**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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| **Flint Mine Solar LLC,** | ) | |
| **Complainant** | ) | **Docket No. EL22-3-000** |
| **v.** | ) | |
| **New York Independent System Operator, Inc.,** | ) | |
| **Respondent** | ) | |

# ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure[1] and the Commission's October 22, 2021 *Notice of Extension of Time,* the New York Independent System Operator, Inc. ("NYISO") respectfully submits this answer ("Answer") to the October 14, 2021 "Complaint for Refund of Milestone Deposit" and the October 27, 2021 "Amended Complaint for Refund of Milestone Deposit" (hereinafter collectively, "Complaint") in the above-captioned docket by Flint Mine Solar LLC ("FMS"). The Complaint seeks, pursuant Section 309 of the Federal Power Act ("FPA") and Section 35.1(e) of the Commission's Regulations,[2] a refund of a portion of a deposit submitted in lieu of satisfying the necessary regulatory milestone requirements to enter the Class Year Interconnection Facilities Study for Class Year 2019.

[1] 18 C.F.R § 385.213 (2021). The Complaint was filed under Rule 218. For the reasons set forth in the NYISO's October 20, 2021 *Motion for Extension of Time,* the NYISO does not concede that the Complaint qualifies as a "small controversy" for purposes of Rule 218 of the Commission's Rules of Practice and Procedure.

[2] 16 U.S.C. § 825h; 18 C.F.R. § 35.1(e) (2021).

The Complaint would have the Commission "interpret" the plain terms of the NYISO's Open Access Transmission Tariff ("OATT")[3] to authorize the return of a deposit that is expressly not refundable. FMS is effectively asking the Commission to revise retroactively, not interpret and apply, the OATT. This is impermissible under the OATT and the filed rate doctrine. Even if there were any ambiguity about the plain language of the OATT, which there is not, there would be no basis for the Complaint's proposed "reinterpretation." All relevant extrinsic evidence is clear that the $100,000 portion of the at-issue, two-part deposit was not intended to be refundable under the facts presented in this case. The precedent from other regions that FMS cites is not relevant and cannot salvage its unfounded claim.

In short, the Complaint is without merit and must be denied. Neither FMS nor the Commission can ignore the plain terms of the OATT. If FMS truly believes that the relevant OATT provision is unjust and unreasonable, the appropriate avenue should have been filing a complaint under Section 206 of the FPA and satisfying the burden of proof required to justify revising the OATT.[4] In this case, even if FMS had made the necessary showing, any tariff revisions under Section 206 of the FPA could only be effective prospectively and would not retroactively entitle FMS to a refund of the deposit.[5] FMS cannot escape these legal

[3] Capitalized terms that are not otherwise defined in this filing letter shall have the meaning specified in Attachments S and X of the NYISO OATT, and if not defined therein, in the NYISO Market Administration and Control Area Services Tariff ("Services Tariff").

[4] 16 U.S.C. § 824e(b) (stating that under Section 206, "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon . . . the complainant"); *see also Alabama Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (stating that proponent of rate change under section 206 has the burden of proving the rate is unlawful); *Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) (quoting 16 U.S.C. § 824e[a]).

[5] 16 U.S.C. § 824e(b); *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Circuit 1992) (holding that the Commission "'may' order a refund if, after finding any rate 'unjust, unreasonable, unduly discriminatory, or preferential,' [it] fixes a just and reasonable rate for the future").

requirements by invoking Section 309 of the FPA,[6] Rule 35.1(e) of the Commission's Regulations, or Rule 218 of the Commission's Rules of Practice and Procedures.

## I. BACKGROUND

### A. NYISO Rules Governing Entry into Class Year Study

A facility seeking interconnection service through the NYISO's Large Facility Interconnection Procedures is subject to three successive studies prior to entering into an interconnection agreement. The first study is the Optional Interconnection Feasibility Study, which is a high-level evaluation of the configuration and local system impacts of a proposed interconnection.[7] The second is the Interconnection System Reliability Impact Study ("SRIS"), which is a detailed single-project study that evaluates the project's impact on transfer capability and system reliability.[8] The third and final study is the Class Year Study, a detailed evaluation of the cumulative impact of a group of projects—*i.e.*, a "Class Year" of projects—that have met specified eligibility requirements by the Class Year Start Date and have elected to enter that Class Year Study.[9] The Class Year Study identifies the upgrade facilities needed to reliably interconnect all of the projects in the Class Year and provides a binding cost allocation of the upgrade facilities for each project.

The NYISO's tariff explicitly identifies the eligibility requirements for a proposed project to enter a Class Year.[10] Specifically, Attachment S to the NYISO's OATT provides that to enter a Class Year, a Developer's project must: (1) have an SRIS approved by the NYISO's

[6] *See Verso Corp. v. FERC*, 898 F.3d 1, 10-11 (D.C. Cir. 2018) (holding that the Commission may order a refund under its Section 309 authority where the rate paid exceeded the filed rate [citing *Concord v. FERC*, 955 F.2d at 73]); *see also Old Dominion Elec. Coop. Inc. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993).

[7] *See* OATT § 30.6.

[8] *See id.* § 30.7.

[9] *See id.* § 30.8.

[10] Although the need for a Class Year Study as part of the interconnection process is detailed in Attachment X of the OATT, the Class Year Study process itself is defined primarily by Attachment S of the OATT.

stakeholder Operating Committee and (ii) have satisfied one of the regulatory milestones described in Section 25.6.2.3.1 of Attachment S to the OATT. Those regulatory milestones are primarily federal and state regulatory determinations or actions related to siting and permitting requirements for a project. Relevant to this proceeding, a Large Generating Facility that is greater than 25 MW would satisfy the regulatory milestone requirement by submitting evidence of "a determination pursuant to Article 10 of the Public Service Law that the Article 10 application filed for the [generator] is in compliance with Public Service Law § 164."[11]

Attachment S to the OATT also provides that a project that has not met the required regulatory milestone can nonetheless enter a Class Year if the project "submits a two-part deposit consisting of (1) $100,000 and (2) $3,000/MW for the nameplate capability of the Large Facility."[12] These deposits are in addition to the study deposit required for the Class Year Study.[13]

The tariff language governing this two-part deposit specifies further the circumstances under which it may be refunded to the Developer. With respect to the $100,000 portion, Attachment S makes clear that that deposit is only refundable if the Developer satisfies certain requirements by a certain date. Specifically, the tariff states that the $100,000:

> will be fully refundable ***if***, ***within twelve months after the Class Year Start Date or the Operating Committee's approval of the Class Year Study, whichever occurs first***, the Developer satisfies an applicable regulatory milestone and provides the [NYISO] with adequate documentation that the Large Facility has satisfied an applicable regulatory milestone.[14]

[11] OATT § 25.6.2.3.1.1.7.

[12] *Id.* § 25.6.2.3.1. After FMS provided the two-part deposit in lieu of satisfying the regulatory milestone requirement, the NYISO revised the second-part of the deposit to be "$3,000/MW for the requested ERIS of the Large Facility. *See New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions Regarding Interconnection Process Improvements, Docket No. ER20-638-000 (December 19, 2019). These changes are not relevant to the current Complaint.

[13] *See* OATT §§ 25.6.2.3.1, 30.8.1.

[14] *Id.* § 25.6.2.3.1 (emphasis added).

In contrast, the second portion of the deposit ($3,000/MW) is always refundable, but the timing of the refund will depend on the occurrence of a certain event.[15]

The intent behind the regulatory milestone requirement is to screen for speculative projects and to confirm progress in project development so that projects that enter a Class Year are reasonably likely to continue to full development.[16] If a project enters a Class Year, but then subsequently drops out, such a change may impact the Class Year Study results and complicate the NYISO's efforts to timely process the interconnections of the Developers that remain in the Class Year. The prerequisites established by the OATT for entry into a Class Year Study are meant to lower the risks of this outcome.

In 2016 and 2017, the NYISO introduced and then modified the flexibility under its tariff for Developers to provide additional deposits instead of actually satisfying the regulatory milestone prior to the Class Year Start Date.[17] The NYISO established this flexibility in response to developer concerns that it was, in some cases, difficult to obtain a determination of a complete application under the Article 10 siting process in time to enter a desired Class Year. The framework in the OATT that was applicable at the time that FMS entered its project in Class Year 2019 provided for the forfeiture of the $100,000 portion of the deposit to reasonably accommodate a Developer's desire for flexibility where it has not yet achieved a regulatory milestone while disincentivizing the use of such flexibility by more speculative projects to the detriment of the process and other Developers.

[15] *Id.*

[16] *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions Regarding Interconnection Process Improvements, Docket No. ER16-1627-000, at pp 4-5 (May 5, 2016).

[17] *Id.*; *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions Regarding Interconnection Process Improvements, Request for Expedited Commission Action, Request for Waiver of Prior Notice Requirement, and Request for Shortened Comment Period, Docket No. ER17-830-000 (January 23, 2017) ("2017 NYISO Filing").

In an order issued on February 21, 2017, the Commission accepted the tariff language governing the submission of the two-part deposit in lieu of satisfying the regulatory milestone requirement.[18] The Commission made the Attachment S language effective, without condition or change, on February 22, 2017.

### B. FMS Participation in Class Year 2019 Study

FMS is developing an approximate 100 MW solar photovoltaic generation facility in Greene County, New York. In 2019, FMS elected to enter Class Year 2019 rather than wait for the next Class Year Study. Class Year 2019 commenced on August 9, 2019. However, as of that date, FMS had not satisfied the regulatory milestone requirement because its application to the New York Department of Public Service ("DPS") under New York Public Service Law § 164 had not yet been "deemed complete."[19] FMS elected, but was not required, to use the alternative approach to entering Class Year 2019, which carried inherent risks, by making a two-part deposit in accordance with Section 25.6.2.3.1 of the OATT. Specifically, FMS submitted the fixed amount of $100,000 and an amount of $3,000 for each megawatt (MW) of the nameplate capability of its proposed facility.[20] These deposits were in addition to the study deposit required for the Class Year Study.

The deadline for FMS to "satisfy[] an applicable regulatory milestone and provide[] the [NYISO] with adequate documentation that the Large Facility has satisfied an applicable regulatory milestone" was August 9, 2020—*i.e.*, 12 months after the 2019 Class Year Start Date

[18] *See New York Indep. Sys. Operator, Inc.*, Letter Order, Docket No. ER17-830-000 (February 21, 2017) (accepting the revisions proposed in the 2017 NYISO Filing).

[19] A determination by DPS that its application is "deemed complete was the regulatory milestone that FMS later notified it satisfied after the 12-month deadline set forth in Section 25.6.2.3.1 of the OATT.

[20] FMS satisfied the other criterion of Section 25.6.2.3.1 of the OATT—*i.e.*, approval of its SRIS by the NYISO's stakeholder Operating Committee.

of August 9, 2019.[21] As acknowledged in the Complaint, FMS received a determination, dated August 12, 2020, that its application was deemed complete in accordance with Article 10 of the Public Service Law. The issuance of this determination, as well as the date that the NYISO received it, missed the deadline specified by Section 25.6.2.3.1 by several days.

FMS participated in Class Year 2019 and received a cost allocation, which it accepted.[22] FMS is now in the process of negotiating an interconnection agreement for its Large Facility. However, since it received the determination that its Article 10 application is deemed complete, FMS has objected on multiple occasions to NYISO's refusal to refund the $100,000 portion of the deposit in lieu of satisfying the regulatory milestone requirement. In this Complaint, FMS seeks a return of $99,999 of the $100,000 portion that the NYISO had retained, which represents a reduction of $1 in attempt to make the Complaint eligible to be processed under Rule 218 of the Commission's Rules of Practice and Procedures.

## II. ANSWER

### A. The Plain Language of the OATT and the Filed Rate Doctrine Require that the Complaint Be Denied

FMS's claim for $99,999 hinges on the interpretation of Section 25.6.2.3.1 of the OATT. As described above, that provision allows a Developer to enter a Class Year Study, even though it has not met the requisite regulatory milestone, by submitting a two-part deposit —*i.e.*, a fixed $100,000 amount and $3,000 for each megawatt of the facility's nameplate capability sought by the Developer. Section 25.6.2.3.1 states that the $100,000 portion:

> will be fully refundable if, within twelve months after the Class Year Start Date or the Operating Committee's approval of the Class Year Study, whichever occurs

[21] The NYISO's stakeholder Operating Committee did not approve the applicable Class Year Study report until after the August 9, 2019 commencement of Class Year 2019. For this reason, under Section 25.6.2.3.1, the deadline is 12 months from August 9, 2019.

[22] Due to the nature of the Class Year Study process, FMS could have potentially received a less favorable cost allocation if it waited for the start of a Class Year Study after Class Year 2019.

> first, the Developer satisfies an applicable regulatory milestone and provides the [NYISO] with adequate documentation that the Large Facility has satisfied an applicable regulatory milestone.

The question raised by FMS is whether, under this language, the $100,000 amount is refundable even in circumstances where the Developer has neither satisfied the requisite regulatory milestone nor provided the NYISO with documentation of the satisfaction of such a milestone by the applicable deadline.

The question is answered by the language of Section 25.6.2.3.1 itself. In tariff disputes, the Commission looks first to the relevant tariff language and gives effect to that language if it is clear and unambiguous.[23] Ambiguity exists only if the tariff language is "reasonably susceptible [to] different constructions or interpretations."[24] In this case, there is no ambiguity. The $100,000 portion of the deposit is refundable only if the Developer satisfies the requisite regulatory milestone "within twelve months after the Class Year Start Date or the Operating Committee's approval of the Class Year Study, whichever occurs first." If the Developer fails to satisfy at least one of the applicable regulatory milestones by that deadline, the tariff language is clear that the $100,000 portion is not to be refunded to the Developer. The tariff language is not "reasonably susceptible" to any other interpretation.

FMS attempts to create ambiguity by citing to language in Sections 30.13.3, 30.13.3.1, and 30.14 of Attachment X to the OATT. These sections, however, state that study deposits provided for the performance of any Interconnection Study will be trued up in a manner that ensures that the interconnection customer pays only for the cost of the relevant Interconnection Studies. These Attachment X provisions are referring only to the study deposits that a Developer pays specifically for the performance of the three Interconnection Studies outlined above: the

[23] *See, e.g.*, *Southwest Power Pool*, 160 FERC ¶ 61,115 at P 45 (2017).
[24] *Id.* (citing *Miss. River Transmission Corp.*, 96 FERC ¶ 61,185, at 61,819 (2001)).

Interconnection Feasibility Study, the SRIS, and the Class Year Study.[25] They do not refer, and have no applicability, to the two-part deposit in lieu of satisfying a regulatory milestone provided for under Section 25.6.2.3.1 in Attachment S to the OATT.

Furthermore, even if these provisions were deemed to relate to Section 25.6.2.3.1 in Attachment S, such a reading of Attachment X would effectively nullify the clear language of Section 25.6.2.3.1. That language plainly requires that the Developer forfeit the $100,000 portion of the deposit in circumstances where the Developer fails to meet the regulatory milestone by the prescribed deadline. "[T]ariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results."[26] To read the cited provisions from Attachment X in the manner suggested by FMS, and to ignore the express qualifications in that language of Section 25.6.2.3.1,[27] would be to give the OATT an interpretation that is illogical. In effect, the interpretation urged by FMS would have the effect of using the language in Attachment X to eliminate the express directive of Section 25.6.2.3.1 that a Developer forfeits its $100,000 portion of the deposit if it fails to meet an applicable regulatory milestone by the relevant deadline.

Given the clear language of the OATT, which requires that a Developer forfeit its $100,000 portion of the deposit if it fails to meet the applicable regulatory milestone by the deadline specified in Section 25.6.2.3.1 of the OATT, the Complaint is utterly without merit.

[25] The language relied on by FMS in Section 30.11.3 of the OATT explicitly refers to "study deposit," which is distinct from the two-part deposit in lieu of satisfying the regulatory milestone requirement. *Compare* OATT § 25.6.2.3.1 and OATT § 30.11.3.

[26] *Monterey MA, LLC v. PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,201 at P 45 (2018); *see also Penn Cent. Co. v. Gen. Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971); *Southwest Power Pool, Inc.*, 163 FERC ¶ 61,063, at P 26 (2018); *AEP Generating Co.*, Opinion No. 266-A, 39 FERC ¶ 61,158, at 61,626 (1987) (citing *Penn Central*, 439 F.2d at 1340-41).

[27] Section 30.13.3.1 of the OATT provides that the Developer will pay only for the cost of the relevant Interconnection Study, "except as otherwise provided herein."

The NYISO, by retaining the $100,000 portion paid by FMS under Section 25.6.2.3.1, is merely adhering to the express terms of its applicable filed rate.

As the D.C. Circuit has observed, the "filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."[28] The OATT is clear that when a Developer that has used the two-part deposit under Section 25.6.2.3.1 to access a Class Year and subsequently fails to meet the applicable regulatory milestone by the prescribed deadline, the Developer forfeits the $100,000 portion of the deposit. The filed rate requires that the $100,000 portion be forfeited, and the NYISO (along with the Commission itself) has no discretion to contravene the plain terms of the OATT.

### B. The Intent of Section 25.6.2.3.1 is that a Developer Forfeits the $100,000 Portion if it Fails to Meet the Regulatory Milestone for its Large Facility by the Required Deadline

Even if the Commission were to deem the language in Section 25.6.2.3.1 of the OATT to be ambiguous, rather than a clear expression of intent to require that the $100,000 portion of the two-part deposit be forfeited in the circumstances presented here, the applicable extrinsic evidence shows clearly that the intent of the NYISO when it developed the relevant language was to require that the $100,000 portion of the deposit to be forfeited entirely when a Developer fails to meet the regulatory milestone by the prescribed deadline in the tariff.[29]

As explained above, the NYISO added the two-part deposit language to Section 25.6.2.3.1 in order to accommodate stakeholder concerns that the regulatory milestone

[28] *Old Dominion Elec. Coop., Inc.*, 892 F.3d at 1230 (D.C. Cir. 2018) (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990)).

[29] *See New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,032 at P 30 (2010) (holding that if disputed tariff language is ambiguous, the Commission will look at extraneous evidence to determine the intent of the parties).

prerequisite to accessing a Class Year was posing timing difficulties.[30] That is, Developers wanted to be able to enter a Class Year without having to obtain regulatory action from federal and state authorities. The NYISO provided this added flexibility to Developers but with the condition that they continue to pursue applicable regulatory approvals with alacrity. The NYISO's goal was to make sure that only serious projects enter a Class Year, and a tariff provision forcing a Developer to forfeit a $100,000 deposit if it fails to meet the regulatory milestone by a given deadline advances this overarching goal. The Developer then had to make the necessary calculations of whether its application for a regulatory permit or approval was sufficiently advanced that it was worth it to move forward despite the risk of forfeiture of the $100,000 portion.[31]

Furthermore, the language of the NYISO's filing letter plainly shows that the NYISO intended the $100,000 portion of the deposit under Section 25.6.2.3.1 to be forfeited if the Developer failed to obtain the relevant regulatory approvals by the applicable deadline. The Complaint implausibly asserts that "[n]owhere in the Filing Letter did NYISO actually state that the proposed 'deposit' would always automatically be forfeit if a project failed to meet its regulatory milestone within twelve months of the start of the Class Year Facilities Study."[32] This characterization flies in the face of the language of the filing letter, particularly the NYISO's explanation that the $100,000 portion of the two-part deposit would be "at risk" and that the $100,000 deposit is refundable to the Developer *only* "if it proceeds to satisfy the applicable regulatory milestone by the earlier of: (i) twelve months after the Class Year Start Date or (ii) the Operating Committee's approval of the Class Year Study."[33] The Complaint's characterization

[30] *See* 2017 NYISO Filing at pp 4-5.
[31] *See id.* at p 7.
[32] Complaint at p 5.
[33] 2017 NYISO Filing at pp 4-5.

also is contradicted by the NYISO's subsequent description, in the filing letter, of the timeframe for Developers to meet the required regulatory milestones:

> The revised process provides Developers with additional time to complete the regulatory milestone, while ensuring that a project satisfies its regulatory milestone requirement within a specified time period after completion of the Class Year Study. Moreover, notwithstanding the additional time provided to the Developer, ***the Developer still has an incentive to satisfy its regulatory milestone as soon as possible. Otherwise, as described above, the Developer may forfeit the $100,000 first part of its deposit***.[34]

FMS provides no evidence to contradict this clear expression of intent. Thus, even if language in Section 25.6.2.3.1 of the OATT were deemed to be ambiguous regarding the issue of forfeiture, there is no doubt that the underlying intent was that a Developer, using the two-part deposit to access a Class Year Study, would forfeit the $100,000 portion if it failed to meet the applicable regulatory milestone by the prescribed deadline. Therefore, Section 25.6.2.3.1 must be interpreted to provide that a Developer that has used the two-part deposit to access the Class Year Study process will forfeit its $100,000 portion if it fails to meet the relevant regulatory milestone by the applicable deadline. FMS acknowledges that it did not meet an applicable regulatory milestone within that deadline (as described above) and, thus, must forfeit the $100,000 portion that it provided to access Class Year 2019 prior to completion of an applicable regulatory milestone.

### C. Arguments Regarding the Justness and Reasonableness of the Forfeiture of Interconnection-Related Deposits Are Irrelevant to Whether FMS Should Be Refunded the Deposit in Lieu of Satisfying the Regulatory Milestone Requirement

Ignoring the multiple instances in which the 2017 NYISO Filing clearly stated that the intent of the two-part study deposit in lieu of satisfying the regulatory milestone requirement was that the $100,000 portion would be completely forfeited under specified circumstances pursuant

[34] *Id.* at p 7 (emphasis added).

to Section 25.6.2.3.1 (many of which were highlighted in Exhibit 3 of the Complaint), the Complaint asserts that:

> had NYISO's Filing Letter clearly disclosed to the Commission that NYISO intended to forfeit milestone deposits paid by projects that did not meet their regulatory milestone within twelve months and to credit those deposit payments to the benefit of load serving entities generally, FMS believes that the Commission would have rejected that proposal as a clear violation of the Commission's established cost causation principles requiring that costs be allocated to the parties who cause the incurrence of such costs.[35]

The Complaint then goes on to cite Commission precedent[36] relating to the Midcontinent Independent Transmission System Operator, Inc.'s interconnection procedures to essentially assert that allowing the NYISO to retain the $100,000 is unjust and unreasonable and, therefore, should not be permitted by the Commission.

It is patently inaccurate for FMS to assert that the 2017 NYISO Filing was unclear, let alone misleading, with respect to non-refundability of the $100,000 portion of the two-part deposit under the circumstances presented here. As described in detail above, the tariff language and the 2017 NYISO Filing letter were abundantly clear that the $100,000 deposit would be "at risk" and subject to forfeiture if the Developer failed to meet the applicable regulatory milestone by the prescribed deadline in Section 25.6.2.3.1. Assertions to the contrary are simply wrong. Moreover, suggestions that the Commission somehow misunderstood the NYISO's filing, or would have acted differently if only it understood the tariff's true meaning, are mere speculation—not evidence.

At the same time, the assertions regarding the justness and reasonableness of the forfeiture requirement in Section 25.6.2.3.1 are irrelevant to whether FMS is entitled to a refund of its $100,000 deposit. As the Complaint's numerous citations to Section 309 of the FPA

[35] Complaint at p 6.
[36] *See generally, Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,233 (2012).

indicate, FMS's claim for a refund of its deposit is based—and, indeed, must be based—on the assertion that the retention of that deposit by the NYISO is a violation of the filed rate. The only issue relevant to a disposition of FMS's claim is whether the language of the currently filed OATT requires the NYISO to retain, or to refund to FMS, the $100,000 portion of the deposit that FMS submitted under Section 25.6.2.3.1 to gain access to the 2019 Class Year Study. As detailed above, both the plain language of the OATT and all extrinsic evidence of intent in the record show clearly that a Developer that paid the two-part deposit in lieu of satisfying the regulatory milestone requirement must forfeit the $100,000 portion if it fails to meet the applicable regulatory milestone by the prescribed deadline.

By contrast, whether the retention of a deposit provided under Section 25.6.2.3.1 of the OATT is just and reasonable could only be relevant to whether the tariff should be modified on a prospective basis, which is an issue under Section 206 of the FPA. Given the clear language of the OATT and the weight of the extrinsic evidence in this case, it has no bearing at all on how the existing filed OATT should be interpreted. Thus, FMS's argument regarding the justness and reasonableness of the forfeiture rule is an improper conflation of Sections 206 and 309 of the FPA, and is irrelevant to the disposition of the Complaint. The Commission should disregard that argument.[37]

[37] To the extent that FMS is arguing that Section 25.6.2.3.1 of the OATT should be amended to prohibit the NYISO from retaining the $100,000 deposit in circumstances such as these, it has failed to meet its burden of demonstrating that the existing rule is unjust and unreasonable. As described in detail above, and in the 2017 NYISO Filing, there is good reason to allow the NYISO to retain the deposit where the Developer fails to meet the applicable regulatory milestone within a reasonable time. Such a rule helps to ensure that the Class Year Study process is limited to evaluating projects that are reasonably likely to proceed to full development. FMS has provided no evidence to contravene these considerations, or to otherwise demonstrate that allowing the NYISO to retain the deposit in the limited circumstances specified by Section 25.6.2.3.1 is unjust and unreasonable.

## III. COMMUNICATIONS AND CORRESPONDENCE

Communications in this proceeding should be directed to:


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*Designated to receive service.[38]

## VI. CONCLUSION

For the reasons set forth above, the Complaint should be denied in its entirety. The Commission should take no further action and should not initiate any further proceedings.

Respectfully Submitted,

*/s/ Brian R. Hodgdon*
Brian R. Hodgdon
Sara B. Keegan
Counsel for the New York Independent System Operator, Inc.

November 3, 2021

cc:

| | |
|---|---|
| Matt Christiansen | David Morenoff |
| Jignasa Gadani | Larry Parkinson |
| Jette Gebhart | Douglas Roe |
| Leanne Khammal | Frank Swigonski |
| Kurt Longo | Eric Vandenberg |
| John C. Miller | Gary Will |

[38] 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.

**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 3rd day of November 2021.

*/s/ Mitchell W. Lucas*

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