract necessary capital because they suffer by comparison to other transmission owners who earn a return on their equivalent of SUFs/SDUs.[63] In this regard, the Supreme Court has held that a public utility is entitled to earn a return "commensurate with returns on investments in other enterprises having corresponding risks."[64] Therefore, since other TOs are allowed an opportunity to self-fund their equivalent of SUFs/SDUs and thereby are provided an opportunity to earn a return on those upgrades, the NYTOs are not provided a comparable return to that earned by other transmission owners having corresponding risks and uncertainties in violation of *Hope* and *Bluefield*.[65]

5. *Under the current NYISO OATT, interconnection customers pay for System Upgrades up-front. To the extent that the System Upgrades increase the transfer capability of the transmission system, interconnection customers are able to receive incremental transmission congestion contracts as compensation for the funding of the System Upgrades in accordance with the relevant provisions of the NYISO OATT.*[66] *In the order accepting participant funding in NYISO related to these NYISO OATT provisions, the Commission explained that the ability for interconnection customers to receive transmission congestion contracts for funding System Upgrades was consistent with Order No. 2003.*[67]

   a. *Please explain if interconnection customers will still be able to seek transmission congestion contracts for the System Upgrades that they are required to pay for under the Core Amendment. As part of your explanation, provide a description of any changes to*

[62] Supplemental Nowak Testimony, pp. 6-9 (among other things, identifying several of the MISO TOs that are allowed the option of self-funding and that have typically been considered peers, or proxy companies, for the NYTOs).

[63] *Id.*, pp. 7-9.

[64] *Hope* 320 U.S. 591 at 603.

[65] Supplemental Nowak Testimony, pp. 7-9.

[66] NYISO, NYISO Tariffs, NYISO OATT, § 19.2 OATT Attach. M Award of TCCs Other Than Through TCC Auctions: Fixed Price TCCs and Incremental TCCs (8.0.0), § 19.2.4; *see generally*, NYISO, NYISO Tariffs, NYISO OATT, § 25 OATT Attach. S Rules To Allocate Responsibility for the Cost of New Interconnection Facilities (0.0.0).

[67] *N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,159, P 57 (2004), *order on reh'g*, 111 FERC ¶ 61,347 (2005).

*the transmission congestion contract compensation process for System Upgrades under the Core Amendment, and explain how the changes are just and reasonable.*

**Response**

Interconnection Customers will continue to be able to seek transmission congestion contracts for the SUFs/SDUs that they are required to pay for under the Core Amendment. The TOs do not seek to change the NYISO OATT provisions governing transmission congestion contracts.

6. *The NYTOs state that System Upgrades are a significant portion of their business, and in support of this assertion present a graph that shows rising initial cost estimates for System Upgrades from Class Year 2009 to 2019.*[68] *However, while the initial cost estimate for the 2019 System Upgrades is $1.2 billion, the graph does not reflect the final costs of the System Upgrades accepted by interconnection customers. For Class Year 2019, the interconnection customers have accepted responsibility for $248,797,424 of the initial System Upgrades identified, according to the NYTOs.*[69]

   a. *Did the final costs of the System Upgrades accepted by interconnection owners rise from Class Year 2009 to 2019? Please provide and explain the final costs of the System Upgrades accepted by interconnection customers for the Class Years 2009 to 2019. As part of your response, please provide a comparison of the final System Upgrade costs to the NYTOs' net transmission plant over the same time period.*

**Response**

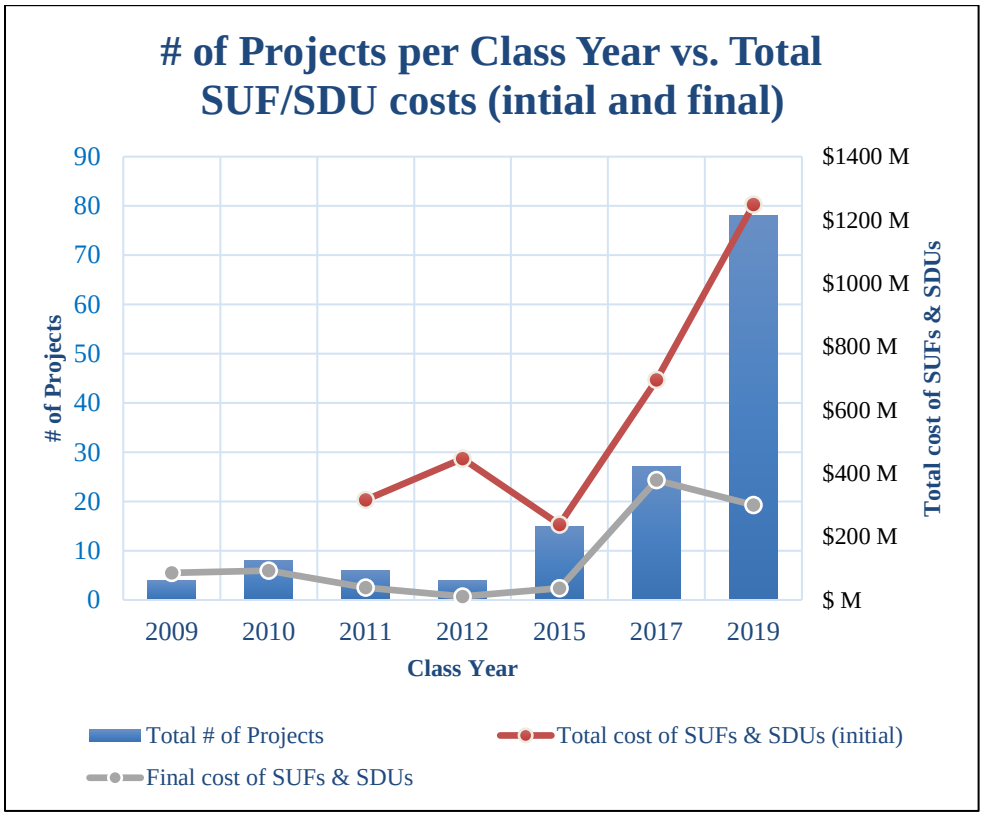
The final costs of the SUFs/SDUs accepted by Interconnection Customers rose from the 2009 Class Year to the 2019 Class Year. As illustrated through the following graphs and charts, the final costs of SUFs/SDUs increased significantly in the 2017 Class Year and the 2019 Class Year, and represent an increasing share of the NYTOs' net transmission plant over that period.

**1. Final vs. Initial System Upgrade Costs**

The following graph is the same graph included at page 9 of the Section 205 Filing, but adds a grey line depicting the actual final costs of the SUFs/SDUs accepted by the Interconnection Customers:

[68] Section 205 Filing, p. 9.

[69] *Id.*, p. 5 & n.23.




The grey line reflects the total final costs of the SUFs/SDUs of the TOs, with information gleaned from the NYISO's notices of Class Year completions. Additionally, the total cost of Class Year 2019 SUFs has increased, since the Section 205 and Section 206 Filings, from $248.8 million to $300.2 million as a result of developers having accepted cost allocation for additional SUFs associated with NYC and Long Island SDU Studies. Below is the underlying data for the chart above:

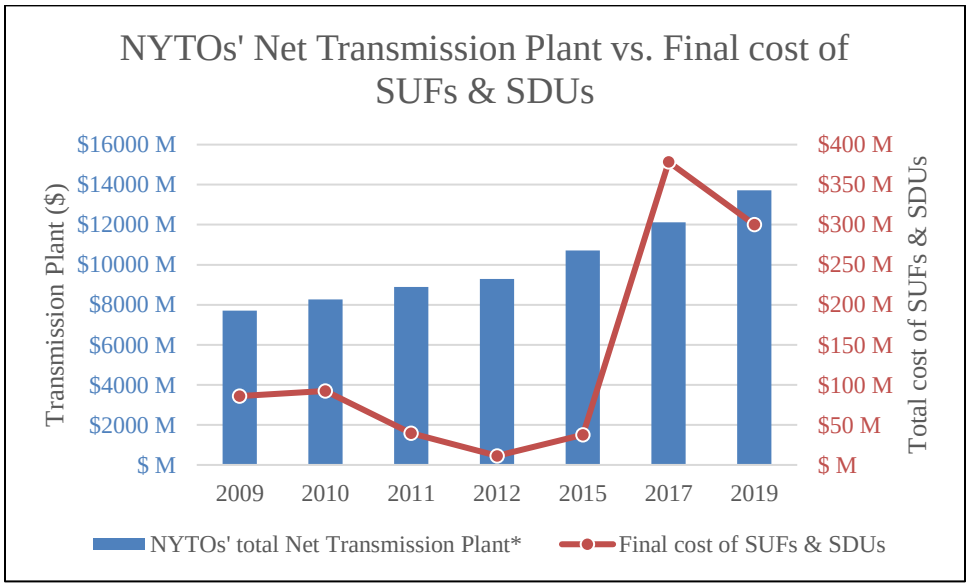
| Class Year | Total # of Projects | Total cost of SUFs & SDUs (initial) | Total cost of SDUs (initial) | Total cost of SUFs (initial) | Final cost of SUFs & SDUs | Total cost of SDUs (final) | Total cost of SUFs (final) |
|---|---|---|---|---|---|---|---|
| 2009 | 4 | | | | $86,000,772 | $1,053,513 | $84,947,259 |
| 2010 | 8 | | | | $92,541,609 | $1,035,954 | $91,505,655 |
| 2011 | 6 | $316,143,174 | $7,683,173 | $308,460,001 | $39,577,935 | $14,540,334 | $25,037,601 |
| 2012 | 4 | $445,969,000 | $0 | $445,969,000 | $11,400,000 | $0 | $11,400,000 |
| 2015 | 15 | $238,476,774 | $34,068,612 | $204,408,162 | $37,527,874 | $6,100,784 | $31,427,090 |
| 2017 | 27 | $695,239,932 | $23,801,384 | $671,438,548 | $378,307,098 | | |
| 2019 | 78 | $1,248,373,332 | $243,151,862 | $1,005,221,470 | $300,242,939 | $0 | $300,242,939 |

*The rows for the initial cost estimates for 2009 and 2010 are blank because NYISO notices on initial cost allocations did not include the cost estimates. It was only in class year 2011 that the NYISO began including the initial cost estimates in the notices of cost allocation. Likewise, the NYISO's data for 2017 does not break-out final SUF and SDU costs, so those items are shown blank.

While the final SUF/SDU costs for which cost allocation was accepted by Interconnection Customers are lower than the initial costs identified in studies, the trend of dramatically increasing, significant costs is still clear. As indicated by the grey line in the graph and the amounts in the "Final cost of SUFs & SDUs" column highlighted in yellow in the chart directly above, final SUF/SDU costs roughly correlate to the total number of projects for each Class Year. Compared to Class Year 2015, final SUF/SDU costs for Interconnection Customers increased by 908% in Class Year 2017 ($378 m vs. $37 m) and by 700% in Class Year 2019 ($300 m vs. $37 m).

**2. Final System Upgrade Costs Compared to Net Transmission Plant**

The following graph compares the TOs' net transmission plant plus that of NYPA and LIPA to the final SUF/SDU cost (also including NYPA and LIPA):[70]



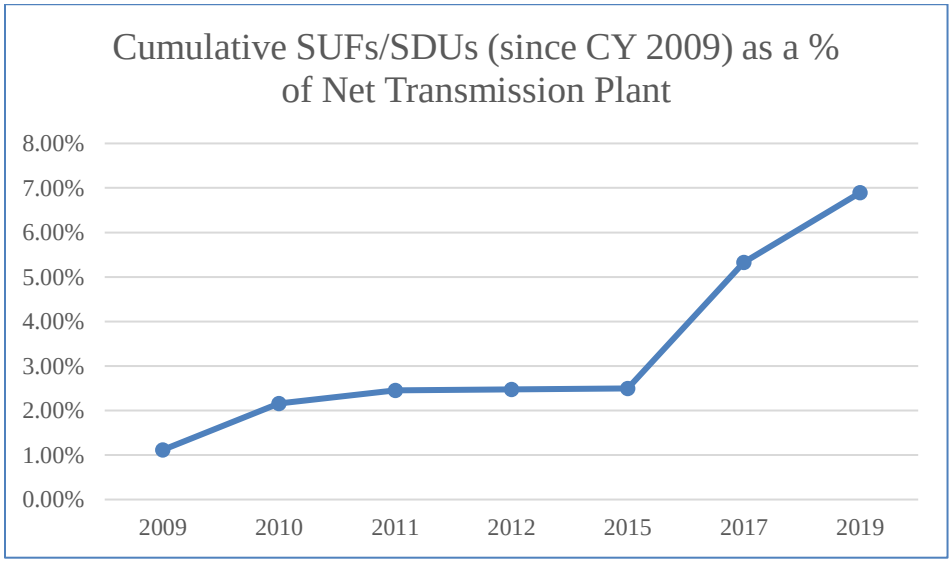

The following chart contains the underlying data for the graph directly above:

| Calendar Year | **Final cost of SUFs & SDUs per Class Year** | Cumulative cost of SUFs & SDUs since Class Year 2009 | NYTOs' total Net Transmission Plant* | Change in Net Transmission Plant between Class Years |
|---|---|---|---|---|
| 2009 | $86,000,772 | $86,000,772 | $7,713,302,662 | |
| 2010 | $92,541,609 | $178,542,381 | $8,263,381,215 | $550,078,553 |
| 2011 | $39,577,935 | $218,120,316 | $8,890,682,919 | $627,301,704 |
| 2012 | $11,400,000 | $229,520,316 | $9,285,898,506 | $395,215,587 |
| 2015 | $37,527,874 | $267,048,190 | $10,706,339,364 | $1,420,440,858 |
| 2017 | $378,307,098 | $645,355,288 | $12,112,778,754 | $1,406,439,390 |
| 2019 | $300,242,939 | $945,598,227 | $13,719,135,818 | $1,606,357,064 |

[70] Accordingly, these charts references to NYTOs' transmission plant costs include that of both NYPA and LIPA.

*Net Transmission Plant values: (1) for TOs are taken from Calendar Year's Q4 FERC Form 1 page 207, line 58; (2) for NYPA are taken from Annual Report Financial Statements 2009-2019; and (3) for LIPA are taken from LIPA's internal accounting records. (4) Form 1 data may not be inclusive of the full value of SUFs/SDUs as they would have been transferred from the developer to the TO at $0 book value with limited capital construction costs for the TO. NYPA's and LIPA's financial data is provided for informational purposes. Any representations using the financial data do not constitute a position by NYPA or LIPA.

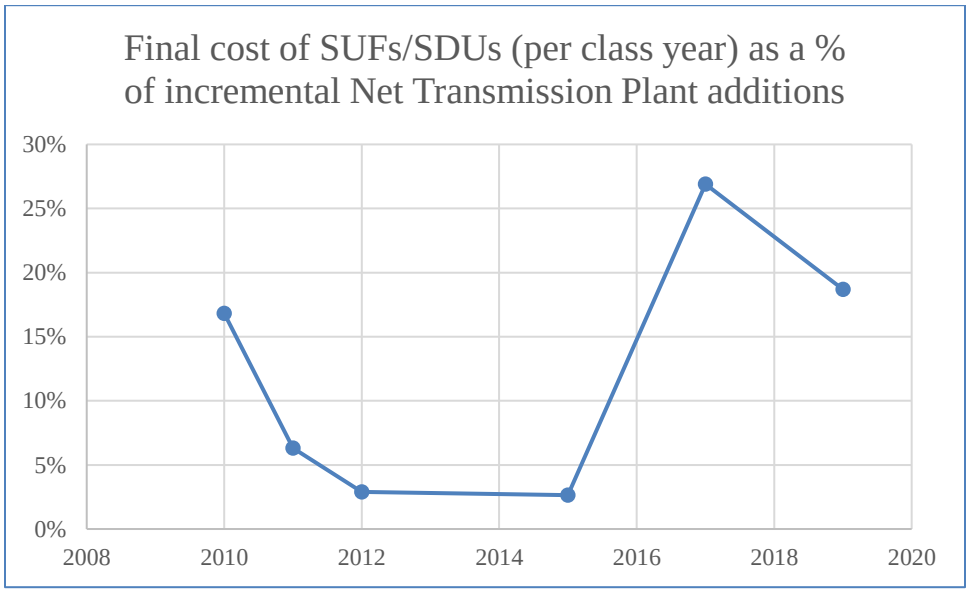
SUF/SDU costs since the 2009 Class Year have represented an increasing share of overall transmission rate base. The graph below shows the cumulative amount of SUFs/SDUs (based on the final costs accepted by Interconnection Customers) as a percentage of the TOs', NYPA's and LIPA's net transmission plant since 2009:




*For simplicity, all comparisons of FERC Form 1, NYPA and LIPA's transmission plant data with Class Year data were made based on the year described in the source's title. For example, 2019 data points in all charts utilize the FERC Form 1 Q4 reports for the 2019 year and all final cost estimates in the Class Year 2019 study process, despite the Class Year 2019's study completion occurring in 2021.

As indicated above, the total amount of SUFs/SDUs installed since Class Year 2009 represents 6.89% of the TOs', NYPA's, and LIPA's net transmission plant. Seven percent, or $945.6 million, is a significant amount of transmission plant and has been growing at a faster rate than the rest of net transmission plant in New York.

Finally, SUF/SDU costs can represent a significant percentage of annual incremental net transmission plant additions for the TOs', NYPA's, and LIPA's transmission plant, as shown in the chart below.




The final SUF/SDU costs for an individual Class Year can represent a significant share of the incremental net transmission plant additions for the TOs, NYPA, and LIPA over a comparable time period. For example, in Class Year 2017, final SUF/SDU costs were approximately 27% of the change between 2017 and 2015 in the TOs', NYPA's, and LIPA's transmission plant.

The information provided above clearly demonstrates that the final costs of the SUFs/SDUs accepted by Interconnection Customers represent a significant share of overall transmission plant for the NYTOs, which is expected to increase further as increasing renewable and other clean resources seek to interconnect to the grid to advance New York's aggressive climate goals.

7. *The NYTOs state that the increasing amount of System Upgrades in turn increases a transmission owner's overall risk profile. In addition, the NYTOs assert that there are numerous risks and costs associated with owning and operating System Upgrades, which include both modifications and additions to the transmission system.*[71]

   a. *Please state (and provide any available support for) the proportion of System Upgrades that are modifications or replacements of existing transmission facilities rather than additions to the NYTOs' transmission system. Please explain whether there is any difference between the risks and costs associated with the modification or replacement of existing transmission facilities versus the addition of new transmission facilities.*

**Response**

The NYTOs account for assets based upon plant accounting categories and not based upon the reason why it was installed (*e.g.*, not upon distinctions based upon whether the asset is a modification/replacement or new facility). Accordingly, the NYTOs do not record the

[71] Section 205 Filing, p. 18, Direct Nowak Testimony, pp. 10-13.

information in the requested format. Similarly, the NYISO does not have the information readily available in the requested format. For these reasons, the NYTOs are unable to provide a data-supported response to this question.

Regarding the differences in risks and costs, while any modification/replacement might prove more or less risky than a new addition depending on the specific upgrades at issue, when viewed in the aggregate there should be no appreciable difference in the risks and costs associated with modifications or replacements as compared to new additions. This is because both categories consist of the exact same range of transmission facilities: *e.g.*, a replacement facility could be a 345 kV transmission line and a new facility could be a 345 kV transmission line. Note, however, that while the risks and costs of owning, operating and maintaining modified, replaced and new facilities should largely be the same, construction risk for new facilities can be expected to be greater than for modified/replaced facilities.

While the reason for this question is unclear, the TO's acknowledge that some protestors in this proceeding have argued that SUFs/SDUs increase the reliability of the electric system because they can result in the replacement of older equipment with newer equipment, and newer equipment is less likely to fail.[72] However, SUFs, which constitute the majority of current generator-funded SUFs/SDUs, are not constructed and installed to increase reliability; they would not be constructed at all "but for" the Interconnection Customer's generation project. Instead of increasing reliability,[73] and as discussed in the NYTOs' Answer, SUFs are modifications to the transmission system that are made to "***maintain*** system reliability" to safely interconnect the generators and/or to address issues identified in the interconnection process.[74] Thus, the installation of SUFs/SDUs increases risk by adding new elements and complexities to the system.

Some protestors have also argued that SUFs/SDUs that replace existing equipment increase reliability because the likelihood of failure of transmission components "increases dramatically with age."[75] Even if true, this argument is irrelevant because, as discussed in the NYTOs' Answer, investors would not be compensated for the risk of failure for the entire life of the assets absent the adoption of TO Self-Funding.[76] Focusing on near-term performance and benefits to the grid is misleading because NYTOs would own and operate such facilities for the life of transmission plant without compensation for these risks,[77] including its later stages when

[72] Invenergy, p. 9; Goggin Affidavit, p. 10.

[73] Nowak Testimony, p. 64.

[74] NYTOs' Answer, p. 18 (quoting NYISO OATT, § 25.1.2 (definition of "System Upgrade Facilities")).

[75] Goggin Affidavit, p. 9.

[76] NYTOs' Answer, p. 18.

[77] *Id.* In addition, the NYTOs replace aging equipment, consistent with good utility practice and as permitted by their regulator, in a planned manner to seek to prevent such failures. This fact means that an SUF replacing an existing piece of equipment ahead of schedule should not be misconstrued to mean that the SUF prevented the equipment from failing. *Id.*, pp. 17-18.

the witness for the NY Interconnection Customers, Mr. Goggin, identifies that leaks are more likely to occur.[78]

8. *The proposed revisions in section 25.5.4 of the NYISO OATT appear to apply only to large generating facilities being processed under the Large Facility Interconnection Procedures (LFIP) and a subset of small generating facilities that are required to undergo a Class Year Study.*[79]

    a. *Would the Core Amendment apply to Small Generating Facilities outside of the Class Year process in Attachment Z to the OATT and/or Transmission Projects studied under the Transmission Interconnection Procedures in Attachment P to the OATT.*

**Response**

The Core Amendment, by itself, does not apply to Small Generating Facilities identified outside of the Class Year process in Attachment Z or to Transmission Projects studied under the Transmission Interconnection Procedures in Attachment P. However, the NYTOs' Section 206 Filing in Docket No. EL21-66 filed contemporaneously with the Section 205 Filing asks the Commission to, among other things, direct NYISO to (1) revise the *pro forma* Small Generator Interconnection Agreement ("SGIA") attached as Appendix 7 to Attachment Z[80] to apply TO Self-Funding to all Small Generating Facilities and (2) make such other revisions to the Small Generator Interconnection Procedures ("SGIP") in Attachment Z that are necessary to implement TO Self-Funding.[81]

With regard to Transmission Projects studied under the Transmission Interconnection Procedures in Attachment P to the OATT, the NYTOs' Section 206 Filing also requests the Commission to "direct NYISO to make such other changes to the NYISO Tariffs that might be identified as appropriate to efficiently implement the TO Funding Mechanism."[82] The NYISO's Answer in the Section 206 Proceeding asks the Commission to clarify whether TO Self-Funding should also apply to transmission project interconnections under Attachment P, noting, in the absence of such application, the potential for "different funding approaches for similar upgrades identified in the NYISO's separate interconnection procedures or identified for different facilities."[83] While the NYTOs believe there are differences between generation project

[78] In this regard, Mr. Goggin argues that the NYTOs really do not bear environmental risks for transformers and substation switching equipment even though he concedes that such "equipment can leak" because, according to Mr. Goggin, such equipment generally increases reliability because it only has "minimal failures during the first 30 years of transformer operations." Goggin Affidavit, p. 13 (footnote omitted). Of course, under the current paradigm, the NYTOs would own and operate such facilities for the life of plant, including the later stages when (according to Mr. Goggin) leaks are more likely to occur.

[79] Section 205 Filing, pp. 13-14; NYISO Comments, p. 10.

[80] Section 206 Filing, p. 31.

[81] *Id.*, p. 33.

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

[83] NYISO Answer, p. 11.

interconnection and transmission project interconnection (see response to b. below), they accept that the TO Funding Mechanism may logically apply to transmission interconnection and acknowledge NYISO's implied preference for uniformity between the processes. The NYTOs therefore support the Commission consider directing NYISO on compliance in the Section 206 Proceeding to revise Attachment P to adopt TO Self-Funding.

b. *If so, please explain how the Core Amendment would be applied to those Small Generating Facilities and/or Transmission Projects. If not, please explain how the different treatment of small generating facilities and transmission projects under the Core Amendment will not lead to undue discrimination amongst similarly situated entities.*

**Response**

Reference is made to the Response to 8.a. above. TO Self-Funding is proposed to apply to all small generator interconnections pursuant to the combined effect of the Section 205 and 206 Filings.

With regard to transmission projects, as discussed above, while neither the Section 205 nor 206 Filings explicitly sought application of the Core Amendment to transmission projects, the Section 206 Filing provides the Commission the procedural means to direct the NYISO on compliance to revise Attachment P to adopt TO Self-Funding should the Commission determine it appropriate to do so. While the NYTOs would support such a Commission directive, it would not constitute undue discrimination to apply TO Self-Funding to generator interconnections but not to transmission interconnections because the two are not similarly situated.[84] The two are governed by separate and distinct sections under the NYISO OATT. Transmission interconnections are governed by those processes, planning requirements, and cost allocations established in Attachment P (i.e., NYISO OATT Section 22), while generation interconnections are generally governed by those in Attachment S (i.e., Section 25).[85] The two are studied under different transmission planning processes: transmission projects are evaluated under specific System Impact Studies[86] and Facilities Studies[87] while generator interconnections are generally studied under the "clustered" Class Year planning process provided under Attachment S. The costs incurred by transmission developers under the Attachment P process do not impact the costs incurred by generation developers under Attachment S, and *vice versa.* Different classifications of upgrades are identified and cost allocated, with Attachment P processes

[84] *See, e.g., TranSource, LLC v. PJM Interconnection L.L.C.*, 168 FERC ¶ 61,119, P 240 (2019) ("a finding of undue discrimination requires a showing that (1) two classes of customers are treated differently; and (2) the two classes of customers are similarly situated.") (footnote omitted).

[85] In addition, and as indicated in the response to question 8.a. above, small generator interconnections that are not studies as part of the Class Year process in Attachment S are studied separately under Small Generator Interconnection Procedures in Attachment Z.

[86] NYISO OATT, § 22.8

[87] *Id.*, § 22.9.

identifying, among other things, "Network Upgrade Facilities"[88] while the Attachment P processes identify, among other things, SUFs/SDUs.[89] Transmission developers and generation developers are also in separate niches of the electric industry, offering separate services and products. Accordingly, transmission developers and generation developers should not necessarily be considered similarly situated. In any event, as stated above, the Commission could approve the Section 205 Filing for generator interconnections and then further consider in the Section 206 Proceeding whether it should extend the *Ameren* logic to transmission interconnections. It is well settled that regulatory agencies can resolve issue in this step-by-step manner.[90]

For similar reasons, the TOs likewise do not believe that small generators studied outside of the Attachment S Class Year process are similarly situated to the large and small generators that are studied within that Class Year process.[91] The Attachment S Class Year planning and resulting cost allocation processes are both extensive and significant as indicated above, meaning that other customers under the NYISO OATT should not be considered similarly situated for purposes of undue discrimination analysis. Therefore, the Core Amendment, by applying to all generator interconnections subject to the Attachment S Class Year process, encompasses the realm of similarly situated customers for purposes of such analysis.

## III. List of Documents

The following is a list of documents[92] submitted with this filing:

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

2. A redlined version of the proposed revisions to Section 25.5.4 of the OATT; and

3. The Prepared Supplemental Testimony of Joshua C. Nowak (Exhibit NYT-0006)

[88] *See* NYISO OATT, § 22.1.

[89] NYISO OATT, § 25.1.2.

[90] *See TC Ravenswood v. FERC*, 331, Fed. Appx. 8 (D.C. Cir. 2009) ("An incremental approach to a problem is certainly within the scope of the Commission's discretion, s*ee Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 231, 111 S.Ct. 615, 112 L.Ed.2d 636 (1991) ('[A]n agency need not solve every problem before it in the same proceeding.'))"

[91] Again, as discussed above, the NYTOs intend for TO Self-Funding to apply to all generator interconnections through the combined effect of the Section 205 and 206 Filings.

[92] 18 C.F.R. § 35.13(b)(1).

## IV. Conclusion and Relief Requested

For the reasons provided herein and in the Section 205 Filing and the NYTOs' Answer, the NYTOs 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 September 7, 2021.

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

Sincerely,

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official Service List compiled by the Secretary in this proceeding.

Dated at Birmingham, Alabama, this 8th day of July 2021.

*/s/ Andrew W. Tunnell*
Andrew W. Tunnell