

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

New York Independent System Operator, Inc.)
) Docket No. EL20-65-000
)

**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”).² The Answer responds to protests concerning the NYISO’s August 18, 2020, submission of a petition (“Petition”) requesting that the Commission issue a declaratory order to confirm that Transmission Owners in New York (“NYTOs”) possess a right to build, own, and recover the costs of upgrades to their existing transmission facilities that is permitted under Order No. 1000 and to clarify the implementation and scope of that right in the NYISO’s Open Access Transmission Tariff (“OATT”).³ In particular, the Answer responds to the protests of: (i) LSP Transmission Holdings II, LLC and LS Power Grid New York, LLC (collectively, “LS Power”);⁴ (ii) Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and Sustainable FERC Project (collectively,

¹ 18 C.F.R. § 385.213 (2019).

² Capitalized terms not defined in this Answer shall have the meaning set forth in Section 31.1.1 of Attachment Y of the NYISO Open Access Transmission Tariff (“OATT”) or in Section 1 of the OATT.

³ *New York Indep. Sys. Operator, Inc.*, Petition for Declaratory Order of New York Independent System Operator, Inc., Docket No. EL20-65-000 (August 18, 2020) (“Petition”).

⁴ *New York Indep. Sys. Operator, Inc.*, Protest of LSP Transmission Holdings II, LLC and LS Power Grid New York, LLC to Petition for Declaratory Order of New York Independent System Operator, Inc., Docket No. EL20-65-000 (September 17, 2020) (“LS Power Protest”).

“New York Consumer Advocates”);⁵ (iii) Anbaric Development Partners, LLC (“Anbaric”);⁶ (iv) NextEra Energy Transmission New York, Inc. (“NextEra”);⁷ and (v) the New York State Public Service Commission (“NYPSC”) (collectively, the “Protestors”).⁸ As described in Part II below, the Commission should reject the protests and grant the NYISO’s requested confirmations and clarifications in the Petition.⁹ Commission action is required to remove uncertainty and preempt disputes concerning the NYTOs’ rights of first refusal for upgrades in the NYISO’s Comprehensive System Planning Process (“CSPP”).

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.¹⁰ 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

⁵ *New York Indep. Sys. Operator, Inc.*, Protest of Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and Sustainable FERC Project, Docket No. EL20-65-000 (September 17, 2020) (“New York Consumer Advocates Protest”).

⁶ *New York Indep. Sys. Operator, Inc.*, Protest of Anbaric Development Partners, LLC of the Petition for Declaratory Order of the New York Independent System Operator, Docket No. EL20-65-000 (September 17, 2020) (“Anbaric Protest”).

⁷ *New York Indep. Sys. Operator, Inc.*, Motion to Intervene and Protest of NextEra Energy Transmission New York, Inc., Docket No. EL20-65-000 (September 17, 2020) (“NextEra Protest”).

⁸ *New York Indep. Sys. Operator, Inc.*, Notice of Intervention and Protest of the New York State Public Service Commission, Docket No. EL20-65-000 (September 17, 2020) (“NYPSC Protest”).

⁹ The NYISO has limited its response to those issues for which it believe 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.

¹⁰ 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).

Commission fully evaluate the arguments in this proceeding. The NYISO, therefore, respectfully requests that the Commission accept this Answer.

II. ANSWER

The Petition requested a declaratory order confirming that the NYTOs have a right pursuant to the NYISO's governing agreements, Section 31.6.4 ("Rights of Transmission Owners") of the OATT, and Order No. 1000 to build, own, and recover the costs of upgrades to their existing transmission facilities, including upgrades included in another Developer's transmission project that is selected by the NYISO as the more efficient or cost effective solution in its regional transmission planning processes. In addition, with regard to the implementation and scope of this right, the NYISO requested that the Commission: (i) confirm that, if a NYTO exercises such right, the NYTO is appropriately categorized as the Developer of the upgrade under the OATT; and (ii) clarify the scope and treatment of upgrades regarding the retirement of existing facilities for replacement by a facility that serves a different function. The Commission should reject Protestors' objections to the Petition and grant the NYISO's requested confirmations and clarifications.

A. The Petition Seeks Guidance on Applying the NYISO's Tariff to Avoid Disputes that are Expected to Arise in the Near Future in the NYISO Transmission Planning Processes and Is Therefore Appropriate for Commission Resolution in a Declaratory Order

The Commission should reject assertions by Protestors that the matters at issue in the Petition are merely speculative or hypothetical and are not properly addressed by a declaratory order.¹¹ The confirmations and clarifications sought by the NYISO in the Petition will remove

¹¹ LS Power Protest at pp 4-5, 24-27; *see also* Anbaric Protest at p 1 (noting that it supports LS Power's comments). LS Power apparently misinterprets the NYISO's inclusion of Attachment A to the Petition. *See* LS Power Protest at pp 24-27. The NYISO is not seeking the Commission to confirm or otherwise act on the potential scenarios contained in Attachment A to the Petition. Rather, the NYISO provided those examples as background for the clarification sought in the Petition as it relates to a new transmission facility that would require the retirement or

uncertainty and preempt controversies in its current planning processes. This case is therefore distinguishable from those cited by the Protestors where petitions were rejected as speculative.¹² As discussed below, the issues addressed by the Petition have already resulted in uncertainty and disputes between NYTOs and non-incumbent Developers concerning the application of the NYTOs' reserved rights to build, own, and recover the costs of upgrades in the OATT, and are virtually certain to give rise to additional disputes in the immediate future.

The Petition identified, and this Answer further describes, the specific ambiguities and harms that the Commission should address via declaratory order to resolve this controversy and remove uncertainty.¹³ The Petition explained that the questions it raised were not speculative and that Commission action was necessary to “prevent disruption to the NYISO’s ongoing transmission planning process and to avoid litigation.”¹⁴ The NYISO reiterates that the issues raised by the Petition have caused, and will clearly continue to cause, actual controversies and disputes that are not just properly but best resolved through a declaratory order. Commission precedent is clear that declaratory action is not “premature or speculative” in interpreting a tariff ambiguity, and is appropriate in the circumstances presented here. The NYISO’s petition for declaratory relief is therefore both proper under Rule 207(a)(2) and consistent with Commission precedent.¹⁵

The NYISO has administered several competitive transmission planning processes in its CSPP. As part of such processes, uncertainty and disputes over the treatment of certain elements

decommissioning of a NYTO’s existing transmission facility and that would connect to the transmission system in a different configuration than the original facility. *See* Petition at pp 17-21.

¹² Compare LS Power Protest at pp 4, with Petition at p 2 n 5.

¹³ *New England Ratepayer Assoc.*, 172 FERC ¶ 61,042 at P 36 (2020) (describing when the Commission will exercise its discretion to provide declaratory relief).

¹⁴ Petition at p 2 n 1.

¹⁵ The Commission has consistently made clear that action on a petition for declaratory order is appropriate when there is a specific controversy or harm that is in need of resolution, and where there is a need to promote regulatory certainty or uniform interpretation of applicable tariff language. *See, e.g., NTE Carolinas II, LLC, et al.*,

of selected projects have arisen between the Developer of a selected transmission project and the NYTO that owns facilities to be upgraded concerning the NYTO's rights to build, own, and recover the costs of such upgrades. Each instance has resulted in time-consuming discussions following project selection. The fact that parties have managed to find negotiated solutions to these controversies thus far does not mean that the issues raised by the Petition are speculative. Case-by-case negotiations cannot resolve the underlying issue, and do not foreclose similar, recurring future disputes that may be litigated at the Commission and in court. The confirmations and clarifications sought by the NYISO in the Petition are necessary to provide transparency and clarity concerning the upgrade rules, which is necessary to continue robust participation by Developers in the NYISO's transmission planning processes.¹⁶

The NYISO has sought to address the matters raised in the Petition with stakeholders through its stakeholder governance process. However, as highlighted by the widely divergent

171 FERC ¶ 61,128 at P 27 (2020) (where petitioner was engaged in interconnection process, and had attempted to suspend its interconnection pursuant to the terms of its Large Generator Interconnection Agreement ["LGIA"] with transmission owner, it was appropriate for FERC to address declaratory order petition seeking clarification of LGIA provisions governing termination; it was a "proper exercise of [Commission] discretion" to issue a declaratory order to promote regulatory certainty and a uniform interpretation of [the termination provisions] of the pro forma LGIA for all public utilities subject to the Commission's jurisdiction"); *Southern California Edison Co.*, 151 FERC ¶ 61,273 at P 24 (2015) (ruling on request for a declaratory order addressing the scope of a limitation of damages provision of a LGIA where transmission provider and interconnecting customers were engaged in court litigation regarding potential damages arising out of transmission outages); *see also Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,061 at P 92 (2007) ("Providing general guidance on policy issues is precisely the function of this Commission in ruling on a petition for declaratory order.").

¹⁶ The Commission has generally exercised its discretion to address declaratory order requests when clarifying issues will facilitate transmission planning and development. *See, e.g., Morongo Transmission LLC*, 148 FERC ¶ 61,139 at P 17 (2014) (it was not premature or speculative to rule on prospective CAISO transmission owner's ratemaking issues arising out of its planned participation in an upgrade; "Commission consideration and approval of the Petition early in the Project's development process will provide a level of regulatory certainty that is reasonable in this instance."); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P 35 (2013) ("Although Pioneer Wind and PacifiCorp have not executed a final PPA and the Wyoming Commission procedures have not concluded with respect to the PPA, these facts are not determinative of our ability to exercise our discretion to act on the Petition at this time and we, therefore, reject PacifiCorp arguments to this effect. Rather, the record demonstrates that Pioneer Wind and PacifiCorp have an irreconcilable controversy as to whether the proposed curtailment provision in section 4.4(b) of the draft PPA may be properly included in the PPA, consistent with PURPA and the LGIA's provisions."); *Western Grid Development, LLC*, 139 FERC ¶ 61,056 at PP 16-17 (2010) (holding that it was not premature to rule on developer's request that its planned energy storage facility should be treated as a transmission facility, and therefore should be eligible for transmission incentives; FERC found that it was

comments and protests submitted to the Commission in this proceeding, the fundamental nature of the uncertainties identified in the Petition have prevented progress on obtaining sufficient stakeholder support to move forward on tariff revisions related to upgrades. Commission action in this proceeding will preserve the Commission's and parties' resources by decisively resolving any tariff ambiguities in advance and reducing the disruption and delays of disputes and litigation.

Far from being hypothetical as LS Power indicates, the NYISO expects new disputes over rights to upgrades to arise imminently in the NYISO's current transmission planning processes. On July 30, 2020, the Long Island Power Authority ("LIPA") filed with the NYPSC its determination that a transmission need exists within Long Island to increase export capability, driven by the NYPSC's 2018 Offshore Wind Standard.¹⁷ Under the NYISO OATT, LIPA has authority to determine Long Island transmission needs, and the NYPSC must confirm those needs if LIPA seeks cost allocation for transmission solutions outside of Long Island.¹⁸ If the NYPSC confirms the Public Policy Transmission Need, the NYISO will commence a 60-day period for submission of proposed solutions.¹⁹

Moreover, on August 3, 2020, the NYISO commenced its 2020-21 Public Policy Transmission Planning Process with a solicitation for proposed Public Policy Transmission

reasonable to address the request, even though the applicable regional planning process had not yet been completed, in order to grant clarity to the parties).

¹⁷ On July 30, 2020, LIPA filed with the NYPSC its determination that a transmission need exists within Long Island to increase export capability, driven by the PSC's 2018 Offshore Wind Standard. *See* NYPSC Case No. 18-E-0623, LIPA letter, *available at*: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=18-E-0623&submit=Search>. If the NYPSC confirms the Public Policy Transmission Need, the NYISO will solicit solutions. *See* OATT § 31.4.3.

¹⁸ *Id.* at § 31.4.2.3.

¹⁹ *Id.* at § 31.4.3.

Needs that are due from stakeholders on October 2, 2020.²⁰ Immediately thereafter, the NYISO will submit any proposed Public Policy Requirements and needs it receives to the NYPSC.

Following public notice and comment under state law, the NYPSC could determine new transmission needs as early as January 2021. NYPSC action is likely as New York State laws passed in 2019 and 2020 call upon the NYPSC to conduct a State Power Grid Study with the NYISO and to utilize the NYISO's Public Policy Transmission Planning Process to address transmission needs to fulfill the state's climate change policy requirements.²¹

Finally, the NYISO is in the process of determining Reliability Needs in its Reliability Planning Process and Short-Term Reliability Process. In draft assessments under review, the NYISO has identified transmission security needs as early as 2023 and resource adequacy needs beginning in 2027.²² Should these Reliability Needs not be resolved through facility and load forecast updates, the NYISO will solicit transmission and other solutions to those needs in early 2021²³ with a deadline for responses from NYTOs and Developers 60 days thereafter.²⁴

For all of these processes, fairness to all Developers, incumbent and non-incumbent, requires certainty over the nature and scope of rights over upgrades contained in competitive projects. The requested confirmations and clarifications will provide clarity and transparency to both the NYTOs and non-incumbent Developers concerning rights of first refusal for upgrades

²⁰ See Notice, available at: <https://www.nyiso.com/documents/20142/1406936/2020-2021-Notice-Requesting-Proposed-PPTNs-20200731.pdf/fe90e0d5-3bdc-4fea-bbc4-fe27ccef8b65>. The NYPSC may also request that the NYISOP conduct the Public Policy Process outside the regular biennial process cycle. OATT § 31.4.2.

²¹ See Climate Leadership and Community Protection Act, New York Laws Ch. 106 of 2019 (requiring 70 percent renewable energy by 2030, 100 percent renewable energy by 2040, 3,000 MW of storage, 6,000 MW of solar, and 9,000 MW of offshore wind), available at <https://www.nysenate.gov/legislation/bills/2019/s6599>.

Accelerated Renewable Energy Siting and Community Benefit Act, New York State Budget, Part JJJ (2020), available at <https://legislation.nysenate.gov/pdf/bills/2019/S7508B>.

²² See 2020 Reliability Needs Assessment Draft Report, available at <https://www.nyiso.com/espwg/meetingDate=2020-09-10>.

²³ See OATT §31.2.4.3 (regulated backstop solutions), § 31.2.4.5 (market-based responses), and § 31.2.4.7 (alternative regulated responses).

²⁴ See *id.* at § 31.2.5.1.

and will enhance the NYISO's ability to administer its competitive processes in a fair and orderly manner. In addition, the requested ruling will enable the NYISO to facilitate stakeholder discussions to break the current impasse among stakeholders concerning these matters and to clarify and enhance related tariff procedures. The Commission has previously granted a NYISO request for a declaratory order interpreting its tariffs and agreements, and for the reasons stated above, the NYISO respectfully submits that the Petition falls well within the scope of the Commission's declaratory order process.²⁵

B. The Requested Declaratory Order Is Consistent with Order No. 1000 Concerning Competition.

The Commission should reject New York Consumer Advocates' argument that granting the confirmations and clarifications in the Petition would impair or eliminate competitive transmission in New York.²⁶ While Order No. 1000-A required the elimination of federal rights of first refusal to remedy undue discrimination against non-incumbent transmission developers, the Commission struck a balance and determined that "incumbent transmission providers should be able to maintain an existing federal right of first refusal for certain types of new transmission projects, including a local transmission facility and upgrades to its existing transmission facilities."²⁷ The Petition requested that the Commission make discrete determinations concerning the NYISO's application of the NYTOs' reserved rights for upgrades as set forth in the NYISO's governing agreements and OATT and in compliance with Order No. 1000. These reserved rights appear similar to the transmission owner rights for upgrades in other regions that the Commission determined to be in compliance with Order No. 1000. In sum, the requested

²⁵ *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,032 (2010) (granting the NYISO's request for a declaratory order interpreting the NYISO's tariff and related agreements, and ruling that NYPA's ownership of Grandfathered TCCs did not terminate when the original Poletti generating unit ceased to operate).

²⁶ See New York Consumer Advocates Protest at pp 4-11.

²⁷ Order No. 1000-A at P 360; see Order No. 1000 at P 262.

confirmation that the NYTOs' right to build, own, and recover the cost of upgrades to their existing facilities is consistent with the balance struck by the Commission concerning competition in Order No. 1000.

Moreover, the Protestors' concern about the effect of a ruling on upgrades on competition appears to be overstated based on the NYISO's experience thus far in administering its transmission planning processes. For example, in the NYISO's first competitive Public Policy Transmission Planning Process to address the Western New York Public Policy Transmission Need, the NYISO selected a transmission project proposed by NextEra with the major project components consisting of entirely new substations and circuit primarily located in a NYTO's existing rights-of-way. The aforementioned substations and circuit would not have been subject to a NYTO's right to build, own, and recover the cost of upgrades to its existing facilities.

Additionally, the absence of clarity concerning the NYTOs' rights for upgrades, and the likelihood of recurring lengthy and costly disputes and litigation concerning such upgrades, present a greater potential danger to the long-term competitive processes in New York. Such uncertainty and disputes discourage non-incumbent developers from robustly participating in the NYISO's transmission planning processes. The Commission's determinations regarding the Petition will provide upfront clarity and transparency to the NYTOs and non-incumbent Developers about their rights and obligations in the CSPP.

C. The Commission Should Reject Protests that Incumbent Transmission Owners Should not be Treated as Developers of Upgrades.

The Commission should reject the assertions by LS Power, NYPSC, and New York Consumer Advocates that the NYISO's tariff cannot be reasonably interpreted to permit the NYISO to treat a NYTO that elects to exercise its right to an upgrade as the Developer of that

upgrade under the OATT.²⁸ As detailed in the Petition, the NYISO believes that if the Commission confirms that there is a right for NYTOs to build, own, and recover the cost of upgrades to their existing facilities, it is reasonable for the Commission to clarify the ambiguous language in NYISO's currently-effective OATT to permit the NYISO to identify a NYTO as the Developer—*i.e.*, the project sponsor—of upgrades. This determination will enable the NYTOs to develop, finance, own, operate and maintain the upgrade portion of the selected project.²⁹ The Commission should similarly reject arguments by LS Power, Anbaric, and NextEra that the description of the NYTOs' right and Section 31.6.4 in the initial Order No. 1000 joint NYISO and NYTO compliance filing somehow bar the NYISO's requested confirmations and clarifications in its Petition.³⁰ As detailed in the Petition, the initial Order No. 1000 compliance filing described the NYTOs' rights in the context of the initially proposed revisions to the CSPP, which revisions were thereafter significantly modified at the direction of the Commission, including establishing the NYISO's role, in place of the NYPSC, as the selecting party.³¹ Moreover, Order No. 1000 required the removal of impermissible federal rights of first refusal—none of which are contained in the NYISO's tariff and agreements.³² Lastly, nothing in the language in Section 31.6.4 limits the application of the provision in the manner claimed by Protestors.

D. The Commission Should Reject Protestors' Arguments on Cost Containment.

The NYISO also disagrees with Protestors that it could reasonably interpret its currently-effective OATT to require it to apply to a NYTO exercising its right over an upgrade the cost

²⁸ See LS Power Protest at pp 22-24; NYPSC Protest at 2-5; New York Consumer Advocates Protest at pp 15-19.

²⁹ See Petition at pp 15-17.

³⁰ See LS Power Protest at pp 13-18; Anbaric Protest at pp 1-3; NextEra at pp 2-4.

³¹ See Petition at pp 12-14.

³² Order No. 1000-A at P 360; see Order No. 1000 at P 262.

containment mechanism voluntarily proposed by the Developer of the underlying transmission project.³³ The NYISO expressly noted when filing the cost containment measures at the Commission that it would need to develop additional rules concerning how cost containment relates to NYTOs asserting the right to build, own, and recover the cost of upgrades to existing facilities that they own.³⁴ Following an order from the Commission that confirms that such right exists, the NYISO intends to continue discussions with stakeholders on when and how cost containment should be handled with regard to upgrades to existing transmission facilities over which a NYTO exercises its rights. In fact, a Commission determination here will facilitate and provide a further framework to inform stakeholder discussions on the treatment of cost containment for upgrades.

E. The Commission Should Reject Attempts to Conflate Rights-of-Way and the Right to Upgrade Existing Facilities.

Finally, the Commission should reject LS Power's and Anbaric's argument that the NYISO's requests in the Petition would conflict with state requirements concerning the use of existing rights-of-way or would otherwise prohibit non-incumbent Developers from making use of existing rights-of-way.³⁵ LS Power and Anbaric appear to misconstrue the Petition's request. The NYISO has requested that the Commission confirm that NYTOs possess a federal right to build, own, and recover the costs of upgrades to their existing transmission facilities. The

³³ See New York Consumer Advocates Protest at pp 11-15.

³⁴ *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Revisions Regarding Cost Containment in the Public Policy Transmission Planning Process, Docket No. ER20-617-000 at p 5 ("In a parallel stakeholder process resulting from its lessons learned initiative, the NYISO held stakeholder meetings on the respective rights of Transmission Owners and non-incumbent Developers related to upgrades proposed by non-incumbent Developers to Transmissions Owners' existing transmission facilities. As part of those discussions, questions were raised on the application of cost containment if a Transmission Owner elected to build, own and recover the costs of the upgrades to its existing transmission facilities. *The NYISO proposed to focus on establishing the framework of cost containment in this Section 205 filing, and to consider the cost containment treatment for such upgrades in future stakeholder discussions.* [emphasis added])."

³⁵ See LS Power Protest at pp 18-22; Anbaric Protest at pp 3-4.

NYISO has not requested that the Commission determine that a NYTO has a right of first refusal for a project element because it is located in its existing right-of-way.

III. CONCLUSION

In sum, the divergence of views expressed in the comments and protests highlight that it is both appropriate and necessary for the Commission to decide these issues to avoid uncertainty, and costly and time-consuming disputes and litigation, concerning the application of the NYTOs' reserved rights in the CSPP. Accordingly, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this Answer, reject the protests, and grant the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated at Rensselaer, NY this 2nd day of October 2020.

/s/ Mohsana Akter

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