

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

New York Independent System Operator, Inc.)
) Docket Nos. EL22-2-000, 001
)

**REQUEST FOR LEAVE TO ANSWER AND ANSWER OF
THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 213 of the Commission’s Rules of Practice and Procedure,¹ the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this request for leave to answer and answer (“Answer”). The Answer responds to protests concerning the NYISO’s filing (the “Filing”), pursuant to Section 206 of the Federal Power Act (“FPA”), proposing revisions to its Open Access Transmission Tariff (“OATT”)² to establish the rules by which a Transmission Owner in New York (an “NYTO”) can exercise its federal right of first refusal (“ROFR”) regarding upgrades identified in the NYISO’s Public Policy Transmission Planning Process (“Public Policy Process”).³ In particular, the Answer responds to the protests (“Protests”) of: (i) LSP Transmission Holdings II, LLC and LS Power Grid New York, LLC (collectively, “LS Power”)⁴ and (ii) the New York State Public Service Commission, Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and Sustainable FERC Project (collectively, “New York Consumer Advocates”) (and collectively with LS Power, the “Protestors”).⁵

¹ 18 C.F.R. § 385.213 (2021).

² Capitalized terms not defined in this Answer shall have the meaning specified in Attachment Y to the NYISO Open Access Transmission Tariff (“OATT”) and, if not defined therein, in Section 1 of the OATT or the Filing.

³ The NYISO submitted the Filing on October 8, 2021, with a subsequent errata filing on October 12, 2021.

⁴ *New York Indep. Sys. Operator, Inc.*, Protest of LSP Transmission Holdings II, LLC and LS Power Grid New York, LLC, Inc., Docket Nos. EL22-2-000, -001 (November 2, 2021) (“LS Power Protest”).

⁵ *New York Indep. Sys. Operator, Inc.*, Protest of the New York State Public Service Commission, New York State Energy Research and Development Authority, Multiple Intervenors, City of New York, Consumer Power

As described in Part II below, the Commission should reject the Protests, find pursuant to Section 206 of the FPA that the NYISO's OATT is unjust and unreasonable to the extent that it does not contain rules that implement the NYTOs' ROFR rights in the Public Policy Process, and accept as just and reasonable the NYISO's proposed revisions to the OATT to implement the NYTOs' ROFR rights.⁶ The NYISO requests that the Commission issue an order by December 16, 2021, accepting the proposed revisions to the OATT with an effective date of October 12, 2021, to allow the NYISO to implement the new procedures for projects proposed to meet the Long Island Offshore Wind Export Public Policy Transmission Need.⁷

I. REQUEST FOR LEAVE TO ANSWER

The Commission has discretion to and routinely accepts answers to protests where, as here, they help to clarify complex issues, provide additional information, are otherwise helpful in the development of the record in a proceeding, or assist in the decision-making process.⁸ The NYISO's Answer satisfies those standards and should be accepted because it addresses inaccurate and misleading statements, and provides additional information that will help the Commission to fully evaluate the arguments in this proceeding. The NYISO, therefore, respectfully requests that the Commission accept this Answer.

Advocates, Natural Resources Defense Council, and Sustainable FERC Project, Docket Nos. EL22-2-000, -001 (November 2, 2021) ("New York Consumer Advocates Protest").

⁶ The NYISO has limited its response to those issues for which it believes that providing additional information will best assist the Commission to reach its decision. The NYISO's silence with respect to any particular argument or assertion should not be construed as acceptance or agreement.

⁷ See NYISO Notice: Request for Proposed Transmission Needs Being Driven by Public Policy Requirements for the 2020-2021 Transmission Planning Cycle (April 3, 2020), available at <https://www.nyiso.com/documents/20142/1406936/2020-2021-Notice-Requesting-Proposed-PPTNs-20200731.pdf/fe90e0d5-3bdc-4fea-bbc4-fe27ccef8b65>.

⁸ See, e.g., *Southern California Edison Co.*, 135 FERC ¶ 61,093, at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058, at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,160, at P 13 (2012); *PJM Interconnection, LLC*, 132 FERC ¶ 61,217, at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

II. ANSWER

A. **The NYISO Appropriately Filed Under Section 206 of the FPA and Satisfied its Burden of Demonstrating that Certain Rules in the OATT Related to the Public Policy Process are Unjust and Unreasonable**

The Filing satisfied the NYISO's burden under Section 206 of the FPA to demonstrate that certain rules in the OATT for its Public Policy Process are unjust and unreasonable (to the limited extent specified in the Filing), and the NYISO's filing pursuant to Section 206 of the FPA is authorized by the NYISO's foundational agreement, is consistent with the FPA, and is entirely appropriate and reasonable given the relevant factual and legal history.⁹ LS Power argues that the Filing was somehow inappropriate and should be rejected because the NYISO allegedly failed to demonstrate that the OATT is unjust and unreasonable and because there was not adequate stakeholder discussion to warrant the filing under Section 206.¹⁰ These arguments are wholly without merit.

i. *The NYISO's OATT is Unjust and Unreasonable without Rules in the Public Policy Process that Implement the NYTOs' ROFR Rights for Upgrades to their Existing Transmission Facilities*

On April 15, 2021, the Commission issued a declaratory order ("Declaratory Order") confirming that the NYTOs possess a ROFR under the NYISO's foundational agreements and as reserved by Section 31.6.4 of the OATT, which Order No. 1000 permitted,¹¹ to build, own, and recover the costs of upgrades to their existing transmission facilities that are part of a competitive transmission solution selected by the NYISO Board of Directors in the NYISO's transmission

⁹ See generally, Independent System Operator Agreement ("ISO Agreement") § 19.02, available at <https://www.nyiso.com/regulatory-viewer>.

¹⁰ LS Power Protest at pp 2-9.

¹¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Unless specifically referenced, Order No. 1000 and Order No. 1000-A will be collectively referred to as "Order No. 1000."

planning processes (“NYTOs’ ROFR Rights”).¹² However, as also confirmed by the Commission,¹³ there is no existing mechanism in the OATT for the NYTOs to implement these rights. For instance, the Commission noted that an NYTO that exercises its ROFR for an upgrade cannot be considered the Developer of that upgrade under the existing provisions of the OATT, notwithstanding the reservation in Section 31.6.4 that nothing in Attachment Y affects the NYTOs’ right to build, own, and recover the costs of the upgrades.¹⁴

Without a mechanism enabling the NYTOs to exercise these rights, the provisions of the Public Policy Process are not simply unclear, but rather, as detailed in the Filing: (i) conflict with the NYISO’s foundational agreements and other provisions of its OATT, (ii) do not comply with Order Nos. 890 and 1000, and (iii) create uncertainty in the Public Policy Process, particularly about the rights and responsibilities of non-incumbent Developers and NYTOs concerning upgrades that are part of selected transmission projects. Moreover, the absence of explicit rules in the Public Policy Process to account for the NYTOs’ ROFR Rights could result in an inconsistency between the costs for an upgrade considered in selecting a project and the costs that an NYTO that exercises a ROFR may seek to recover for such upgrade.

LS Power contends that the OATT is not unjust or unreasonable because nothing in Order No. 1000 mandates that transmission owners be required to have a ROFR and the tariff is not required to address every potential dispute.¹⁵ However, the Commission has confirmed that the NYTOs’ ROFR Rights exist, and Section 31.6.4 of the OATT expressly provides that nothing in

¹² *New York Indep. Sys. Operator, Inc.*, Order on Petition for Declaratory Order, 175 FERC ¶ 61,038, at PP 30, 33-39 (April 15, 2021) (“Declaratory Order”).

¹³ *Id.* at P 42.

¹⁴ *Id.* at PP 41-42.

¹⁵ LS Power Protest at pp 8-9.

Attachment Y shall affect these rights.¹⁶ Order No. 1000 expressly provided that the reforms do not affect such rights.¹⁷

In addition, LS Power's reliance on *Indicated SPP Transmission Owners* is misplaced. That controversy had to do with the allocation of cost responsibility, which the Commission has specifically noted "is not a matter for the slide-rule."¹⁸ Here, the rules addressing the implementation of a ROFR for upgrades constitute a structural element of the Public Policy Process. There is not a case-by-case "myriad of facts" that the Commission must consider; rather, the proposed revisions establish tariff procedures for handling the NYTOs' ROFR Rights in an open, transparent, and coordinated manner within the framework of the NYISO's competitive process in compliance with Order No. 1000. As a result, the lack of rules implementing the NYTOs' ROFR Rights is categorically different than simply not containing tariff rules to address every potential dispute as LS Power suggests.¹⁹ If a component of a proposed Public Policy Transmission Project meets the definition of a Public Policy Transmission Upgrade,²⁰ then the NYTO may elect to implement its rights based on explicit tariff procedures. LS Power does not identify the "myriad of facts" the Commission may need to

¹⁶ Declaratory Order at PP 41-42.

¹⁷ Order No. 1000-A at P 392 ("[T]he Commission explained that the reforms do not affect the right of an incumbent transmission provider to build, own, and recover costs for upgrades to its own transmission facilities, . . . regardless of whether an upgrade has been selected in a regional transmission plan for purposes of cost allocation.").

¹⁸ *Indicated SPP Transmission Owners*, 162 FERC ¶ 61,213, at PP 60-62 (2018).

¹⁹ LS Power Protest at pp 7-9.

²⁰ Notably, the NYISO is not proposing substantive revisions to the definition of an upgrade that is subject to the NYTOs' ROFR Rights. The definition continues to be in line with the definition used in Order No. 1000-A. *See* Filing at p 14 & n 46.

consider as it relates to the proposed revisions at issue here,²¹ and such arguments are without merit.

ii. *The NYISO Is Authorized to File the Proposed Revisions under Section 206 in Accordance with the ISO Agreement and Only Did So After Substantial Stakeholder Engagement*

The Commission should also reject, as without merit, LS Power's assertion that (i) the NYISO did not adequately use the stakeholder process before filing under Section 206 of the FPA and (ii) the filing is an end-around the stakeholder process.

First, as the Commission has acknowledged, the NYISO spent considerable time and effort trying to reach a consensus in its stakeholder process concerning the existence and application of the NYTOs' ROFR Rights prior to pursuing its petition for a declaratory order seeking clarification of such rights.²² Following issuance of the Declaratory Order, the NYISO again expended additional time and effort to further develop the tariff revisions required to implement such rights. The topic was addressed in more than 11 stakeholder meetings that originated near the beginning of 2019 with numerous opportunities for stakeholder review and input and a Commission proceeding seeking a declaratory order. LS Power attempts to diminish these efforts and the ongoing and significant disagreement among various stakeholder groups, which impeded the NYISO's ability to obtain a stakeholder consensus.²³

In developing the tariff revisions to implement the NYTOs' ROFR Rights, the NYISO evaluated a range of potential approaches for implementing these rights. The Filing describes

²¹ See *Indicated SPP Transmission Owners*, 162 FERC ¶ 61,213 at P 62.

²² Declaratory Order at P 31 (finding that "[t]he record reflects that NYISO has already expended considerable time and resources pursuing a stakeholder process to resolve these issues" concerning the NYTOs' ROFR Rights).

²³ As discussed in greater detail in Part B.ii of this Answer, the concern among the Protestors that the NYTOs' ROFR Rights exist has been a significant issue for certain stakeholders in the discussions regarding the development of proposed tariff revisions following the Commission's issuance of the Declaratory Order. This has certainly affected the ability of stakeholders to move forward with a consensus on proposed revisions.

the NYISO's reasoning for its proposed approach and demonstrates that the tariff changes to implement this approach are just and reasonable.²⁴ While certain stakeholders proposed particular changes to the NYISO's proposed tariff revisions and high-level concepts, there was not an alternative proposal with majority support for implementing the NYTOs' ROFR Rights as suggested by LS Power. The NYISO carefully considered all of the stakeholders' proposed changes to the tariff revisions and, as detailed in the Filing, submitted tariff revisions that: (i) align with the scope of the NYTOs' ROFR Rights established in the NYISO's foundational agreements and reserved in the OATT, as clarified in the Declaratory Order, (ii) comply with the Commission's precedent, including the Order No. 1000 requirements, (iii) provide for the continued timely administration of the Public Policy Process, and (iv) are more flexible for non-incumbent Developers than the ROFR requirements for upgrades adopted by other ISO/RTOs.

Protestors' claims that the NYISO's filing was developed to favor the NYTOs are also without merit.²⁵ The NYISO filed the proposed replacement revisions based on its independent interest in addressing a critical conflict between its foundational agreements and the rules in the Public Policy Process and in providing for the efficient administration of the process consistent with Commission precedent and the NYISO's foundational agreements and OATT.

LS Power's claim that there was a majority consensus that the NYISO ignored is unsupported and overstates the meaning of the vote at the Management Committee.²⁶ The results of the motion at the Management Committee can only show that 42.36% supported and 57.64% opposed the NYISO filing of the proposed revision, as presented to stakeholders at the

²⁴ Filing at pp 17-20, 26-28.

²⁵ New York Consumer Advocates Protest at p 23; LS Power Protest at p 13.

²⁶ LS Power Protest at p 10.

committee, under Section 205 of the FPA.²⁷ LS Power’s assertions that every stakeholder that voted in opposition “supported a tariff provision that would require a transmission owner exercising a right of first refusal to accept the proposal as made, including any Upgrade related to the cost containment submitted in the project proposal” is unsupported in the record.²⁸ Moreover, even if such assertion was true, the opposing stakeholders would themselves not have had the 58% of the vote required to recommend that the NYISO Board authorize the filing of tariff revisions pursuant to Section 205 of the FPA.²⁹

Second, the NYISO is authorized to file unilaterally under Section 206 of the FPA pursuant to Section 19.02 of the ISO Agreement.³⁰ The ISO Agreement does not limit when the NYISO may submit proposed tariff revisions pursuant to Section 206 or require the NYISO to prepare an alternative proposal. The NYISO is free to make a Section 206 filing at any time, although it has rarely done so in practice because it is preferable to work through the shared governance process and proceed under Section 205 of the FPA whenever possible.

Even if there is a favored concept among non-incumbent Developers and consumer advocates, it does not mean that it is a feasible route to establishing just and reasonable tariff

²⁷ The motion presented to the Management Committee stated: “The Management Committee (“MC”) hereby approves changes to the Open Access Transmission Tariff as more fully described in the presentation titled “Mechanism to Implement Transmission Owners’ ROFR over Upgrades in the Public Policy Transmission Planning Process” presented to and discussed with the MC on August 25, 2021, and recommends that the NYISO Board of Directors authorize NYISO staff to file such revisions under Section 205 of the Federal Power Act.” *NYISO Management Committee*, August 25, 2021 Final Motions, available at https://www.nyiso.com/documents/20142/23994725/082521%20MC_Final_Motions.pdf/4995a6e7-06a4-522b-7972-d562e7d8bd64.

²⁸ LS Power Protest at p 10. LS Power correctly notes that the NYISO only advanced one proposal for a vote at the Management Committee; however, there was no specific alternative approach that was championed by other stakeholders with the exception of Multiple Intervenor and the City of New York, which sought to have the exercise of the ROFR prior to the solicitation of proposals to a Public Policy Transmission Need. While LS Power concentrates on the Management Committee vote, the NYISO presented proposed tariff revisions to the Business Issues Commission and received a vote resulting in 64.91% in support of the NYISO’s proposal before the NYISO proceeded to the Management Committee.

²⁹ See ISO Agreement §§ 7.10, 19.01.

³⁰ ISO Agreement § 19.02 (“Subject to Section 19.01, nothing in this Agreement shall be construed in any way as affecting the rights of any party to make a filing with the Commission pursuant to Section 206.”).

revisions once Commission precedent, the foundational agreements, and the tariff are considered.³¹ As explained in its Filing, the NYISO determined that the requirement that an NYTO exercising a ROFR over an upgrade must adopt the voluntary cost containment measure in a proposal lacked clear support by the NYISO's tariffs and agreements and Commission precedent and, importantly, stakeholders did not provide support to the contrary.³² If the Commission were to accept LS Power's argument, an ISO/RTO would conceivably be barred from filing under Section 206 of the FPA, as permitted by Commission-jurisdictional agreements, because there may be an alternative concept proposed by a group of stakeholders. This result would not only be contrary to the rights articulated in the ISO Agreement but would also result in significant inefficiencies at the ISO/RTO and Commission level in the development and evaluation of tariff provisions.

Finally, the Commission should reject LS Power's request for the NYISO to return to the stakeholder process.³³ The NYISO has engaged in numerous meetings with stakeholders that resulted in little, if any, progress in reaching a consensus based on the sharp divide among groups. It was this divide that required the NYISO to petition the Commission for a declaratory order in the absence of consensus on the threshold issue of whether the NYTOs' ROFR Rights exist. In fact, over the multiple meetings that the NYISO held on this topic, it investigated

³¹ For example, in 2020, certain PJM stakeholders reached a majority consensus that proposed to revise the PJM Operating Agreement to move the planning of all transmission facilities determined to be at the end of their life to a new category under PJM's regional transmission planning process. *PJM Interconnection, L.L.C.*, Docket No. ER20-2308-000, at pp 5-9 (July 2, 2020). The revisions were not fully supported by the PJM and PJM Transmission Owners, among others, because of a conflict with foundational agreements governing PJM. However, the PJM stakeholders had the requisite consensus under PJM's governance rules that required PJM to file them under Section 205 of the FPA. PJM, as the regional transmission organization, and others commented that the revisions conflicted with provisions in the Consolidated Transmission Owner Agreement, and the Commission ultimately rejected the PJM stakeholder proposal. *See generally, PJM Interconnection, L.L.C.*, Comments of PJM Interconnection, L.L.C., Docket No. ER20-2308-000 (July 2, 2020); *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,242, at PP 51, 57 (2020).

³² Filing at pp 17-19.

³³ LS Power Protest at p 13.

several approaches to address stakeholder concerns, but was not able to reach sufficient consensus among stakeholders to authorize a Section 205 tariff filing. The NYISO has exhausted the stakeholder process and additional meetings seeking a consensus would be futile. LS Power has not provided any basis for its position that an additional six months would change stakeholders' entrenched positions, which differences are highlighted by the continued, diverging comments and protests in this proceeding, or result in tariff revisions that would be accepted by the Commission as consistent with the NYISO's foundational agreements and OATT and Commission precedent. Such delay would, however, adversely impact the NYISO's timely administration of its ongoing Public Policy Process to enhance transmission to support offshore wind in New York.

B. The NYISO's Proposed Tariff Revisions Are Just and Reasonable

The NYISO also satisfied in the Filing its burden to demonstrate that the proposed replacement tariff revisions are just and reasonable. As described in the Filing, the proposed revisions are consistent with Commission precedent, are consistent with how other ISOs/RTOs have implemented ROFRs related to upgrades in their regional transmission planning processes, and comply with Order Nos. 890 and 1000. Moreover, the NYISO is not required to demonstrate that the replacement tariff revisions are the only just and reasonable manner of revising the tariff or even the best approach, simply that they are just and reasonable.³⁴ While

³⁴ *Association of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,254, at P 199 (2019) (holding that the Commission's return on equity methodology for use in a Section 206 review of existing rates "recognizes that there may be more than one just and reasonable return"); *ISO New England Inc.*, 143 FERC ¶ 61,150, at P 115 (2013) (emphasizing, in the context of evaluating ISO New England's Order No. 1000 compliance filing under FPA Section 206, that "there may be *more than one just and reasonable* [filing], and . . . the Commission must only determine that [that utility's] proposed solution is just and reasonable, not that it is superior to other possible solutions" [emphasis added]); see also *City of Bethany v. FERC*, 727 F.2d 1131, 1136-37 (D.C. Cir. 1984) (confirming that the Commission's authority to review rate under the FPA is "limited to an inquiry into whether the rates proposed by a utility are reasonable—and [does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate design").

the Protests proffer high-level, alternative approaches, they fail to provide any evidence or Commission authority as to how the proposed revisions to implement the NYTOs' ROFR Rights in the Public Policy Process are not just and reasonable.

i. The Proposed Tariff Revisions Provide for Competition as Required by Order No. 1000

Protestors make conclusory and unsupported assertions that the proposed tariff revisions will have an adverse impact on competition in New York, which they assert renders the proposed revisions unjust and unreasonable. With the tariff revisions, the NYISO's Public Policy Process will continue to provide for competition among incumbent and non-incumbent transmission Developers as required by Order No. 1000, which will result in the selection of the more efficient or cost-effective solution for inclusion in the regional transmission plan for purposes of cost allocation.

As detailed in the Filing, the NYISO's proposed tariff revisions implement the NYTOs' ROFR Rights consistent with approaches employed by other ISOs/RTOs that the Commission has determined comply with the requirements of Order No. 1000.³⁵ In fact, as described in the Filing, the NYISO's tariff revisions provide a non-incumbent Developer with more flexibility

³⁵ See, e.g., PJM Operating Agreement, Schedule 6, section 1.5.8 (establishing a process by which PJM assigns projects to designated entities following PJM's Board approval of the Regional Transmission Expansion Plan, and expressly providing that "Transmission Owner Upgrades" will be designated to the transmission owner that owns the facility to be upgraded); see also e.g., Midcontinent Independent System Operator Open Access Transmission Tariff, Attachment FF, Sections V, VIII.C (designating projects included in the MISO Transmission Expansion Plan to one or more Transmission Owners, unless the identified facility constitutes a Competitive Transmission Project, which excludes facilities that meet the definition of upgrade under Attachment FF); Southwest Power Pool, Attachment Y, Sections I and III (competitively soliciting proposals for projects from qualified RFP participants that are not subject to a right of first refusal; specifically, those transmission facilities that meet the criteria as "Competitive Upgrades"); California Independent System Operator Open Access Transmission Tariff § 24.5 (issuing a market notice soliciting proposals to finance, construct, own, operate and maintain only regional transmission facilities eligible for competitive solicitation, which are those projects that do not constitute an upgrade or a local transmission facility); ISO New England Open Access Transmission Tariff, Schedule K, Sections 4.2 and 4.3 (performing a preliminary feasibility review of proposed solutions to ensure that the project is only eligible to be constructed by the applicable transmission owner in accordance with the Transmission Owner Agreement because the proposed solution is an upgrade to existing Transmission Owner facilities).

than developers in some of the other regions.³⁶ Specifically, a Developer in New York may include upgrades as a part of its project proposal, even though they are subject to the NYTOs' ROFR Rights. The NYISO's proposed approach provides more optionality to the Developer than removing its ability to propose upgrades entirely from the competitive process, which more stringent rules the Commission has found to be a just and reasonable approach in other regions.³⁷

While Protestors claim that the proposal is anti-competitive and an unreasonable application of the NYTOs' ROFR Rights, their pleadings lack any evidence that the proposed tariff revisions will no longer result in the identification of the more efficient or cost-effective solution as required by Order No. 1000.³⁸ In fact, in support of their arguments, the Protestors seek to have the Commission apply a non-existent standard that would require the NYISO to identify the best solution by considering cost, including cost containment for upgrades, as a primary factor in the evaluation.³⁹ Notably, the Protestors do not offer any authority for the Commission to impose this modified standard on the NYISO for selecting such projects for

³⁶ Filing at p 20.

³⁷ See, e.g., *New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040, at P 116 (2015) ("Order No. 1000 requires NYISO to consider the relative efficiency and cost-effectiveness of proposed transmission solutions.").

³⁸ The New York Consumer Advocates note that the NYISO's past three solicitations resulted in robust participation by non-incumbent Developers, which they "understand that all of the non-incumbents have offered some form of cost containment as part of their proposals." New York Consumer Advocates Protest at p 10. Those solicitations predated the NYISO's provisions providing for the consideration of cost containment measures in the Public Policy Process. See generally, *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098 (2020). For instance, in its order identifying the AC Transmission Public Policy Transmission Needs, the New York Public Service Commission generically required that all Developers include 80/20 cost containment measures. NYPSC Case No. 12-T-0502, *et al.*, Proceeding on Motion of the Commission Examine Alternating Current Transmission Upgrades, *Order Finding Transmission Needs Driven by Public Policy Requirements*, at p 48 (December 17, 2015). However, for all three projects, the Commission ultimately accepted a rate that included cost containment for the projects addressing those needs without express requirements in the OATT. Even with the proposed revisions in the Filing, rates filed with the Commission can still include cost containment measures for an upgrade that is designated to an NYTO (or a Developer) when the original proposal did not have a containment measure.

³⁹ New York Consumer Advocates Protest at p 14 (stating that "one would hope and expect that a competitive process would result in the best and most cost-effective projects being identified for selection"); see also LS Power Protest at p 5 (stating that "[t]he goal of the [Public Policy Process] is to identify the least cost and viably efficient project ultimately reducing the overall cost to rate payers in New York"); Filing at p 18 (noting that stakeholders characterized the NYISO's competitive planning process as identifying the best project at the lowest cost for consumers).

inclusion in a regional transmission plan for purposes of cost allocation. Order No. 1000 explicitly requires the evaluation of competitive proposals that results in the selection of the “more efficient or cost-effective” solution to an identified regional need. As detailed in the Filing, Order No. 1000 does not mandate that the transmission provider select the least cost project or apply cost containment provisions at all or for any particular set of facilities.⁴⁰

Accordingly, the NYISO’s OATT provides that it will identify in the Public Policy Process the “more efficient or cost effective” solution.⁴¹ The NYISO makes such determination by evaluating proposed projects using a wide range of selection metrics of which cost is one criterion.⁴² As a result, the NYISO assesses an entire array of benefits to consumers in selecting the project that is more efficient or cost-effective (*e.g.*, production cost savings, Installed Capacity savings, avoided refurbishment costs, operability, expandability, etc.),⁴³ even if that project is not the least cost to build. The NYISO’s proposed revisions to implement the NYTOs’ ROFR Rights maintain a process by which the NYISO would identify the more efficient or cost-effective solution to an identified transmission need in accordance with all of the selection metrics, are consistent with the requirements of Order No. 1000, and provide for the competition contemplated by the Commission.

Consistent with the NYISO’s sponsorship approach to the regional transmission plan, the proposed tariff revisions also allow non-incumbent Developers to propose upgrades to existing

⁴⁰ See Order No. 1000 at PP 256, 704 (agreeing that cost containment is important but “declin[ing] to establish a corresponding cost allocation principle”).

⁴¹ OATT §§ 31.4.1, 31.4.8.

⁴² See, *e.g.*, *New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040 at PP 116-17 (rejecting protests that costs should be treated as the primary factor in the NYISO’s evaluation of proposed transmission solutions and that there should be a specific cost containment metric); *see also* Order No. 1000 at PP 256, 704.

⁴³ See OATT § 31.4.8.1 (detailing the metrics that the NYISO uses in its evaluation of the more efficient or cost-effective solution to a Public Policy Transmission Need, including criteria specified by the New York Public Service Commission in identifying the need, to the extent feasible).

transmission facilities to enhance their proposals. While the proposed structure of the cost containment provisions removes cost containment for upgrades within the NYISO's process, the structure provides an evenhanded process under which all incumbent and non-incumbent Developers may propose upgrades to existing transmission facilities. The NYISO's proposed approach reduces any potential advantage that would exist if incumbent transmission Developers were the only Developers permitted to propose upgrades with their projects. As a result, Developers will have additional flexibility that is not necessarily provided in other ISO/RTO planning processes that do not subject upgrades to competitive evaluations.

Importantly, the proposed revisions would continue to permit both incumbent and non-incumbent Developers to propose voluntary cost containment for entirely new transmission facilities. The NYISO's use of an independent cost estimate for evaluation of all upgrades maintains the focus of the competitive process, which is on entirely new transmission facilities as required in Order No. 1000. This structure also affords the non-incumbent Developers with the option of enhancing their proposals even if an NYTO may elect to exercise a ROFR over a proposed upgrade. New York Consumer Advocates cite no Commission or judicial precedent supporting a requirement that the owner of an existing transmission facility exercising its ROFR over an upgrade to its facility must do so on the condition that the facility owner agree to file another Developer's transmission rate including cost containment.

- ii. *The Arguments that the Proposed Revisions Are Not Just and Reasonable Are Largely a Collateral Attack on the Exceptions to the Requirement to Eliminate a Federal Right of First Refusal Established in Order No. 1000*

New York Consumer Advocates also urge the Commission throughout their Protest to reject the proposed revisions as not just and reasonable because they will “undermine competition in New York, create a distinctly unlevel playing field and unfair process, and expose

consumers to unnecessarily higher costs.”⁴⁴ These arguments, however, have less to do with the particular proposed revisions in this proceeding and more to do with an attempt to alter the manner in which the Commission structured the exceptions to the requirement to eliminate federal ROFRs in Order No. 1000. New York Consumer Advocates’ assertions largely challenge the existence of the ROFR itself and its effect on competition, as opposed to the implementation of the ROFR in the NYISO’s Public Policy Process. This is an impermissible collateral attack on established precedent.

The Commission has a well-established policy against unnecessary relitigation that is based upon,⁴⁵ but is ultimately broader than, judicial preclusion doctrines such as collateral estoppel and *res judicata*.⁴⁶ The Commission has repeatedly and strongly discouraged attacks on final orders and relitigation of applicable precedent as they “thwart the finality and repose that are essential to administrative (and judicial) efficiency.”⁴⁷ “[I]n the absence of new or changed circumstances requiring a different result, it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally

⁴⁴ New York Consumer Advocates Protest at p 9.

⁴⁵ See, e.g., *Pacific Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 39 (2007) (“Both the courts and the Commission have previously found that, to the extent that “new evidence” is not presented or “changed circumstances” are not demonstrated, preclusion doctrines such as collateral estoppel apply to administrative rate cases.”).

⁴⁶ *Id.* at P 40. “In *Alamito Co.*, the Commission expressly stated that its policy against relitigation of issues is not constrained by the limits of the doctrine of collateral estoppel,” and rejected the utility’s argument that it was not subject to collateral estoppel because it was not a party to the previous case. *Id.*; *Alamito Co.*, 41 FERC ¶ 61,312, at 61,829 (1987), *order denying reconsideration and granting request for clarification*, 43 FERC ¶ 61,274 (1988). In rejecting the argument, the Commission held that its “long standing” policy against relitigation of issues disposed of the dispute.

⁴⁷ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 134 FERC ¶ 61,229, at P 15 (2011); *Southern Co. Servs., Inc.*, 129 FERC ¶ 61,253, at P 37 (2009); *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.*, 112 FERC ¶ 61,117, at P 12 (2005).

determined.”⁴⁸ Thus, the Commission routinely rejects collateral attacks on prior orders.⁴⁹ The Commission should adhere to this well-established policy here.

In Order No. 1000, the Commission imposed additional transmission planning requirements that built on Order Nos. 890 and 890-A. The Commission’s purpose was, among other things, providing that transmission planning processes at the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet transmission needs more efficiently or cost-effectively.⁵⁰ The Commission required the elimination of federal ROFRs from Commission-jurisdictional agreements and tariffs to achieve this end.⁵¹ However, the Commission did not go so far as to require the elimination of all ROFRs, such as the right to build, own, and recover cost for upgrades to transmission owners’ facilities, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation.⁵² As a result, a fundamental principle in Order No. 1000 is that there should not be “a federally established monopoly over the development of an *entirely new transmission facility*.”⁵³

The arguments claiming harm to the competitive transmission process in New York are targeted at the existence of the ROFR, as opposed to the NYISO’s implementation of that right that the Commission confirmed in the Declaratory Order. For instance, the New York Consumer Advocates note that the Commission’s logic in Order No. 1000 to require the elimination of federal ROFRs from Commission-jurisdictional agreements and tariffs is relevant to the present

⁴⁸ *Alamito Co.*, 43 FERC ¶ 61,274 at 61,753; *see also Central Kansas Power Co.*, 5 FERC ¶ 61,291, at 61,621 (1978).

⁴⁹ *New England Conf. of Pub. Util.*, Order on Rehearing, 135 FERC ¶ 61,140, at P 27 (2011) (generally prohibiting collateral attacks as “[a]n attack on a judgment in a proceeding other than a direct appeal” [citing *Wall v. Kholi*, 2011 U.S. Lexis 1906 at *12 (2011)]).

⁵⁰ Order No. 1000 at P 4.

⁵¹ *Id.* at P 319.

⁵² *Id.*

⁵³ Order No. 1000-A at P 426 (emphasis added).

proceeding, and argue that “the Commission should not allow the NYTOs to avoid competing for the right to construct new transmission and earn a return associated therewith.”⁵⁴ There is nothing in the proposed revisions that would excuse the NYTOs from competing for the construction of entirely new transmission facilities, consistent with the requirements of Order No. 1000. Instead, New York Consumer Advocates’ arguments are aimed at rewriting Order No. 1000 by requiring upgrades to be subject to competition.

The proposed replacement revisions are structured to implement the NYTOs’ ROFR Rights in a manner consistent with the competition required under Order No. 1000 as it relates to entirely new transmission facilities. They go further and provide reasonable opportunities to enhance competition, such as the ability of for Developers to enhance their proposals by including upgrades. The New York Consumer Advocates’ arguments that challenge the existence of the ROFR do not support their claim that the proposed revisions are not just and reasonable and, therefore, should be rejected as a collateral attack on the Commission’s orders.

iii. The Proposed Revisions Requiring that NYTOs Reject Their Right to Build, Own and Recover the Costs of Upgrades to Their Existing Facilities Are Just and Reasonable

New York Consumer Advocates’ assertion that the presumption that the NYTOs will be designated as the entity to build, own, and recover the cost of upgrades is not just and reasonable is similarly unsupported. As detailed in the Filing, the requirement for an NYTO to reject its designation as the Designated Entity for an upgrade is based on the nature of the NYTOs’ rights retained in the ISO-TO Agreement and the Operating Agreement, as reserved in the OATT, which is the right to build, own, and recover the cost of upgrades to their existing facilities.⁵⁵

⁵⁴ New York Consumer Advocates Protest at p 12.

⁵⁵ Filing at pp 27-28.

New York Consumer Advocates’ argument that the NYTOs need to make an affirmative election to build, own, and recover the costs of an upgrade is really a distinction without a difference.

New York Consumer Advocates place too much emphasis on the term “right of first refusal” in asserting that the NYTO must make an affirmative election, rather than an election to reject a designation by the NYISO. The right is actually the reserved right to build, own, and recover the cost of upgrades to their existing facilities.⁵⁶ The New York Consumer Advocates do not cite any authority for their claim that an affirmative election is required or that the NYISO’s proposed approach is not just and reasonable.

Additionally, the New York Consumer Advocates characterize the need for NYTOs to affirmatively elect the upgrade as “preferable.”⁵⁷ However, being their preferred approach does not establish that the NYISO’s proposed replacement revisions are not just and reasonable.⁵⁸ The NYISO’s proposed approach is consistent with other regional planning processes’ complete exclusion of upgrades from the competitive evaluation process, where the applicable transmission owner is presumed to be responsible for building, owning, and recovering the cost of upgrades to their existing facilities.⁵⁹ Moreover, under the NYISO’s Public Policy Process, an NYTO could still reject its designation, and the Developer would then become the Designated Entity.

The New York Consumer Advocates also seek to establish uncertainty in the NYISO’s proposed tariff revisions where none exists, asserting that interested parties, including the

⁵⁶ Section 31.6.4 of the OATT provides that “[n]othing in this Attachment Y affects the right of a Transmission Owner to . . . build, own, and recover the costs for upgrades to the facilities it owns.”

⁵⁷ New York Consumer Advocates Protest at p 22 (“[I]t would be *preferable* for a NYTO exercising a ROFR to make an affirmative election to do so, rather than having the NYISO assume it was the NYTO’s intent based on the absence of any action.” [emphasis added]).

⁵⁸ See footnote 33, *supra*.

⁵⁹ See footnote 34, *supra*.

Commission, “should be free of any doubt as to a NYTO’s intent.”⁶⁰ However, the NYTOs’ “intent” is not relevant here. The NYISO’s proposed tariff revisions establish a clear, tariff-prescribed timeframe for NYTOs to take action if they choose to reject their designation as the Designated Entity for an upgrade. There is no evidence to reasonably conclude that Developers or NYTOs will be caught unaware about the designation of upgrades because the decision period for the NYTOs will be preceded by the NYISO’s performance of its extensive Public Policy Process. Parties will know within 30 days of the NYISO selecting a project which entity will serve as the Designated Entity for an upgrade. The NYISO will post a final list after the close of the 30-day period following selection.⁶¹

Moreover, all parties are on notice of any entity’s tariff-prescribed responsibilities when it is designated as the Designated Entity for a Designated Public Policy Project, including the responsibilities if an NYTO does not timely reject its designation for an upgrade. For instance, the proposed revisions would require a Designated Entity to enter into a Development Agreement with the NYISO.⁶² If a Designated Entity—either an NYTO or a non-incumbent Developer—fails to satisfy its obligations as it relates to the Development Agreement, then that component of the selected project would be subject to the default rules set forth in the OATT.⁶³ As a result, there is no reasonable basis to support the argument that the requirement for the NYTOs to reject a designation for an upgrade is not just and reasonable or creates any uncertainty in the process.

⁶⁰ New York Consumer Advocates Protest at p 22.

⁶¹ Filing at p 27 (referencing proposed new Section 31.4.11.3 of the OATT).

⁶² See OATT § 31.4.12.1; Filing at p 30. To the extent that the New York Consumer Advocates cite concerns over the timely development of a selected project due to more than one entity building the various components, the NYISO proposed specific revisions to require the coordination of Designated Public Policy Projects that are part of a selected Public Policy Transmission Project to meet the Required Project In-Service Date. See Filing at pp 29-33.

⁶³ See Filing at pp 34-35 (proposing revisions to address the inability of an NYTO in, among other things, complying with the requirements of Section 31.4.12.3 of the OATT for entering into a Development Agreement).

III. CONCLUSION

WHEREFORE, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this Answer and find pursuant to Section 206 of the FPA that the NYISO's OATT is unjust and unreasonable to the extent that the rules do not contain a mechanism to account for and implement the NYTOs' ROFR Rights. As a remedy, the NYISO also respectfully requests that the Commission accept the proposed revisions to the OATT as just and reasonable or, in the alternative, direct the NYISO to make a further compliance filing of tariff revisions to account for and implement the NYTO's ROFR Rights that would render the NYISO's OATT just and reasonable. The NYISO requests that the Commission issue an order by December 16, 2021, given the current ongoing Public Policy Process to address the Long Island Offshore Wind Export Public Policy Transmission Need.

Respectfully submitted,

/s/ Brian R. Hodgdon

Carl F. Patka
Brian R. Hodgdon
Counsel for the New York System Operator, Inc.

November 17, 2021

cc: Janel Burdick
Matthew Christiansen
Jignasa Gadani
Jette Gebhart
Leanne Khammal
Kurt Longo
Robert Fares
David Morenoff
Douglas Roe
Frank Swigonski
Eric Vandenberg
Gary Will

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 17th day of November 2021.

/s/ Mitchell W. Lucas

Mitchell W. Lucas
New York Independent System Operator, Inc.
10 Krey Blvd.
Rensselaer, NY 12144
(518) 356-6242