

Attachment I

NYISO Response to Deficiency Letter
Docket No. ER17-1310-___
July 10, 2017

Question 1

NYISO states that it made the current section 205 filing pursuant to section 31.5.5.4.1 of NYISO's Tariff. That section states: "[i]f the Public Policy Requirement that results in the identification by the NYPSC of a Public Policy Transmission Needs prescribes the use of a particular cost allocation and recovery methodology, then the [NY]ISO shall file that methodology with the Commission within 60 days of the issuance by the NYPSC of its identification of a Public Policy Transmission Need."¹ However, section 2.10 of the Tariff provides: "[n]otwithstanding any other provision in this Tariff, this Tariff may be modified only as follows: any proposed amendment to this Tariff must be submitted to both the ISO Management Committee and the ISO Board; if both the ISO Board and the ISO Management Committee agree to an amendment of this Tariff, the ISO shall file the proposed amendment with the Commission pursuant to Section 205 of the FPA; if the ISO Board and the ISO Management Committee do not agree on a proposed amendment of this Tariff, this Tariff shall not be subject to change pursuant to Section 205 of the FPA. Nothing herein is intended to limit the rights of the ISO or any person under Section 206 of the FPA."²

- a. Please explain whether NYISO interprets section 2.10 as applying to filings made under section 31.5.5.4.1. Please provide the basis for that interpretation.
- b. To the extent that NYISO interprets section 2.10 to apply to filings made under section 31.5.5.4.1 of the Tariff, please explain how section 2.10 was followed prior to making this filing.

NYISO Response:

Section 2.10 of the NYISO's Open Access Transmission Tariff ("OATT") does not apply to filings that the NYISO is required to make to comply with the Commission's directives in its orders or explicit tariff directives accepted by the Commission, such as the filing required by Section 31.5.5.4.1 of the OATT.³ A contrary interpretation of Section 2.10 would be inconsistent with court and Commission precedent and at odds with the Commission's practice over nearly two decades. Further, requiring stakeholder approval of these filings would effectively empower stakeholders to nullify or override Commission directives to the NYISO, and impede the NYISO's ability to implement tariff requirements that have been accepted by the Commission.

¹ NYISO OATT § 31.5.5.4.1.

² NYISO OATT § 2.10, Tariff Modifications (emphasis added).

³ Capitalized terms that are not otherwise defined in this response shall have the meaning specified in Section 31.1.1 of Attachment Y of the NYISO OATT, and, if not defined therein, in the NYISO OATT and the NYISO Market Administration and Control Area Services Tariff.

i. *The NYISO Is Required to Make Filings in Compliance with Commission and Tariff Directives.*

Section 2.10 of the OATT, and related provisions in the NYISO's Market Administration and Control Area Services Tariff ("Services Tariff") and foundational agreements, establish the requirements by which the NYISO and its stakeholders may voluntarily amend the NYISO's tariffs through a shared governance process. As described below, these provisions should not be read to restrict the NYISO from making filings to amend its tariffs in compliance with Commission orders to do so or explicit tariff directives accepted by the Commission.

NYISO filings that must be made to comply with Commission orders are not subject to stakeholder approval in the NYISO's shared governance process.⁴ The D.C. Circuit has confirmed this.⁵ Specifically, in response to an argument that the NYISO's tariff revisions submitted in a compliance filing violated its governance structure because the Management Committee did not approve them, the D.C. Circuit stated: "We find this argument meritless since NYISO was *required* to make such a filing to comply with the Commission's order in [the relevant proceeding]."⁶

The Commission has recognized the distinction between compliance filings and voluntary Section 205 filings initiated by the public utility. It has determined that "[a] compliance filing is not a change initiated by a utility, but rather is a change expressly directed by the Commission -- whether summarily or after a trial-type evidentiary hearing -- which the utility is merely implementing or carrying out."⁷ Moreover, the Commission is aware that NYISO stakeholders do not vote on compliance filings⁸ and has recognized "that NYISO must timely comply with the Commission's directives."⁹ Accordingly, the NYISO has made, and the Commission has accepted, numerous compliance filings over the past eighteen years in response

⁴ This is the case regardless of whether the Commission's compliance directives are narrowly drawn and exact, *e.g.*, a directive to add particular Commission-prescribed language to the tariff, or more general in scope, *e.g.*, a broad mandate to develop extensive tariff language complying with general principles.

⁵ See *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 at 830 n. 9 (D.C. Cir. 2006).

⁶ *Id* (emphasis in original).

⁷ *Southern Company Services, Inc.*, 61 FERC ¶ 61,339 at 62,328-29 (1992). A compliance filing "is not an opportunity to make changes not directed or otherwise authorized" by the Commission "especially if the effect is to undo a Commission directive." *Southern Company Services, Inc.*, 63 FERC ¶ 61,217 at 62,596 (1993).

⁸ See *New York Independent System Operator, Inc.*, Compliance with Order No. 719, Docket No. ER09-1142-000 (May 15, 2009) at p 33 ("Certain NYISO stakeholders have recently expressed a desire that the NYISO establish a more formal procedure for soliciting stakeholder input on NYISO compliance filings that are submitted in response to major Commission rules. The NYISO is not required to obtain stakeholder approval before making such filings but values their input and is preparing a preliminary draft of a proposed procedure for their consideration.")

⁹ *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,072 at P 41 (2010) (acknowledging the NYISO's process for making compliance filings in order affirming that the NYISO satisfies the RTO/ISO governance requirements of Order No. 719).

to Commission directives, which filings were not subject to a vote in the NYISO's shared governance process.¹⁰

Similarly, the Commission has accepted numerous provisions in the NYISO's OATT and Services Tariff that direct the NYISO to make a filing to amend its tariffs under limited, clearly-defined circumstances, without requiring stakeholder approval.¹¹ Section 2.10 cannot reasonably be read as nullifying these explicit filing directives, which were submitted by the NYISO and accepted by the Commission after Section 2.10 was in place.¹² The Commission has accepted tariff amendments submitted by the NYISO in compliance with these directives. As with NYISO filings made to comply with Commission directives, tariff filings made to comply with express tariff directives accepted by the Commission fall outside the scope of Section 2.10 because they do not represent voluntary NYISO proposals to amend its tariff, but rather must be submitted to avoid the NYISO being out of compliance with its Commission-approved tariff.¹³ A few examples of these tariff-based filing directives include:

¹⁰ Although stakeholders do not vote on compliance filings, the NYISO typically consults with its stakeholders concerning the contents of such filings and values stakeholder input on them. In this instance, the NYISO provided stakeholders with an opportunity to review and comment on the input that the NYISO was requested by the New York Public Service Commission ("NYPSC") to provide concerning the development of the cost allocation methodology for the AC Transmission Public Policy Transmission Needs. See October 13, 2016 Electric System Planning Working Group ("ESPWG") presentation, *available at*: http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_espwg/meeting_materials/2016-10-13/Cost_Allocation_Presentation.pdf. In addition, upon the identification by the NYPSC of the final cost allocation methodology, the NYISO presented the methodology to stakeholders for informational purposes prior to filing at its March 23, 2017, ESPWG. The presentation is *available at*: http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_espwg/meeting_materials/2017-03-23/Agenda%2003_Cost%20Allocation%20Presentation.pdf.

¹¹ The Commission has accepted these tariff provisions whether developed through compliance filings made by the NYISO in response to a directive contained in a Commission order or through voluntary Section 205 filings developed in the shared governance process.

¹² Consistent with traditional canons of contract interpretation, the Commission should not interpret Section 2.10 of the OATT in a manner that would render the filing directive contained in Section 31.5.5.4.1 of the OATT as meaningless or in conflict with Section 2.10. See *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010 at P 25 (2004) ("A fundamental tenet of contract interpretation is that a contract provision should be interpreted, where possible, as consistent with the contract as a whole and that contract must be interpreted as a whole. Our ruling conforms to the generally accepted canons of contract interpretation; which require that: (1) a contract should be interpreted as an integrated whole; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of contract should prevail over a more general clause.") (footnotes omitted); see also *Ameren Services Co.*, 151 FERC ¶ 61,237 at P 27 (2015) ("In accordance with these rules, provisions of a contract should normally not be interpreted as being in conflict."); *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop. Inc.*, 86 FERC ¶ 61,174, at 61,598 (1999) ("It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision meaningless.") As the Commission has held, like a contract, a tariff must be interpreted to give meaning to all of its provisions. *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371 at P 9 (2003) ("Like a contract, a tariff must be interpreted to give meaning to all provisions of the tariff."); *Transcontinental Gas Pipe Line Corp.*, 83 FERC ¶ 61,050 at 61,292 (1998) ("Just as it is a basic principle of contract law that all provisions of a contract must have meaning, so too must all such tariff provisions be given effect.")

¹³ See, e.g., *City of Vernon*, 109 FERC ¶ 61,369 at P 27 (2004) ("The fact is that the CAISO's tariff now provides that load curtailment is based on resource deficiency and the CAISO is required to follow its tariff.")

- The Services Tariff directs the NYISO to make a filing to establish a New Capacity Zone when the tariff conditions that necessitate a new zone arise.¹⁴ Pursuant to this provision, the NYISO filed in 2013 to establish a New Capacity Zone to encompass Load Zones G, H, I, and J, which filing was made without stakeholder approval and was accepted by the Commission.¹⁵
- The Services Tariff directs the NYISO to file an updated ICAP Demand Curve on a recurring basis.¹⁶ Pursuant to this provision, the NYISO has made five filings updating its ICAP Demand Curve over the last twelve years. Each time, the filing was made without stakeholder approval and was accepted by the Commission.¹⁷
- The OATT directs the NYISO to file non-conforming interconnection agreements with the Commission.¹⁸ The NYISO adopted this filing directive from the Commission's *pro forma* interconnection procedures in its compliance filings to address Orders No. 2003 and 2006.¹⁹ Pursuant to this provision, the NYISO has filed numerous non-conforming agreements without obtaining stakeholder approval.²⁰
- The Services Tariff directs the NYISO to file with the Commission to seek authorization to apply an appropriate mitigation measure under certain circumstances to address conduct that departs significantly from the conduct that would be expected under competitive market conditions.²¹

¹⁴ Services Tariff § 5.16.4.

¹⁵ See *New York Independent System Operator, Inc.*, Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference, 144 FERC ¶ 61,126 (2013), Order on Rehearing, 147 FERC ¶ 61,152 (2014), Letter Order, Docket No. ER13-1380-005 (August 5, 2014).

¹⁶ Services Tariff §§ 5.14.1.2.1.11 and 5.14.1.2.2.4.11.

¹⁷ See, e.g., *New York Independent System Operator*, Order Accepting Tariff Filing Subject to Condition, 158 FERC ¶ 61,028 (2017) (accepting ICAP Demand Curves for 2017/2018, 2018/2019, 2019/2020, and 2020/2021); *New York Independent System Operator, Inc.*, Order Accepting ICAP Demand Curves, as Modified, Removing Refund Condition, and Dismissing Motion and Request for Rehearing, 111 FERC ¶ 61,117 (2005) (accepting ICAP Demand Curves for 2005/2006, 2006/2007, and 2007/2008).

¹⁸ OATT § 30.11.3. Consistent with these interconnection requirements, the NYISO has also adopted filing requirements for non-conforming development agreements as part of its compliance with Order No. 1000.

¹⁹ See Section 11.3 of the Commission's *pro forma* Standard Large Generator Interconnection Procedures (establishing filing requirements for non-conforming interconnection agreements); see also Order No. 2003 at PP 913-915 (describing the filing requirements for non-conforming interconnection agreements); Order No. 2006 at PP 560-562 (same).

²⁰ See, e.g., *New York Independent System Operator, Inc.*, Letter Order, Docket No. ER17-352-000 (January 5, 2017) (accepting a non-conforming interconnection agreement filed by the NYISO); *New York Independent System Operator, Inc.*, Letter Order, Docket No. ER15-1895-000 (July 16, 2015) (same).

²¹ Services Tariff §23.3.2.3; see also Services Tariff § 30.4.6.2.1.

ii. *The NYISO Was Required to File the Cost Allocation Methodology Prescribed by a Public Policy Requirement to Comply with Section 31.5.5.4.1.*

The NYISO acted appropriately in submitting the methodology associated with the AC Transmission Public Policy Transmission Needs in its March 27, 2017 filing pursuant to Section 31.5.5.4.1 (“March 2017 Filing”).²² The obligation established in Section 31.5.5.4.1 for the NYISO to file with the Commission a cost allocation methodology prescribed by a Public Policy Requirement within 60 days of an order by the New York Public Service Commission (“NYPSC”) is consistent with other long-standing filing directives contained in the NYISO’s tariffs, including those described above, with which the NYISO must comply. As the NYISO was required to file the cost allocation methodology pursuant to Section 31.5.5.4.1 and simply complied with this requirement, the March 2017 Filing was not the type of voluntary tariff filing initiated by the NYISO or its stakeholders that is governed by Section 2.10.²³

The cost allocation requirements in Section 31.5.5.4 of the OATT for the NYISO’s Public Policy Transmission Planning Process (“Public Policy Process”) were developed to comply with the Commission’s directives in Order No. 1000.²⁴ Specifically, Order No. 1000 held that the tariffs of public utility transmission providers were unjust and unreasonable if they did not contain a clear *ex ante* cost allocation methodology that allocates costs to project beneficiaries.²⁵ Through extensive discussions with its stakeholders, the NYISO determined that a multi-step process was necessary to satisfy this *ex ante* cost allocation directive for its Public Policy Process. The flexibility of a multi-step process was required because the nature of the need driven by a specific Public Policy Requirement and the related benefits would not be known until the requirement was identified.

In their joint Order No. 1000 compliance filings, the NYISO and the New York Transmission Owners proposed, and the Commission accepted, a hierarchical, multi-step

²² *New York Independent System Operator, Inc.*, Docket No. ER17-1310-000 (March 27, 2017) (“March 2017 Filing”).

²³ The NYISO submitted the March 2017 Filing of the cost allocation methodology prescribed by the Public Policy Requirement to comply with the tariff obligation imposed on it by Section 31.5.5.4.1. The NYISO’s authority under Section 31.5.5.4.1 is limited to submitting the proposed cost allocation methodology. Consistent with Section 2.10 and the NYISO’s shared governance process, the NYISO is currently collaborating with the NY Department of Public Service and interested parties to examine the concerns raised by the NYPSC in their filing letter regarding the proper treatment of proposed cost containment measures in the Public Policy Transmission Planning Process. The NYISO will continue to collaborate with all parties to discuss and develop tariff amendments regarding the treatment of cost containment in its planning process within the shared governance process for governance committee and NYISO Board consideration. If approved by stakeholders and the NYISO Board, the NYISO would then file the tariff changes as a Section 205 filing.

²⁴ *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 on reh’g and clarification*, 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).

²⁵ See Order No. 1000 at PP 495, 499.

approach in Section 31.5.5.4, including a detailed timeframe, for arriving at a just and reasonable *ex ante* methodology.²⁶ This process can be summarized at a high-level as follows:

- Step One (Section 31.5.5.4.1): The NYISO shall file with the Commission any cost allocation methodology prescribed by the Public Policy Requirement within 60 days of the NYPSC's determination of a Public Policy Transmission Need.

This first step was included to allow for the Commission's review and acceptance of any cost allocation methodology specifically identified with a particular Public Policy Requirement that was driving the need for transmission in New York, including a Public Policy Requirement adopted directly by the NYPSC.²⁷

- Step Two (Section 31.5.5.4.2): The Developer of the selected transmission project may propose a different cost allocation methodology for the Commission's review and acceptance.

In such case, within 30 days of the NYISO's selection of the transmission project, the Developer will provide its alternative methodology for the NYPSC's consideration. If the NYPSC supports the Developer's proposed methodology, the Developer will submit it to the Commission. If the NYPSC does not support the Developer's methodology and the parties are unable to agree upon one that is mutually acceptable, the Developer may file its preferred methodology with the Commission along with the methodology supported by the NYPSC.

This second step was included expressly to preserve the Section 205 filing rights of the selected Developer. As expressly noted in Section 31.5.5.4, nothing in the multi-step process deprives the Developer of its Section 205 rights to file its own cost allocation methodology. If the Commission accepts the Developer's methodology, the NYISO will use it to allocate the costs of the selected Public Policy Transmission Project.²⁸

- Step Three (Section 31.5.5.4.3): The NYISO will only apply the load ratio share provided for in the final step of the framework in Section 31.5.5.4 if either no

²⁶ See *New York Independent System Operator*, Order on Rehearing and Compliance, 148 FERC ¶ 61,044 at P 337 (2014) ("NYISO 2014 Compliance Order") (summarizing the multi-step process). Note that steps two and three of the four-step process described in the Commission's order are combined into Step Two here.

²⁷ See OATT § 31.1.1 ("Public Policy Requirement: A federal or New York State statute or regulation, including a NYPSC order adopting a rule or regulation subject to and in accordance with the State Administrative Procedure Act, any successor statute, or any duly enacted law or regulation passed by a local governmental entity in New York State, that may relate to transmission planning on the BPTFs.") (emphasis added).

²⁸ The Commission can accept a just and reasonable cost allocation methodology subsequently proposed by the Developer without having to determine that the methodology prescribed by the Public Policy Requirement is unjust and unreasonable. See *City of Winnfield v. FERC*, 744 F.2d 871 at 874-875 (D.C. Cir. 1984) ("As is evident, § 205, unlike § 206, allows the Commission to approve rate increases without a showing that current rates are unjust and unreasonable; it need only find the *proposed* rates to be just and reasonable.") (emphasis in original).

alternative methodology is proposed under Step One or Step Two or no proposed alternative methodology is found by the Commission to be just and reasonable. As described by the Commission: “We further note that this default cost allocation method is the last step of a [multi-step] cost allocation process that we have already accepted, and in earlier steps, the transmission developer of a public policy transmission project may propose other just and reasonable cost allocation methods.”²⁹

In accepting this multi-step process, the Commission expressly noted both the NYISO’s obligation to file the alternative methodology and the Commission’s role in reviewing and accepting it:

Further, we note that NYISO will file any such proposed cost allocation mechanisms with the Commission for approval. This additional requirement that NYISO file each proposed cost allocation method with the Commission for approval ensures that the Commission will review each proposed cost allocation method to determine whether it is just and reasonable and not unduly discriminatory or preferential.³⁰

In this instance, the NYISO acted as required by the obligation clearly established in its tariff to implement Step One of the multi-step process by submitting the methodology associated with the AC Transmission Public Policy Transmission Needs in its March 2017 Filing.³¹ The NYISO would have been out of compliance with its tariffs if it had failed to make this filing. As the NYISO was merely implementing its express tariff obligation, the March 2017 Filing was not the type of voluntary tariff filing initiated by the NYISO or its stakeholders that is governed by Section 2.10.

If, notwithstanding long-standing precedent and Commission practice concerning such filings, the NYISO was required to obtain stakeholder approval prior to making the filing prescribed by Section 31.5.5.4.1, stakeholders would be empowered to veto or otherwise impede such filings. This result would be untenable as it would enable stakeholders to thwart the NYISO’s fulfillment of a tariff requirement, disrupt the multi-step process and timeline approved by the Commission, and effectively (and impermissibly) limit the Commission’s authority.

²⁹ NYISO 2014 Compliance Order at P 332 (footnotes omitted). Note that steps two and three of the four-step process described in the Commission’s order are combined into Step Two here.

³⁰ *New York Independent System Operator, Inc.*, 143 FERC ¶ 61,059 at P 325 (2013) (“NYISO 2013 Compliance Order”). The filing requirements were subsequently amended, so that the Developer is responsible for filing its proposed cost allocation methodology, but the NYISO remains responsible for filing any methodology prescribed by the Public Policy Requirement. See OATT §§ 31.5.5.4.1, 31.5.5.4.2.2, 31.5.5.4.2.4, 31.5.5.4.2.5.

³¹ The NYPSC adopted a preliminary cost allocation methodology for transmission solutions to the AC Transmission Public Policy Transmission Needs in a December 17, 2015 order and requested that the NYISO apply its expertise to design a more granular allocation of the costs allocated to downstate entities. See NYPSC Case 12-T-0502, Order Finding Transmission Needs driven by Public Policy Requirements (issued December 17, 2015) at Appendix D. The NYPSC adopted the complete cost allocation methodology with the more granular allocation in a January 24, 2017 order. See NYPSC Case 12-T-0502, *et al.*, Order Addressing Public Policy Transmission Needs for AC Transmission Upgrades (issued January 24, 2017) at 3, 19-22.

Finally, as noted above, the Commission's orders addressing the NYISO's compliance with Order No. 1000 contemplate reviewing alternative methodologies under a just and reasonable standard. The Commission concluded in Order No. 1000 that the absence of an *ex ante* cost allocation methodology renders the NYISO's tariffs unjust and unreasonable and therefore approved the hierarchical framework in Section 31.5.5.4 as the means in the NYISO's tariffs to identify the just and reasonable methodology for a given Public Policy Transmission Project.³² Accordingly, the Commission should review the filed methodology to determine whether it is just and reasonable as it relates to the AC Transmission Public Policy Transmission Needs.

iii. Conclusion.

In sum, Section 2.10 does not apply to the NYISO's March 2017 Filing, which the NYISO made in compliance with the express directive in Section 31.5.5.4.1. The NYISO was required to file the cost allocation methodology for the AC Transmission Public Policy Transmission Needs for the Commission's review and acceptance. Consistent with the NYISO's and the Commission's long-standing practice for such filings, the NYISO properly made the filing and indeed had a tariff obligation to do so. The Commission should review the filed methodology to determine whether it is just and reasonable as it relates to the AC Transmission Public Policy Transmission Needs.

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³² If the Commission determines that the form of the March 2017 Filing was not properly styled, the NYISO respectfully requests that the Commission conform the filing accordingly.