

October 8, 2021

By Electronic Delivery

Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: New York Independent System Operator, Inc., Section 206 Filing of Tariff Revisions to Implement the New York Transmission Owners' Right of First Refusal Regarding Upgrades to Their Transmission Facilities Identified in the Public Policy Transmission Planning Process, Docket No. EL22-____-000

Dear Secretary Bose:

Pursuant to Section 206 of the Federal Power Act ("FPA")¹ and Section 19.02 of the Independent System Operator Agreement ("ISO Agreement"),² the New York Independent System Operator, Inc. ("NYISO"),³ at the direction of its independent Board of Directors ("NYISO Board"), respectfully submits proposed revisions to its Open Access Transmission Tariff ("OATT") 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").

The Commission recently confirmed that the NYTOs possess a federal ROFR under the NYISO's foundational agreements and as reserved by Section 31.6.4 of the OATT 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 in the NYISO's transmission planning processes, as permitted by Order No. 1000 ("NYTOs' ROFR Rights").⁴ This ROFR includes upgrades that are a part of another Developer's project.⁵ The Commission also determined that there are no defined rules in the NYISO's Public Policy Process to implement the NYTOs' ROFR Rights.⁶

¹ 16 U.S.C. § 824e (2021).

² The ISO Agreement is available on the NYISO's website at the following link under "Tariffs" and "Agreements" at: <https://www.nyiso.com/regulatory-viewer>.

³ Capitalized terms that are not otherwise defined in this filing shall have the meaning specified in Attachment Y of the NYISO OATT and, if not defined therein, in Section 1 of the NYISO OATT.

⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at P 704, FERC Stats. & Regs. ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A at P 625, 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).

⁵ *New York Independent System Operator, Inc.*, Order on Petition for Declaratory Order, 175 FERC ¶ 61,038 at PP 30, 33-39 (April 15, 2021) ("April 2021 Declaratory Order").

⁶ April 2021 Declaratory Order at PP 40-42.

The Commission's determinations point out that there is conflict between the existing Public Policy Process rules in the OATT and the NYTOs' rights under the NYISO's foundational agreements that must be addressed to provide Developers, NYTOs, and other interested parties with clarity and confidence in the planning process and its outcomes. Failure to resolve this conflict could harm competitive transmission planning in New York, which as noted by Commissioner Clements "has been a bright spot in the Order No. 1000 landscape."⁷ The lack of clear implementing rules is very likely to result in disputes at the Commission and in court causing delays, diminishing Developers' interest in participating in the process, and limiting the pool of potentially more efficient or cost-effective transmission solutions in future solicitations.

For these reasons, the NYISO engaged with its stakeholders to establish rules for its Public Policy Process through the NYISO's governance process. The NYISO, with stakeholder input, developed a balanced proposal in line with the directives of Order No. 1000 by which Developers may continue to propose innovative transmission solutions that include upgrade components, as well as providing clear, transparent rules through which the NYTOs' ROFR Rights may be implemented. Despite extensive efforts described in Part I.B of this letter, NYISO stakeholders were unable to reach the necessary consensus on certain issues concerning these rules to authorize the NYISO to submit tariff revisions pursuant to Section 205 of the FPA.

The existing Public Policy Process rules in the OATT are unjust and unreasonable to the limited extent that there is a conflict between the Public Policy Process rules and the NYISO's foundational agreements, which creates the potential for lengthy disputes and other consumer harms. As described in Part II below, the existing rules (i) do not align with the NYTOs' ROFR Rights, (ii) do not comply with Order Nos. 890⁸ and 1000, and (iii) create uncertainty in the results of the Public Policy Process, including the rights and responsibilities of both non-incumbent transmission Developers and NYTOs concerning upgrades that are part of selected transmission projects.

The NYISO, therefore, as the independent administrator of the Public Policy Process, proposes tariff revisions pursuant to Section 206 of the FPA that account for and implement the NYTOs' ROFR Rights in the Public Policy Process. The NYISO's proposed tariff revisions establish a transparent, open, coordinated, and balanced process to implement the NYTOs' ROFR Rights, which will preserve the benefits of competitive solicitations. As described in detail in Part III below, the NYISO will identify any upgrades—*i.e.*, "Public Policy Transmission Upgrades"—that are part of proposed Public Policy Transmission Projects submitted for consideration in the Public Policy Process. The NYISO will notify parties of its determination as to the characterization of facilities prior to the start of the comparative evaluation of the submitted proposals. Then, as part of the NYISO's evaluation and selection of the more efficient

⁷ April 2021 Declaratory Order (Clements, *concurring*) at P 3.

⁸ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, 73 FR 2984 (2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 73 FR 39092 (2008), 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 74 FR 12540 (2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 FR 61511 (2009), 129 FERC ¶ 61,126 (2009).

or cost-effective Public Policy Transmission Project, the NYISO will designate to the proposing Developer and the NYTO the new transmission facilities and any Public Policy Transmission Upgrades, respectively, that are part of the selected project—each grouping of project components will be a “Designated Public Policy Project.” The Developer and the NYTO will each be a “Designated Entity” that will be responsible for developing, building, financing, operating, and maintaining its separate Designated Public Policy Project, which collectively make up the selected Public Policy Transmission Project.

The NYISO also proposes that following project selection, any NYTO identified as a Designated Entity for Public Policy Transmission Upgrades included in a non-incumbent transmission Developer’s proposal will have the opportunity to forego such assignment within a specified period for one or more of the upgrade(s) that constitute its Designated Public Policy Project. If an NYTO is a Designated Entity, it will enter into a development agreement with the NYISO concerning its Designated Public Policy Project; it will develop and construct its project; and it will be eligible to allocate and recover under the OATT the costs associated with its project. The Developer of the selected transmission project will continue to be responsible for its Designated Public Policy Project, which includes the new transmission facilities that are part of the selected transmission project and any upgrade(s) for which the applicable NYTO does not exercise its ROFR rights. The Developer will remain eligible to allocate and recover under the NYISO OATT the costs associated with its Designated Public Policy Project. As detailed below, the NYISO’s proposed tariff revisions are just and reasonable, are consistent with the Commission’s precedent, and comply with the requirements of Order Nos. 890 and 1000.

While other regions have excepted upgrades entirely from the evaluation of competitive transmission projects, the NYISO’s proposed tariff revisions retain Developers’ ability to propose both entirely new transmission facilities and upgrades as part of their proposal to address Public Policy Transmission Needs. This will enable Developers to continue to develop and propose innovative solutions, which will continue to promote the identification of more efficient or cost-effective transmission solutions. In addition, Developers will now be aware up-front in the process of the clear and transparent rules for NYTOs to exercise their ROFR, eliminating uncertainty and disputes concerning how and when such rights could be exercised. Developers will be on notice early in the process about whether any project elements could be subject to a ROFR. In addition, with this knowledge, Developers will have the opportunity to elect whether or not to proceed with their projects to be evaluated for selection and will have such knowledge prior to incurring study costs in the process. The NYISO’s proposed tariff revisions, thereby, preserve competition in accordance with the requirements of Order No. 1000, while accounting for the NYTOs’ ROFR Rights in the process as expressly permitted by Order No. 1000.

Finally, the NYISO requests an effective date as of the date of this filing—October 8, 2021—and that the Commission issue an order by December 16, 2021 to avoid disruption of the NYISO’s ongoing Public Policy Process. As described in Part IV of this filing letter, the NYISO has commenced its 2020-2021 planning cycle for its Public Policy Process, and the New York Public Service Commission (“NYPSC”) has identified a Public Policy Transmission Need related to the transmission of offshore wind onto and through Long Island to the rest of New York State. The NYISO has solicited solutions to address that need which are due on October 11, 2021, after the requested effective date of this filing. Developers have known since before

the solicitation began that the Commission confirmed the existence of the NYTOs' ROFR Rights. The NYISO has taken steps within the boundaries of the current tariff so that the tariff revisions proposed herein may apply to the current solicitation following the Commission's acceptance of the proposed tariff revisions. An order by December 16, 2021, will allow a seamless transition of the proposed rules into the current Public Policy Process and avoid potential delays in the evaluation and selection process.

I. Discussion

A. Background

Order No. 1000 required that each transmission provider, such as the NYISO and NYTOs, eliminate provisions in its Commission-jurisdictional tariffs and agreements that establish a federal ROFR for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.⁹ Order No. 1000, however, included certain exceptions to this requirement, including providing that the requirement "does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent."¹⁰

The NYTOs expressly reserved certain ownership rights with regard to their existing transmission facilities in the NYISO's foundational agreements—including the Agreement Between New York Independent System Operator and Transmission Owners ("ISO-TO Agreement") applicable to the Member Systems,¹¹ the ISO Agreement, and the operating agreements for new NYTOs.¹² These agreements establish that the NYTOs retain various rights concerning their transmission facilities as a condition for their agreement to participate in the NYISO and to turn over operational control of these facilities to the NYISO. This includes

⁹ Order No. 1000 at P 313.

¹⁰ *Id.* at P 319. The Commission noted in Order No. 1000-A that it was not "eliminating the right of an owner of a transmission facility to improve its own existing transmission facility by allowing a third-party transmission developer to, for example, propose to replace the towers or the conductors of a transmission line owned by another entity." Order No. 1000-A at P 426.

¹¹ The Member Systems include "[t]he eight Transmission Owners that comprised the membership of the New York Power Pool, which are: (1) Central Hudson Gas & Electric Corporation, (2) Consolidated Edison Company of New York, Inc., (3) New York State Electric & Gas Corporation, (4) Niagara Mohawk Power Corporation d/b/a National Grid, (5) Orange and Rockland Utilities, Inc., (6) Rochester Gas and Electric Corporation, (7) the Power Authority of the State of New York, and (8) Long Island Lighting Company d/b/a Long Island Power Authority." OATT § 1.13 (definition of "Member Systems").

¹² See OATT § 31.11 Appendix H – Form of Operating Agreement; *see also Filing of an Executed Operating Agreement Between the New York Independent System Operator, Inc. and LS Power Grid New York Corporation I; Request for Waiver of the 60-Day Notice Period*, Letter Order, Docket No. ER21-2104-000 (August 5, 2021); *Filing of an Executed Operating Agreement Between the New York Independent System Operator, Inc. and NextEra Energy Transmission New York, Inc.; Request for Waiver of the 60-Day Notice Period*, Letter Order, Docket No. ER21-2105-000 (July 30, 2021); *Filing of an Executed Amended and Restated Operating Agreement Between the New York Independent System Operator, Inc. and New York Transco, LLC*, Letter Order, Docket No. ER18-2015-000 (September 6, 2018).

preserving, among other things, property rights incident to the ownership of the facilities that they own.¹³

The NYISO's Comprehensive System Planning Process ("CSPP") establishes the rules in Attachments Y and FF to the OATT by which the NYISO solicits, evaluates, and selects more efficient or cost-effective solutions to address reliability, economic, and public policy driven transmission needs in New York for inclusion in the NYISO's regional transmission plan for purpose of cost allocation.¹⁴ In their compliance filings under Order No. 1000, the NYISO and the Member Systems added Section 31.6.4 of Attachment Y to the OATT that provides that nothing in the CSPP affects certain rights of the NYTOs, which rights align with the exceptions in Order No. 1000 to the requirement to eliminate a federal ROFR in Commission-jurisdictional tariffs and agreements. Specifically, Section 31.6.4 of the OATT provides, in relevant part:

Nothing in this Attachment Y affects the right of a Transmission Owner to: (1) build, own, and recover the costs for upgrades to the facilities it owns, provided that nothing in Attachment Y affects a Transmission Owner's right to recover the costs of upgrades to its facilities except if the upgrade has been selected in the regional transmission plan for purposes of cost allocation, in which case the regional cost allocation method set forth in Attachment Y of the ISO OATT applies, unless the Transmission Owner has declined to pursue regional cost allocation . . . For purposes of Section 31.6.4, the term "upgrade" shall refer to an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility.

In 2019, as part of an effort to enhance the Public Policy Process, certain NYTOs raised concerns regarding the application of this Section 31.6.4. The NYISO and its stakeholders discussed tariff revisions and enhancements that, among other things, sought to more clearly address when and how the NYISO would assign to NYTOs upgrades included as part of transmission projects selected in the Public Policy Process. Stakeholders, however, were unable

¹³ In particular, Section 3.10(c) of the ISO-TO Agreement states that "[e]ach Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including, without limitation, the right to build, acquire, sell, merge, dispose of, retire, use as security, or otherwise transfer or convey all or any part of its assets." The NYTOs similarly preserved these rights in Section 17.A.3 of the ISO Agreement. These rights are also included in Section 3.08(c) of the operating agreements that have been entered into between the NYISO and new non-incumbent Transmission Owners in New York, and they are included in the *pro forma* Operating Agreement that non-incumbent Transmission Owners must execute prior to energizing their transmission facilities to become an NYTO.

¹⁴ The CSPP contains: (i) a Local Transmission Planning Process by which each NYTO with a Transmission District posts and accepts comments on its Local Transmission Owner Plans for its own transmission system; (ii) a biennial Reliability Planning Process by which the NYISO identifies and addresses long term Reliability Needs on the Bulk Power Transmission Facilities; (iii) a separate Short-Term Reliability Process by which the NYISO addresses local and bulk transmission system needs driven by proposed Generator deactivations and other system changes arising within a five year period; (iv) an Economic Planning Process that conducts an overall analysis of the economic benefits of relieving congestion and includes a process for Developers to propose projects to resolve congestion; and (v) a Public Policy Transmission Planning Process by which the NYISO addresses any Public Policy Transmission Needs identified by the NYPSC. Interregional transmission projects identified under the Northeastern ISO/RTO Planning Coordination Protocol are eligible for consideration for selection in the NYISO's regional planning processes.

to agree on the threshold issue as to whether the NYTOs' ROFR Rights exist. For this reason, on August 18, 2020, the NYISO submitted a petition requesting that the Commission issue a declaratory order confirming: (i) that the NYTOs (both incumbent and non-incumbent) possess the NYTOs' ROFR Rights and (ii) if so, that the NYTO should be treated, to the extent applicable, as the Developer of the upgrade portion of the selected transmission project and subject to OATT provisions relevant to the Developer of a selected transmission project.¹⁵

On April 15, 2021, the Commission issued an order granting in part and denying in part the NYISO's petition ("April 2021 Declaratory Order"), which order is included as Attachment I. The Commission found that:

the NYISO's foundational agreements provide NYTOs a federal ROFR for upgrades to their own existing transmission facilities, and OATT section 31.6.4 reflects the Commission's finding that Order No. 1000 did not affect the right of an incumbent transmission provider to build, own, and recover the costs for upgrades to its own transmission facilities.¹⁶

The Commission further confirmed that the federal ROFR includes the right to build, own, and recover the costs of upgrades that are part of another Developer's proposed transmission project selected by the NYISO.¹⁷ The Commission, however, determined that the OATT was "silent as to how to implement a federal ROFR for a NYTO's upgrades to its own transmission facilities,"¹⁸ and rejected treating the NYTO as the Developer of the upgrade portion of a transmission project under the existing OATT rules if the NYTO exercises its ROFR.¹⁹ The Commission specifically noted that a first step in implementing the NYTOs' ROFR Rights in the Public Policy Process is to establish a defined mechanism in the OATT and that it would evaluate the implementation details when such revisions are presented to the Commission.²⁰

B. Stakeholder Process

Following the April 2021 Declaratory Order, the NYISO re-engaged with its stakeholders concerning the proposed tariff revisions to implement the NYTOs' ROFR Rights that were previously presented to them prior to the NYISO's petition for a declaratory order. The NYISO discussed the proposal with stakeholders at five additional working group meetings and revised the proposal based on stakeholder feedback. NYISO stakeholders, however, were not able to reach consensus on certain issues in the proposal. The principal area of disagreement concerned the application of the NYISO's voluntary cost containment rules in its Public Policy Process in cases in which an NYTO exercises its ROFR for an upgrade. Certain stakeholders argued that

¹⁵ *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).

¹⁶ April 2021 Declaratory Order at P 39. The NYISO sought a third clarification in the April 2021 Declaratory Order related to the scope of the definition of "upgrade" under Commission precedent. However, the clarification is not relevant to the present proceeding in establishing rules to implement the NYTOs' ROFR Rights in the Public Policy Process.

¹⁷ April 2021 Declaratory Order at PP 33-34.

¹⁸ *Id.* at P 41.

¹⁹ *Id.* at P 40.

²⁰ *Id.* at P 42.

the NYTO in exercising its ROFR for an upgrade should be bound by the Cost Cap voluntarily proposed by the Developer for the selected transmission project that included the upgrade. Certain stakeholders also disputed the timing of when in the Public Policy Process the NYTO may exercise its ROFR, argued that there should be no presumption in the OATT that the NYTO will exercise its ROFR, and raised certain other arguments concerning the NYISO's proposed tariff revisions.

Notwithstanding these disagreements, the NYISO's stakeholder Business Issues Committee voted on August 11, 2021, to seek approval from the Management Committee and NYISO Board to file the tariff revisions under Section 205 of the FPA. However, while there was a positive vote, there was a number of abstentions. On August 25, 2021, the Management Committee members voted against seeking NYISO Board approval to file the proposed revisions under Section 205, with several stakeholders changing their previous abstentions to opposition. The resulting vote in favor was 42.38%; short of a 58% affirmative vote required by the ISO Agreement for the NYISO to seek NYISO Board approval to file under Section 205 of the FPA.²¹

The margin of the vote demonstrated an ongoing impasse concerning the implementation of a process to consider and implement the NYTOs' ROFR Rights, which included issues stakeholders have not been able to work through since 2019. Despite the active participation and extensive feedback of all interested parties over a two-year period, disagreements on certain important implementation requirements prevent the possibility for a clear consensus on the proposed tariff rules. While the proposed tariff revisions contained in Attachment IV did not garner sufficient approval to file under Section 205 of the FPA, they were, with minor exceptions, reviewed extensively with stakeholders, including the development of multiple versions of the tariff language to address stakeholder input and to incorporate stakeholder consensus where such consensus was possible.²²

The absence of crucial implementation rules leaves a conflict between the rules in the Public Policy Process and the NYTOs' ROFR Rights established in the foundational agreements and reserved in the OATT. For this reason, the NYISO has concluded, as the independent administrator of the Public Policy Process, that it must file these tariff revisions for the Commission's review and acceptance without receiving full stakeholder consensus. The NYISO's proposed revisions will protect the interests of *all* affected parties, particularly non-incumbent Developers as well as the NYTOs. Absent resolution of this conflict, the NYISO anticipates that greater uncertainty and disputes will arise as the current planning cycle of the process moves further into the evaluation and selection stage.

²¹ ISO Agreement § 7.10.

²² In the stakeholder process, the NYISO proposed not only the revisions to establish a mechanism to consider and implement the NYTOs' ROFR Rights but also enhancements to the Public Policy Process related to evaluating proposed upgrades to existing facilities for constructability and feasibility with the input of the applicable Transmission Owner. The proposed tariff revisions contained in this filing are only those that fall within the Section 206 of the FPA standard of review with minor adjustments and clarifications from what was presented to the stakeholders.

At its meeting on September 21, 2021, the NYISO Board reviewed the proposed approach for addressing the NYTOs' ROFR Rights in the Public Policy Process and the differing positions of the NYISO's stakeholders. The NYISO Board authorized the filing of the proposed tariff revisions to consider and implement the NYTOs' ROFR Rights in the Public Policy Process pursuant to Section 206 of the FPA and its authority in Section 19.02 of the ISO Agreement.

II. 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.

As required by Section 206 of the FPA, the NYISO first must demonstrate that its existing rate/practice is unjust and unreasonable.²³ As detailed below, the NYISO's existing Public Policy Process rules are unjust and unreasonable to the limited extent that they do not contain a mechanism to implement the NYTOs' ROFR Rights as they: (i) do not align with the NYISO's foundational agreements and the 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 both non-incumbent transmission Developers and NYTOs concerning upgrades that are part of selected transmission projects.

First, the NYISO's Public Policy Process does not include rules that account for or implement the NYTOs' ROFR Rights and contain provisions that are in conflict with those rights. The April 2021 Declaratory Order confirmed that the NYTOs have a reserved right to build, own, and recover the cost of upgrades to their existing facilities based on the NYISO's foundational agreements, including upgrades that are a part of another Developer's proposal.²⁴ The OATT expressly provides that nothing in the Public Policy Process affects such right to build, own, and recover of the cost of upgrades to their facilities.²⁵ The Commission further found that there is no current mechanism that accounts for or allows the NYTOs to implement their rights in the Public Policy Process and indicated that there is a need for such a tariff structure.²⁶ The Commission noted that

[w]ithout a defined mechanism in the tariff . . . , it is premature to opine on how or when these aspects should be implemented for a NYTO who exercises its federal ROFR for upgrades to its own transmission facility included in a competitive developer's selected transmission solution. [The Commission] will evaluate tariff revisions to effectuate implementation details when they are presented.²⁷

Commissioner Clements, in her concurrence, explicitly noted that "NYISO's tariff appears devoid of clarity on any of these crucial implementation details."²⁸

²³ See 16 U.S.C. § 824e(a); 18 C.F.R. § 385.206 (2021).

²⁴ April 2021 Declaratory Order at PP 41-42.

²⁵ See OATT § 31.6.4.

²⁶ April 2021 Declaratory Order at PP 41-42.

²⁷ *Id.* at P 42.

²⁸ *Id.* (Clements, *concurring*) at P 5.

The Public Policy Process rules in the OATT are, therefore, unjust and unreasonable in not providing a defined mechanism to implement the NYTOs' ROFR Rights that are expressly established in the foundational agreements and expressly reserved in Section 31.6.4 of the OATT. The absence of such implementation rules in the OATT does not nullify the NYTOs' ROFR Rights.²⁹ Rather, lack of implementation rules only creates a conflict with the existing rules in the Public Policy Process and does not account for the rights and responsibilities of Developers and NYTOs for upgrades that are selected by the NYISO as the more efficient or cost-effective solution to a transmission need. The lack of clear implementing rules is likely to result in disputes at the Commission and in court causing delays. Such delays are likely to hinder the development of transmission projects crucial to addressing public policy matters in New York, diminish Developers' interest in participating in the process, and limit the pool of potentially more efficient or cost-effective transmission solutions in future solicitations. In other words, it could "undermine the evaluation and identification of the more efficient or cost-effective solution to a regional transmission need"³⁰ and potentially harm competitive transmission planning in New York.

Moreover, the current Public Policy Process rules are silent concerning how existing tariff requirements should be implemented if an NYTO seeks to exercise its ROFR. For example, the Public Policy Process establishes rules for Developers to voluntarily propose cost containment measures for the capital costs of their proposed projects³¹ but are silent concerning the application of such rules if an NYTO exercises its ROFR for an upgrade included as part of a non-incumbent transmission Developer's project that contains the developer's proposed Cost Cap. The absence of clear tariff rules may result in an inconsistency between the costs for the upgrade considered by the NYISO Board in selecting the project and the costs that an NYTO that exercises its ROFR may seek to recover for such an upgrade. The difference could undermine the selection of the more efficient or cost-effective solution where a different project would have been the more efficient or cost-effective solution had the exercise of the ROFR been accounted for in the evaluation. Additionally, there is no provision that permits a Developer to adjust its proposed Cost Cap if an NYTO exercises its ROFR for one or more upgrades included in the project proposal, which could minimize the benefit of the Cost Cap when spread across a smaller subset of facilities.³²

²⁹ See ISO-TO Agreement § 6.09 (providing that a conflict between the express terms of the ISO-TO Agreement and the ISO Agreement or the ISO Tariffs, the ISO TO Agreement shall prevail); see also ISO-TO Agreement § 6.14 (limiting modifications to Section 3.10 of the ISO TO Agreement only when there is "an express finding by [the Commission] that such change is required under the public interest standard under the Mobile-Sierra doctrine"); OATT § 31.11, Appendix H – Form of Operating Agreement § 6.14 (same).

³⁰ Order No. 1000, at P 253.

³¹ See OATT §§ 31.4.5.1.8, 31.4.8.2, 31.4.8.3. See generally, *New York Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021) (accepting the rules governing voluntary Cost Caps in the Public Policy Process).

³² Section 31.4.12.2 of the OATT provides, in relevant part, that "[i]f a Developer submitted a Cost Cap for its Public Policy Transmission Project selected by the [NYISO], its Development Agreement for that project shall contain the Cost Cap." Under the Development Agreement, the Developer is required to file the Cost Cap with the Commission in accordance with the requirements under Rate Schedule 10 of the OATT. See OATT § 31.7 (Appx. D), Development Agreement, Article 15.3. Failure to do so is considered a breach of the agreement. See *id.* at Articles 7.1, 15.3. Additionally, the Development Agreement provides *Mobile-Sierra* protections for the

Second, the NYISO's existing Public Policy Process rules do not comply with Order Nos. 890 and 1000 absent rules that account for and implement the NYTOs' ROFR Rights. In Order No. 1000, the Commission continued the requirements established under Order No. 890 that transmission providers conduct regional transmission planning on a coordinated, open, and transparent basis.³³ A planning process that does not adequately account for the reserved rights of transmission owners lacks the necessary transparency, openness, and coordination required by the Commission's orders and could ultimately undermine the NYISO's evaluation and identification of the more efficient or cost-effective solution to a Public Policy Transmission Need.³⁴ Without the ability to consider the NYTOs' ROFR Rights, parties lack the necessary transparency during the planning process concerning how upgrades will be treated and the potential impacts on the selection, and implementation of, the more efficient or cost-effective solution due to whether or not an NYTO exercises its ROFR.

Third, the NYISO's existing Public Policy Process rules do not address the rights and responsibilities for both non-incumbent transmission developers and NYTOs concerning upgrades that are part of selected transmission projects. For instance, the existing rules only provide that the proposing Developer, even if a non-incumbent transmission developer, has the rights and responsibilities for the development of a selected project on the basis that all upgrades will remain as a part of the project.³⁵ The existing rules do not provide guidance about what actions the NYISO, NYTO, or Developer should take in the event an NYTO seeks to exercise its existing ROFR for an upgrade following the NYISO Board's selection of a transmission project. Disputes over the exercise of the NYTOs' ROFR Rights could significantly delay the development of the transmission project as the matter is addressed by the Commission and/or in court through protracted litigation. Such proceedings would adversely impact the timely development of transmission and its ability to meet important public policy goals, as well as add administrative burdens to those entities involved in the disputes.

Based on the foregoing, the NYISO respectfully submits that the absence of rules in the OATT to account for and implement the NYTOs' ROFR Rights in the Public Policy Process results in unjust and unreasonable tariff rules.

III. The NYISO's Proposed Revisions to Implement the NYTOs' ROFR Rights in the Public Policy Process Are Just and Reasonable and Not Unduly Discriminatory or Preferential

A. Executive Summary

The NYISO proposes to revise its OATT to establish rules in its Public Policy Process to implement the NYTOs' ROFR Rights for upgrades that are part of a Public Policy Transmission

requirements under Article 15.3 of the Development Agreement and the Cost Cap against changes. *See id.* at Article 15.3.

³³ Order No. 1000 at P 1.

³⁴ *Id.* at P 253.

³⁵ *See* OATT § 31.4.12.

Project selected by the NYISO as the more efficient or cost-effective transmission solution.³⁶ As required by Section 206 of the FPA, the NYISO must demonstrate that its proposed replacement rate/practice is just and reasonable and does not unreasonably discriminate or give any undue preferential treatment or advantage to any person or entity.³⁷ As described in this Part III, the NYISO's proposed tariff revisions to implement the NYTOs' ROFR Rights are just and reasonable and not unduly discriminatory or preferential, are consistent with Commission precedent, and comply with Order Nos. 890 and 1000.

Under the existing OATT, the NYISO's Public Policy Process establishes the requirements by which the NYISO solicits and evaluates proposed solutions to an identified Public Policy Transmission Need and selects the more efficient or cost-effective transmission solution to address that need for purposes of cost allocation under the OATT. If a Public Policy Transmission Need is identified for a planning cycle of the Public Policy Process, the NYISO will solicit proposed Public Policy Transmission Projects and Other Public Policy Projects to address the need.³⁸ The NYISO's transmission planning processes use the sponsorship model, which permits Developers wide latitude in proposing transmission solutions to an identified transmission need. Potential solutions may include both new transmission facilities and upgrades to an NYTO's existing transmission facilities.

Following its receipt of solutions, the NYISO will assess the viability and sufficiency of the proposed solutions and present the results in a Viability and Sufficiency Assessment to stakeholders.³⁹ Each Developer of a Public Policy Transmission Project found to be viable and sufficient may then elect for its project to proceed to be evaluated for selection.⁴⁰ The NYISO will evaluate and select the more efficient or cost-effective Public Policy Transmission Project in accordance with the selection metrics set forth in the OATT and as reported in a Public Policy Transmission Planning Report.⁴¹ The Developer that proposed the selected transmission project is required to enter into a Public Policy Transmission Planning Process Development Agreement ("Development Agreement") with the NYISO, which establishes requirements for the Developer to complete the project by the required project in-service date.⁴² The Developer of the selected transmission project is eligible to allocate and recover under the OATT the costs of the project.

³⁶ The NYISO focused the discussions with stakeholders to establish rules in the Public Policy Process to consider and implement the NYTOs' ROFR Rights because that planning process is the most active in New York and had the greatest potential to identify needs in the near term. This includes the NYPSC's recent identification of the Long Island Offshore Wind Export Public Policy Transmission Need seeking to integrate at least 3,000 MW of offshore wind into New York, which initiated the current process for soliciting, evaluating, and selecting potential solutions. While the April 2021 Declaratory Order confirmed the existence of the NYTOs' right to build, own, and recover the cost of upgrades to its facilities, including upgrades that are part of another Developer's proposal that the NYISO selects under its Comprehensive System Planning Process, the proposed tariff revisions in this filing are limited to changes necessary to implement these rights in the Public Policy Process. *See* April 2021 Declaratory Order at P 34.

³⁷ 16 U.S.C. § 824d.

³⁸ OATT § 31.4.3. The NYPSC identifies Public Policy Transmission Needs for which the NYISO solicits and selects transmission solutions. *See id.*

³⁹ *Id.* § 31.4.6.

⁴⁰ OATT § 31.4.6.6.

⁴¹ *Id.* §§ 31.4.8, 31.4.11.

⁴² *Id.* §§ 31.4.12.2, 31.7 (Appx. D).

As described in detail below, the NYISO's proposed revisions would distinguish components of a selected Public Policy Transmission Project into new transmission facilities and upgrades to existing transmission facilities to designate those components to the Developer and/or NYTO, as applicable, as a part of the NYISO's selection process. As an initial step in the process, the NYISO will, in coordination with Developers and NYTOs, identify any Public Policy Transmission Upgrades that are part of the proposed Public Policy Transmission Projects submitted by Developers prior to the completion of the Viability and Sufficiency Assessment. The Developers and NYTOs will have the opportunity to raise concerns about the classification of the proposed facilities, and the Developer will be on notice concerning such classification prior to making its determination to proceed with its project for evaluation, at which point in the process the Developer becomes responsible for study costs.

As part of the NYISO's evaluation and selection of the more efficient or cost-effective transmission solution, the NYISO will designate the new transmission facilities from the selected transmission project to the Developer that proposed the project, which will be a Designated Entity responsible for developing those facilities as its Designated Public Policy Project and will be eligible to allocate and recover its costs under the OATT. The NYISO will separately designate any portion of the selected transmission project that satisfies the definition of a Public Policy Transmission Upgrade for purposes of the NYTOs' ROFR Rights to the applicable NYTO. In such case, the NYTO will also be a Designated Entity responsible for developing the upgrades as a separate Designated Public Policy Project, unless the NYTO elects to forego this designation. The NYTO will be eligible to allocate and recover under the OATT the costs of its Designated Public Policy Project. The Developer's and NYTO's Designated Public Policy Projects will collectively make up the Public Policy Transmission Project selected by the NYISO Board as the more efficient or cost-effective transmission solution to a Public Policy Transmission Need. If the NYTO foregoes developing one or more upgrades within a specified period, the NYISO will designate that upgrade to the Developer that proposed the selected transmission project for inclusion in its Designated Public Policy Project.

The NYISO, as the independent administrator of the Public Policy Process, developed its proposed approach in line with the Order No. 1000 requirements to allow non-incumbent transmission developers a comparable opportunity to propose transmission solutions for selection as the more efficient or cost-effective transmission solution for purposes of cost allocation through a regional cost allocation method(s).⁴³ By affording non-incumbent transmission developers the ability to propose innovative solutions that include new transmission facilities and upgrades to existing transmission facilities with a clear understanding of the process for NYTOs to exercise their ROFR, the Public Policy Process continues to promote the identification of the more efficient or cost-effective solution. Accordingly, the proposed revisions maintain the level of competitiveness in the Public Policy Process required by Order No. 1000 without "affect[ing] the right of an incumbent transmission provider to build, own, and recover the costs for upgrades to its own transmission facilities."⁴⁴

⁴³ Order No. 1000, at PP 225-226.

⁴⁴ *Id.* at P 226.

The process steps for the NYISO's proposed revised Public Policy Process are illustrated in the figure included in Attachment II of this filing. The NYISO's proposed tariff changes to its Public Policy Process to implement its proposed approach include tariff revisions to:

- define new terms in its OATT, as described in Part III.B;
- modify project proposal requirements, including the cost containment mechanisms for the Public Policy Process, as described in Part III.C.;
- establish the process for the NYISO, in coordination with Developers and NYTOs, to evaluate and classify the upgrade components of proposed Public Policy Transmission Projects, as described in Part III.D;
- make minor revisions to the NYISO's evaluation requirements for proposed Public Policy Transmission Projects, as described in Part III.E;
- establish the requirements for designating components of a selected Public Policy Transmission Project to the applicable Developer and/or NYTO, and for the NYTO to decide whether to proceed with its designation as permitted by its ROFR Rights for upgrade components proposed by another Developer, as described in Part III.F;
- establish the post-designation requirements for the entities responsible for developing components of the selected Public Policy Transmission Project, including entering into a Development Agreement with the NYISO concerning such components, addressing the division of project elements in the NYISO's Transmission Interconnection Procedures, and addressing a party's inability to complete its designated components, as described in Part III.G;
- revise the cost allocation and cost recovery rules to account for the Developer's and/or NYTO's eligibility for cost allocation and recovery of the costs of its designated components under the OATT, as described in Part III.H; and
- make minor additional, miscellaneous clarifications and clean ups related to the rules proposed herein, as described in Part III.I.

B. New Defined Terms

The NYISO proposes to establish three new defined terms in Attachment Y of the OATT for purposes of its revised requirements for the Public Policy Process.⁴⁵

The NYISO proposes to define "Public Policy Transmission Upgrade" as "[a]ny portion(s) of a Public Policy Transmission Project that satisfies the definition of upgrade in Section 31.6.4 of this Attachment Y." This term will cover the portions of a Public Policy Transmission Project that are subject to NYTOs' ROFR Rights based on the existing definition of "upgrade" in Section 31.6.4 of the OATT, which was previously accepted by the Commission.

⁴⁵ Proposed revisions to OATT § 31.1.1.

The definition of upgrade is consistent with the requirements in Order No. 1000-A, as “an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility.”⁴⁶

The NYISO also proposes to define a “Designated Public Policy Project” as “[t]he Public Policy Transmission Project selected by the ISO as the more efficient or cost-effective solution to a Public Policy Transmission Need, or a portion of such Public Policy Transmission Project, that the ISO designates to a Designated Entity pursuant to Section 31.4.11 of this Attachment Y.” In concert with this definition, the NYISO also proposes to define “Designated Entity” as “[a] Developer or Transmission Owner that the ISO designates pursuant to Section 31.4.11 of this Attachment Y as the person or entity to build, own, and recover the costs of a Designated Public Policy Project.” These terms apply equally to both a Developer and an NYTO that have been designated to be responsible for components of a selected Public Policy Transmission Project. This allows the NYISO to have consistent post-selection rules for the entities that are responsible for developing, constructing, owning, operating, and maintaining transmission facilities that the NYISO selects for inclusion in the regional transmission plan for purposes of cost allocation.

As discussed in Part III.G, the NYISO proposes to replace existing terms concerning the selected Public Policy Transmission Project and its Developer with the terms “Designated Entity” or “Designated Public Policy Project” for certain requirements following the NYISO’s selection of a Public Policy Transmission Project. The NYISO has previously selected three Public Policy Transmission Projects as the more efficient or cost-effective solution to an identified need, and all three projects remain subject to certain post-selection requirements in the NYISO OATT (*e.g.*, compliance with development agreements, conditions for cost recovery). To provide continuity to these projects in fulfilling their requirements under the OATT, the NYISO proposes a transition rule in the definitions of Designated Public Policy Project and Designated Entity for previously selected Public Policy Transmission Projects. Specifically, the NYISO clarifies that a previously selected Public Policy Transmission Project is the Designated Public Policy Project for purposes of these rules, and the Developer of the previously selected project is the Designated Entity.⁴⁷

C. Revisions Related to Project Proposals

1. Project Information Requirements

Under the existing provisions of the OATT, a Developer proposing a Public Policy Transmission Project is responsible for submitting detailed information concerning its proposed project to the NYISO,⁴⁸ including, among other things, a full description of its proposed

⁴⁶ The Commission previously accepted the NYISO’s definition of “upgrade” consistent with Order No. 1000-A in its compliance filings under Order No. 1000. *See New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040, at P 99 (2015). In this filing, the NYISO proposes a minor revision to the definition of “upgrade” by including a comma following the phrase “replacement of a part of” to further align it with the language in Order No. 1000-A. Proposed revision to OATT § 31.6.4.

⁴⁷ Proposed revisions to OATT § 31.1.1.

⁴⁸ OATT § 31.4.5.1.1.

solution,⁴⁹ a detailed major milestone schedule and expected in-service date,⁵⁰ and any facilities that will be required for the interconnection of its project as a part of the cost estimates.⁵¹ The NYISO's existing rules also afford the NYISO the ability to request from Developers "any other information required by the ISO Procedures or requested by the ISO."⁵² For prior solicitations for proposed Public Policy Transmission Needs, the NYISO developed forms in its Public Policy Transmission Planning Manual to implement the project information requirements set forth in the OATT, which forms detail the required information for the proposals and the format in which it should be included.

The NYISO proposes to revise these project information requirements in the OATT to update how certain project information is provided by requiring the Developer to: (i) identify new transmission facilities and any Public Policy Transmission Upgrades that are part of its proposed project in the project description, and (ii) separately identify the in-service dates for the specific project components, including any Public Policy Transmission Upgrades, to properly sequence the project's development, if applicable.⁵³ The NYISO also clarifies that Developers should separately identify any interconnection-related network upgrades that the NYISO has identified through a NYISO-conducted interconnection study or any potential interconnection-related network upgrades that the Developer believes will be necessary and wishes to identify in its proposal. Such network upgrades are a completely separate bucket of facilities from the project that is proposed to address the identified Public Policy Transmission Need and are only finally identified by the NYISO through an interconnection study.⁵⁴

The proposed revisions will assist the NYISO, in coordination with the Developers and NYTOs, in identifying any Public Policy Transmission Upgrades that are part of the project proposals and are subject to NYTOs' ROFR Rights, as well as in the NYISO's evaluation of the proposals. In addition, the revisions enable Developers to consider at the start of the process which project components may be subject to NYTOs' ROFR Rights and to take this into account when developing their project proposals. For instance, a non-incumbent transmission Developer can evaluate project alternatives to maximize the number of new transmission facilities while still achieving an innovative, efficient, and cost-effective solution. This will enable Developers to make informed decisions, will increase the potential for a wider range of competitive solutions in line with Order No. 1000, and will mitigate against the withdrawal of projects if the Developer were instead to later learn that a substantial portion of its project consists of Public Policy Transmission Upgrades.

⁴⁹ *Id.* § 31.4.5.1.1(3).

⁵⁰ *Id.* § 31.4.5.1.1(5).

⁵¹ *Id.* § 31.4.5.1.2.

⁵² *Id.* § 31.4.5.1(15).

⁵³ Proposed revisions to OATT § 31.4.5.1.1.

⁵⁴ The identification of potential interconnection-related network upgrades further distinguishes the project that is necessary to address the identified Public Policy Transmission Need and the facilities necessary for the interconnection of the project pursuant to the NYISO's interconnection standards. The latter is subject to study through the NYISO's interconnection procedures and are finalized through the applicable facilities study. A Developer's separation of the potential facility from its project allows the Developer the ability to better conceptualize its project, as well as the NYISO to understand what facilities are Included Capital Costs under the Cost Cap, if a Developer chooses to propose one.

Given the discussions surrounding the NYTOs' ROFR Rights and the Public Policy Process following the April 2021 Declaratory Order and the ongoing planning cycle of the Public Policy Process, the NYISO structured the proposed revisions to apply to a solicitation that is in progress while it seeks Commission acceptance of the tariff revisions. As a result, the NYISO revised its Public Policy Transmission Planning Process Manual to request the above-referenced information in a modified format in Attachment C – Data Submission for Public Policy Transmission Projects within the existing project information requirements contained in the OATT.⁵⁵ The revisions will not only benefit the administration of the Public Policy Process with the tariff revisions proposed herein but also improve the manner in which information is provided under the current process.

The updated form requests information that is already required in Section 31.4.5.1 of the OATT but changes the manner in which a Developer provides the project information to the NYISO. For example, a Developer is required under the existing rules to provide a description of the transmission project. The new Data Submission for Public Policy Transmission Projects form requests the Developer to describe its project in a manner that identifies and categorizes the various components.⁵⁶ Additionally, the Developer is already required to provide a timeline for the development of the project and, as the NYISO has found in prior cycles, certain projects will require sequencing of the project components. As updated, Developers must provide information concerning the sequencing of projects components. These form updates will work in concert with the proposed tariff revisions, as well as enhance the overall efficiency of the processing and evaluation of proposals. The revised Data Submission for Public Policy Projects form was posted on August 6, 2021, with a notice to stakeholders, as well as to potential Developers that the form has been updated and must be used in submitting a proposed solution to the Long Island Offshore Wind Export Public Policy Transmission Need in the ongoing 2020-2021 planning cycle for the Public Policy Process.⁵⁷

2. Impact on Voluntary Cost Containment Rules

Under the current Public Policy Process, a Developer may voluntarily submit a cost containment measure for its proposed Public Policy Transmission Project.⁵⁸ Section 31.4.5.1.8 of the OATT establishes the requirements for a Developer to propose a Cost Cap for the costs of its project. A Cost Cap must contain the capital costs that the Developer incurs in planning for and constructing the project and making it ready for its intended use (*i.e.*, “Included Capital Costs”) with the exception of certain capital costs defined in the OATT (*i.e.*, “Excluded Capital

⁵⁵ NYISO Public Policy Transmission Planning Process Manual (Manual 36), Attachment C: Data Submission for Public Policy Transmission Projects (updated August 6, 2021), available at <https://www.nyiso.com/documents/20142/2924741/M-36-PPTTP-Att-C-v2020-Final.docx/d4937745-7d4a-8ed9-8c4b-c3bb6d95fdf8> (“Data Submission for Public Policy Projects”).

⁵⁶ See Data Submission for Public Policy Projects at pp 5-6.

⁵⁷ NYISO Notice: Long Island Offshore Wind Export Public Policy Transmission Need Project Solicitation (August 12, 2021), available at <https://www.nyiso.com/documents/20142/22968753/Long-Island-Offshore-Wind-Export-Public-Policy-Transmission-Need-Project-Solicitation.pdf/51b8fdeb-1a66-2938-f116-38f1be486e0d> (“Long Island Offshore Wind Export PPTN Solicitation”). The NYISO’s existing project information rules permit the NYISO to request “any other information required by the ISO Procedures or requested by the ISO.” OATT § 31.4.5.1(15).

⁵⁸ OATT § 31.4.5.1.8.

Costs”).⁵⁹ Currently, the Excluded Capital Costs include, among other things, the costs of interconnection-related network upgrades required for the project in the NYISO’s interconnection procedures, which are typically Network Upgrade Facilities identified through the NYISO’s Transmission Interconnection Procedures under Attachment P to OATT. Based on the current rule, the capital costs for upgrades to existing transmission facilities that are part of the project would be required to be part of the Included Capital Costs.⁶⁰

The NYISO proposes to revise the voluntary cost containment requirements for its Public Policy Process to exclude the costs of Public Policy Transmission Upgrades from the capital costs that may be included in a Cost Cap. In particular, the NYISO proposes to add the costs of Public Policy Transmission Upgrades to the list of Excluded Capital Costs.⁶¹ Therefore, a Developer that chooses to include a cost containment measure must provide with its initial project submission a Cost Cap for all new transmission facilities that are part of its proposed project in accordance with Section 31.4.5.1.8 of the OATT, but the costs of any component that meets the definition of Public Policy Transmission Upgrade will be an Excluded Capital Cost and not be subject to the Cost Cap.

The NYISO’s selection process with the revisions to the cost containment rules proposed in this filing is just and reasonable and complies with Order No. 1000. Order No. 1000 requires the NYISO to select the more efficient or cost-effective transmission solution—not necessarily the lowest cost solution.⁶² The NYISO developed, and the Commission accepted, *voluntary* Cost Cap rules for its Public Policy Process.⁶³ The NYISO does not propose to change the voluntary nature of a Cost Cap or to require an NYTO exercising its ROFR Rights to an upgrade to be involuntarily subject to a Cost Cap proposed by another Developer. As stated previously, the Commission expressly acknowledged that the reforms to promote competition were not intended to affect the right of incumbent transmission providers to build, own, and recover the cost for upgrades to their facilities.⁶⁴ Here, the NYTOs’ ROFR Rights, derived from the foundational agreements, are not contingent on acceptance of a Developer’s cost containment proposal made in one of the NYISO’s transmission planning processes.⁶⁵ Requiring an NYTO to accept another

⁵⁹ *Id.* § 31.4.5.1.8.1.

⁶⁰ *See id.* § 31.4.5.1.8.1.

⁶¹ Proposed revisions to OATT § 31.4.5.1.8.2.

⁶² *See New York Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at P 252 (2014) (rejecting arguments that cost must be the primary factor in the NYISO’s selection of the more efficient or cost-effective transmission solution).

⁶³ *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098 (2020) (accepting NYISO’s proposed mechanism to allow Developers to proposed voluntary cost containment measures for Public Policy Transmission Projects).

⁶⁴ Order No. 1000, at PP 225, 704.

⁶⁵ The ISO-TO Agreement provides that the terms of that agreement are not subordinate to the ISO Tariffs, *see* ISO-TO Agreement § 6.09, and that the provision reserving rights to the existing facilities was intended to not be subject to change absent mutual agreement among the parties or an express determination that such change is required under the public interest standard pursuant to the *Mobile-Sierra* doctrine. *See id.* § 6.14; Amended and Restated Operating Agreement Among the New York Independent System Operator, Inc. and New York Transco LLC (Service Agreement No. 2271) (July 10, 2018) (May 18, 2021) § 6.14; Operating Agreement Among the New York Independent System Operator, Inc. and LS Power Grid New York Corporation I (Service Agreement No. 2627) (May 18, 2021) § 6.14; Operating Agreement Among the New York Independent System Operator, Inc. and NextEra Energy Transmission of New York, Inc. (Service Agreement No. 2628) (May 25, 2021) § 6.14.

Developer's voluntary cost containment measure, based on the unique financial structure of the proposing Developer, would limit or condition the NYTOs' ROFR Rights confirmed by the Commission in the April 2021 Declaratory Order.

As described in greater detail in Part III.F below, the proposed revisions to the process require the NYTOs to exercise their ROFR rights for any Public Policy Transmission Upgrades that are included in the Public Policy Transmission Project after the NYISO has selected the Public Policy Transmission Project. As a result, the NYISO will not know when selecting the more efficient or cost-effective transmission solution whether the Developer or NYTO will be responsible for developing any Public Policy Transmission Upgrades and could not, therefore, account for a Cost Cap for upgrades in its determination of the more efficient or cost-effective solution, as the Cost Cap may not be applicable.

Moreover, the NYISO employs a sponsorship model whereby Developers propose the design of the transmission solutions as well as bid on that solution based on cost and other metrics. This model enables Developers to provide innovative solutions to identified transmission needs. Past experience has shown that non-incumbent transmission developers will consider including in their project designs upgrades to existing facilities to propose a more efficient or cost-effective solution. The NYISO found that retaining the ability for non-incumbent transmission developers to propose a variety of transmission solutions, including upgrades to existing transmission facilities, will continue to foster the creation and submission of innovative solutions. As a result, the NYISO's proposed tariff revisions allow upgrades to be evaluated on a comparative, apples-to-apples basis across incumbent and non-incumbent transmission Developers, while respecting the NYTOs' ROFR Rights. The proposed evaluation of costs for upgrades and the designation process provides a just and reasonable process by allowing for the inclusion of upgrades in designing and selecting the more efficient or cost-effective solution, while effectuating the NYTOs' ROFR Rights over upgrades to their existing facilities.

The application of cost containment to Public Policy Transmission Upgrades was the primary point of disagreement among stakeholders in the NYISO's governance process. Certain stakeholders asserted that Developers, specifically non-incumbent transmission Developers, should continue to be able to include the costs of Public Policy Transmission Upgrade in the Cost Cap. They argued that an NYTO exercising its ROFR for a Public Policy Transmission Upgrade should be bound by the Cost Cap proposed by the Developer of the underlying Public Policy Transmission Project that included the upgrade. By not requiring NYTOs that exercise their ROFR to be bound by cost containment, certain stakeholders asserted that the NYISO is undercutting its competitive planning process by not identifying the best project at the lowest cost for consumers.

The NYISO disagrees. The Commission has previously rejected arguments that the NYISO be required to make cost the primary selection metric.⁶⁶ In addition, the Commission

⁶⁶ The Commission has rejected protests that cost should be treated as the primary factor in the NYISO's evaluation of proposed transmission solutions, indicating instead that "Order No. 1000 requires NYISO to consider the relative efficiency and cost-effectiveness of proposed transmission solutions." *New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040, at P 116 (2015).

rejected arguments from transmission developers in the Order No. 1000 compliance process that the NYISO be required to include specific cost containment metrics among its selection criteria.⁶⁷ Further, the Commission has not required that Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”) provide specific metrics to evaluate and select transmission projects based upon Developers’ cost containment measures.⁶⁸

As described in Part III.F below, certain stakeholders suggested alternatives to the point in time at which an NYTO may exercise its ROFR to include cost containment proposals for upgrades. For example, some stakeholders suggested that the NYTOs should determine prior to the NYISO’s solicitation of solutions whether they would exercise their ROFR for any upgrades rather than after selection so that cost containment can be proposed for any facility not subject to an exercised ROFR. Through these discussions, the NYISO recognized that there is no perfect solution considering a number of competing interests in determining the more efficient or cost-effective solution in a timely manner. Instead, there is a spectrum of potentially reasonable approaches to Order No. 1000 that have been approved across the regions by the Commission.⁶⁹ For example, some transmission planning processes in other regions elected to either not subject upgrades to a competitive evaluation process or to not allow non-incumbent transmission developers to include upgrades in their proposals at all.⁷⁰ Other regions took a similar approach to the NYISO’s proposed approach by designating selected transmission projects, or portions

⁶⁷ *New York Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,040, at P 117 (2015).

⁶⁸ *See, e.g., New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040, at P 117 (2015); *New York Indep. Sys. Operator, Inc.*, Order on Rehearing and Compliance, 148 FERC ¶ 61,044, at P 251 (2014); *see also* Order No. 1000, at P 704 (agreeing that cost containment is important, but “declin[ing] to establish a corresponding cost allocation principle”).

⁶⁹ The Commission granted transmission providers the flexibility to develop, in consultation with stakeholders, procedures by which the transmission planning region will identify and evaluate the set of potential solutions that may meet the region’s needs more efficiently or cost-effectively. *See New York Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at P 39 (2014) (citing Order No. 1000, at P 149). As a result, there is a number of approaches that comply with the requirements of Order No. 1000, and not all of them require that all transmission facilities be evaluated on a comparative basis at the regional level before being selected in the regional transmission plan for purposes of cost allocation. Specifically, the Commission did not require the removal of a federal ROFR for upgrades to existing facilities and, therefore, other regions do not require that upgrades to existing facilities be subject to their competitive processes before being included in a regional transmission plan for purposes of cost allocation. *See* Order No. 1000, at PP 360, 426; *see also* April 2021 Declaratory Order at P 37 (stating that “Order No. 1000 preserved incumbent transmission owner’s legal rights to build upgrades to their own transmission facilities” in rejecting claims that confirming the existence of a ROFR will harm the NYISO’s competitive process and is inconsistent with Order No. 1000).

⁷⁰ *See, 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).

thereof, following selection of the more efficient of cost-effective solution.⁷¹ Importantly, the NYISO has not identified any approach that has required involuntary adoption of cost containment measures by incumbent transmission owners for upgrades, particularly when a non-incumbent transmission developer proposes the cost containment.

Ultimately, as further described in the Affidavit of Zachary G. Smith, NYISO Vice President, System and Resource Planning (Attachment III to this letter), the NYISO determined that there is value in retaining the option of non-incumbent transmission Developers to propose solutions that contain upgrades to existing facilities to obtain innovative solutions, while maintaining competition required by Order No. 1000 and addressing the reserved rights set forth in the NYISO's foundational agreements. As a result, the NYISO submits that the proposed revisions to the cost containment rules are just and reasonable and not unreasonably discriminatory or give an undue preference or advantage.

3. Conforming Revisions Regarding Cost Containment Rules

The NYISO proposes the following additional revisions in its Public Policy Process to conform to the changes to the cost containment rules.

First, in the event that a Developer proposes a Cost Cap that includes the costs of a facility that the NYISO determines to be a Public Policy Transmission Upgrade, the NYISO will identify the deficiency, request additional information, and allow a Developer to amend its proposed Cost Cap accordingly.⁷² However, consistent with its current rules, the NYISO would not allow a Developer to make changes to the project itself.⁷³ Similarly, if a Developer believes that a project component is a Public Policy Transmission Upgrade and the NYISO determines it to be a new transmission facility, the NYISO would allow the Developer to provide additional information to adjust the Cost Cap by including the facility as an Included Capital Cost.

Second, the NYISO proposes conforming changes to its selection requirements to address the modifications to the Cost Cap requirements. The NYISO proposes to revise its rules for evaluating a project's proposed capital costs to clarify that the NYISO will not consider any voluntary Cost Cap to the extent it includes any Public Policy Transmission Upgrades as

⁷¹ 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).

⁷² Proposed new OATT § 31.4.5.1.8.5.

⁷³ In maintaining the current rule, the NYISO also proposes a clarification in Section 31.4.4.3.11 of the OATT that its determination that the project information submission of the Developer is complete does not limit the NYISO's ability to require at any time additional project information. This revision will provide that the NYISO can request additional information at a later point in the process if a Developer's characterization of a facility as either a new transmission facility or as a Public Policy Transmission Upgrade changes.

Included Capital Costs.⁷⁴ The NYISO will only evaluate the Cost Cap for new transmission facilities that are part of the Included Capital Costs.⁷⁵

Finally, the NYISO proposes conforming changes to its cost recovery requirements to address the modifications to the Cost Cap requirements. The NYISO proposes to clarify that when a Developer that submitted the selected Public Policy Transmission Project is the Designated Entity for a resulting Designated Public Policy Project, the Developer must include in its Development Agreement any Cost Cap and agree not to recover Included Capital Costs above its agreed upon Cost Cap.⁷⁶ The NYISO also proposes similar changes concerning the Developer's rate filing in the cost recovery requirements in Rate Schedule 10 of the NYISO OATT and the *pro forma* Development Agreement.⁷⁷ In addition, the NYISO's OATT and *pro forma* Development Agreement currently include an exception to the Cost Cap for transmission project changes, delays, or additional cost due to the actions or omissions of the NYISO, Connecting Transmission Owners, or Affected Transmission Owners.⁷⁸ The NYISO proposes to revise this exception to also include changes, delays, or additional costs due to the actions or omissions of other Designated Entities that are responsible for other components of the selected Public Policy Transmission Project.⁷⁹

D. Identification of Public Policy Transmission Upgrades

Under the current Public Policy Process, the NYISO evaluates the viability and sufficiency of the proposed solutions to address a Public Policy Transmission Need following its receipt of the proposals.⁸⁰ The NYISO then presents the results of its evaluation as a Viability and Sufficiency Assessment to stakeholders and interested parties for their comments and files the final assessment with the NYPSC.⁸¹ Within 15 calendar days of the NYISO's filing of the assessment at the NYPSC, each Developer of a viable and sufficient Public Policy Transmission Project must inform the NYISO whether it intends for its project to proceed for purposes of the NYISO's evaluation of projects for selection.⁸² At this point, the Developer becomes

⁷⁴ Proposed revisions to OATT §§ 31.4.8.2, 31.4.8.2.1. As stated above, the NYISO will afford a Developer the opportunity to address deficiencies in its Cost Caps if the Included Capital Costs include the capital costs for Public Policy Transmission Upgrades. As a result, proposals are not automatically rejected, and the tariff does not create a barrier to Developers proposing solutions to identified needs, as they could still include upgrades in their project design in proposing projects that not only meet the identified Public Policy Transmission Need but also meet their business objectives.

⁷⁵ *Id.*

⁷⁶ Proposed new OATT § 31.4.8.3.3.

⁷⁷ Proposed revisions to OATT § 31.7 (Appx. D), Development Agreement Article 15.3; OATT §§ 6.10.4.2, 6.10.5.2.2, 6.10.5.3.1, 6.10.6.1.

⁷⁸ OATT § 31.7 (Appx. D), Development Agreement Article 15.3; *id.* § 6.10.6.2.

⁷⁹ Proposed revisions to OATT § 31.7 (Appx. D), Development Agreement Article 15.3; OATT § 6.10.6.2. This change provides that the actions or omissions of one Designated Entity do not result in another Designated Entity that is responsible for other portions of the same transmission project being denied cost recovery due to actions beyond its control.

⁸⁰ OATT § 31.4.6.

⁸¹ *Id.* § 31.4.6.5.

⁸² *Id.* § 31.4.6.6.

responsible for the study costs of the NYISO's evaluation in the Public Policy Process of its project for purposes of selection.⁸³

The NYISO proposes to establish a process, which runs concurrently with its viability and sufficiency evaluation, to classify the facilities contained in proposed Public Policy Transmission Projects as new transmission facilities or Public Policy Transmission Upgrades. The identification process will work as follows. After the NYISO's receipt of any proposed Public Policy Transmission Projects, the NYISO will review Developers' project data and information, including, but not limited to, its classifications of their project components as either new transmission facilities or Public Policy Transmission Upgrades. The NYISO will use the Developers' information as a starting point in characterizing the facilities that make up the proposed project. At least 30 calendar days prior to the NYISO's presentation of the initial draft of the Viability and Sufficiency Assessment, the NYISO will post a list of all the facilities that constitute the proposed Public Policy Transmission Project. In the list, the NYISO will identify which facilities are new transmission facilities and which satisfy the definition of a Public Policy Transmission Upgrade but will not link the identified facilities to a specific project.⁸⁴ For the Public Policy Transmission Upgrades, the list will specify the NYTO that owns the transmission facility being modified.⁸⁵

Within 20 calendar days of the NYISO's posting the list, any interested party may dispute the NYISO's classification of a facility by providing the NYISO with written notice, which notice will be posted on the NYISO website.⁸⁶ The NYISO and the disputing party should attempt to resolve the dispute through the NYISO's governance procedures in discussing the Viability and Sufficiency Assessment and as provided in the dispute resolution process for the NYISO's planning process.⁸⁷ The NYISO will then post the final list with its determination of the classification of the proposed facilities on or before the NYISO's filing of the Viability and Sufficiency Assessment with the NYPSC, noting whether any of the facilities are still subject to pending disputes.⁸⁸ Following the submission of the Viability and Sufficiency Assessment, the Developer of each viable and sufficient Public Policy Transmission Project will continue to have the option to elect whether to proceed with its project to be evaluated for selection and, thereby, responsible for the costs of evaluating its project in the Public Policy Process.⁸⁹

This proposed step complies with the Order Nos. 890 and 1000 transmission planning principles as it provides transparency, openness, and an opportunity for stakeholder coordination related to the NYISO's determination of which components of a proposal meet the definition of a Public Policy Transmission Upgrade.⁹⁰ The NYISO proposes to include this process at this point in the overall Public Policy Process to provide an opportunity for Developers and NYTOs to review and provide timely input concerning the classification of the project's facilities prior to

⁸³ *Id.* § 31.4.4.4.

⁸⁴ Proposed new OATT § 31.4.6.5.1.

⁸⁵ Proposed new OATT § 31.4.6.5.1.

⁸⁶ Proposed new OATT § 31.4.6.5.1.

⁸⁷ Proposed new OATT § 31.4.6.5.1.

⁸⁸ Proposed new OATT § 31.4.6.5.1.

⁸⁹ OATT §§ 31.4.4.4, 31.4.6.6.

⁹⁰ Order No. 1000 at P 328.

Developers making their determination of whether they want their projects to proceed to evaluation by the NYISO for purposes of selection and to incur related study costs. As revised, the Developer will be on notice when it makes its determination whether or not to proceed as to the classification of the facilities that constitute its project and whether any classifications are still in dispute. This approach will reduce the potential for disputes that could arise if the determination was shared after completion of the full evaluation. It also permits a Developer an opportunity to withdraw without incurring the costs of the evaluation in the Public Policy Process based on the initial classification of its project elements, in the event that it differs substantially from the Developer's initial classification of facilities.⁹¹ The NYISO believes that facility classifications at this point in time versus in the draft Public Policy Transmission Planning Report will minimize the impact on Developers and preserve their incentive to propose solutions. For instance, a Developer will be able to determine whether the project is still economically viable under its business model based on the classification of the facilities before the evaluation process and prior to incurring additional study costs.

E. Evaluation of Public Policy Transmission Projects

Under its existing rules, the NYISO evaluates all of the viable and sufficient Public Policy Transmission Projects that have elected to proceed for evaluation as the more efficient or cost-effective solution to a Public Policy Transmission Need.⁹² The NYISO performs a comparative evaluation using the metrics set forth in Sections 31.5.8.1 and 31.5.8.2 of the OATT, which includes quantitative and qualitative evaluation of each projects' performance, as well as capital cost estimates and Cost Caps.

The NYISO proposes limited revisions to its capital cost selection metrics used in this evaluation to account for the potential that an NYTO will be responsible for a Public Policy Transmission Upgrade included as part of a Public Policy Transmission Project and that Cost Caps will not include capital costs for the upgrade.⁹³ Specifically, for purposes of the NYISO's evaluation of the capital costs for the Public Policy Transmission Upgrade component of a proposed project, the NYISO will apply an independent capital cost estimate, contingency percentage, and escalation factors for the Public Policy Transmission Upgrades. The independent estimates would be developed by the NYISO's independent consultant, which is already a practice from past processes.⁹⁴

The NYISO's proposed approach provides for a transparent and comparable evaluation of all proposed transmission solutions, particularly as it relates to Public Policy Transmission Upgrades. Furthermore, it significantly reduces, if not eliminates, the potential that an NYTO's exercise of its ROFR would adversely impact the NYISO's ability to make an accurate selection

⁹¹ *Id.* at P 330 ("encourag[ing] public utility transmission providers to consider ways to minimize disputes, such as through additional transparency mechanisms, as they identify enhancements to regional transmission planning processes necessary to comply with this Final Rule").

⁹² OATT § 31.4.8.

⁹³ As a part of the proposed revisions, the NYISO also seeks to clarify that the cost per MW ratio selection metric uses the total capital cost figure calculated per the capital cost election metric. *See* proposed revisions to OATT § 31.4.8.1.3.

⁹⁴ Proposed revisions to OATT § 31.4.8.1.1.

of the more efficient or cost-effective solution.⁹⁵ By using the independent estimates for Public Policy Transmission Upgrades, the NYISO will maintain a process by which non-incumbent transmission Developers are not restricted solely to developing projects that contain only new transmission facilities or modifications to facilities that they own. This, in turn, continues to leverage the sponsorship model to allow Developers to propose innovative solutions that are financially viable for the Developer to undertake, even if they include some facilities that are upgrades subject to the NYTOs' ROFR Rights. Using independent estimates also enables the NYISO to make a comparative evaluation of all Public Policy Transmission Upgrades as it identifies the more efficient or cost-effective solution regardless of whether the NYTO exercises its ROFR for certain eligible facilities.

F. Selection of Public Policy Transmission Project and Designation of Designated Public Policy Projects and Designated Entities

1. Identifying Designated Public Policy Projects and Designated Entities

The current Public Policy Process requires the NYISO staff to compile a draft Public Policy Transmission Planning Report near the end of the evaluation process. The draft report, among other things, preliminarily identifies the more efficient or cost-effective transmission solution, as well as the required in-service date for that solution.⁹⁶ The draft report is reviewed by NYISO stakeholders and undergoes review and final approval by the NYISO Board.⁹⁷

The NYISO proposes to revise its requirements for the Public Policy Transmission Planning Report and for concluding the Public Policy Process to designate upgrade and new portions of the selected Public Policy Transmission Project to the Developer and/or NYTO as applicable.⁹⁸ Specifically, in the draft Public Policy Transmission Planning Report, the NYISO will now include: (i) the facilities list included with the Viability and Sufficiency Assessment that indicates the new transmission facilities and Public Policy Transmission Upgrades associated with the project proposals, and (ii) a breakdown of the new transmission facilities and any Public Policy Transmission Upgrades that make up the Public Policy Transmission Project recommended for selection.⁹⁹ The report will also identify the Designated Public Policy

⁹⁵ See Order No. 1000, at P 328 (“requir[ing] each public utility transmission provider to amend its OATT to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation”).

⁹⁶ OATT § 31.4.11.

⁹⁷ *Id.*

⁹⁸ The NYISO will group components into Designated Public Policy Projects based on the entity that will be responsible for developing, constructing, financing, owning, operating, and maintaining the facility(ies). For example, if the Public Policy Transmission Project does not contain any Public Policy Transmission Upgrades, then there would only be one Designated Public Policy Project. If a non-incumbent transmission Developer proposes a Public Policy Transmission Project that contains a new transmission facility and a Public Policy Transmission Upgrade, then there would be two Designated Public Policy Projects—one made up of the new transmission facility and the other being the Public Policy Transmission Upgrade. However, if an incumbent transmission developer (*i.e.*, an NYTO that proposes modifications to its existing transmission facilities) proposes, as a Public Policy Transmission Project, both new transmission facilities and upgrades only to its own existing transmission facilities, then the NYISO will group both facilities into a single Designated Public Policy Project for which the NYTO is the Designated Entity.

⁹⁹ Proposed revisions to OATT § 31.4.11.

Project(s) that constitute the Public Policy Transmission Project recommended for selection and the Designated Entities responsible for developing them.¹⁰⁰

The NYISO will designate the Developer that proposed the Public Policy Transmission Project recommended for selection as the Designated Entity for the new transmission facility elements of the selected project, which project elements will constitute one Designated Public Policy Project.¹⁰¹ If the project included any Public Policy Transmission Upgrades, the NYISO will designate the applicable NYTO as the Designated Entity for those components of the selected Public Policy Transmission Project that meet the definition of a Public Policy Transmission Upgrade and that upgrade the NYTO's existing transmission facilities, which project elements will constitute a separate Designated Public Policy Project.¹⁰² If the project includes Public Policy Transmission Upgrades that impact more than one NYTO, the NYISO will designate each NYTO as a Designated Entity with a corresponding Designated Public Policy Project.

2. Identifying In-Service Dates

The Public Policy Transmission Planning Report currently identifies the required in-service date for the selected Public Policy Transmission Project as specified by the OATT.¹⁰³ Based on the NYISO's experience in administering past Public Policy Transmission Projects, Developers may propose a solution that would require sequencing of facilities to construct the project in time to meet the required project in-service date, taking into account, for example, the need for outage coordination on the existing system.¹⁰⁴ Because a selected Public Policy Transmission Project could be broken up into several Designated Public Policy Projects under the proposed tariff rules and may require that the project components be constructed on a particular timeframe to meet the ultimate in-service date for the selected project, the NYISO proposes revisions to the rules concerning the in-service date(s) for the Designated Public Policy Project(s).

As revised, the default requirement is that the required in-service date established for the selected Public Policy Transmission Project in the Public Policy Transmission Planning Report will apply to all of the Designated Public Policy Projects that make up the selected project.¹⁰⁵ However, the report may also include specific dates by which one or more of the Designated Public Policy Projects must be in service for the selected Public Policy Transmission Project to

¹⁰⁰ Proposed revisions to OATT §§ 31.4.8.3.2, 31.4.11.

¹⁰¹ Proposed revisions to OATT § 31.4.11. The NYISO also clarifies that if more than one Developer jointly proposed the Public Policy Transmission Project, then they will collectively be the Designated Entity and jointly and severally responsible for the completion of the Designated Public Policy Project. Proposed revisions to OATT § 31.4.11.

¹⁰² Proposed revisions to OATT § 31.4.11.

¹⁰³ OATT § 31.4.11.

¹⁰⁴ See generally, Development Agreement among the New York Independent Operator, Inc, LS Power Grid New York Corporation I, and New York Power Authority (Service Agreement No. 2514), Appx. C (February 3, 2020); Development Agreement among the New York Independent Operator, Inc. and Niagara Mohawk Power Corporate d/b/a National Grid and New York Transco LLC (Service Agreement No. 2510), Appx. C (January 10, 2020).

¹⁰⁵ See OATT § 31.4.11.

meet the overall in-service date.¹⁰⁶ Consistent with its ability to request additional information from Developers, the NYISO will request any additional information needed to understand the project's construction sequencing and identify the in-service dates for the different components, if necessary.¹⁰⁷ The Designated Entity(ies) must develop the Designated Public Policy Project(s) in line with the in-service date(s) established in the Public Policy Transmission Planning Report. The date(s) will be memorialized in the Development Agreement for each Designated Public Policy Project.¹⁰⁸

3. Selection and Finalization of Designated Entities

Under the current process, following the issuance of the draft Public Policy Transmission Planning Report, the report is reviewed in the NYISO's stakeholder process, voted on by the NYISO's stakeholder Business Issues Committee and Management Committee, and subject to review and approval by the NYISO Board.¹⁰⁹ The NYISO Board's approval of the Public Policy Transmission Planning Report, which includes the Public Policy Transmission Project recommended for selection, concludes the process for identifying the more efficient or cost-effective transmission project. Under the current rules, the proposing Developer would be responsible for developing, constructing, financing, operating, and maintaining the selected solution.

The NYISO proposes to include an additional step in this process that will finalize the Designated Entities that will be responsible for developing, constructing, financing, operating, and maintaining the Designated Public Policy Project(s) that make up the selected Public Policy Transmission Project. This additional step provides the point in the process where an NYTO finally determines whether it wishes to exercise the NYTOs' ROFR Rights for any Public Policy Transmission Upgrades.

Within 30 calendar days of the NYISO Board's approval of the Public Policy Transmission Planning Report, an NYTO that has been identified as a Designated Entity for a Designated Public Policy Project (*i.e.*, for one or more Public Policy Transmission Upgrades on its system) must provide notice to the NYISO if it does not intend to exercise its ROFR for one or more upgrades.¹¹⁰ If the NYTO does not take any action within this period with regard to one or more Public Policy Transmission Upgrades, the NYTO will be the Designated Entity concerning the Public Policy Transmission Upgrade(s) and will be responsible for constructing them and placing them in service by the in-service date for its Designated Public Policy Project

¹⁰⁶ Proposed revisions to OATT § 31.4.11.

¹⁰⁷ Proposed revisions to OATT § 31.4.11. Based on the NYISO's experience with previously selected Public Policy Transmission Projects, the identification of such in-service dates for specific components will generally be based on the project milestones submitted as a part of the project information. The NYISO, together with its independent consultant, will determine the in-service dates for project components, as necessary, in applying the project milestone schedule to the Required Project In-Service Date identified in the Public Policy Transmission Planning Report.

¹⁰⁸ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 1, 3.3.4, 3.4.1, 3.4.2, 3.5.

¹⁰⁹ OATT §§ 31.4.11.1, 31.4.11.2.

¹¹⁰ Proposed new OATT § 31.4.11.3.

identified in the Public Policy Transmission Planning Report.¹¹¹ If, on the other hand, the NYTO notifies the NYISO that it rejects its designation with regard to one or more Public Policy Transmission Upgrades, the NYISO will designate such upgrade to the Developer that proposed the underlying Public Policy Transmission Project, which upgrade(s) will be included in the Developer's Designated Public Policy Project.¹¹² At the conclusion of the notification period, the NYISO will post on its website a final list of the Designated Entities and their associated Designated Public Policy Projects.¹¹³ All Designated Entities will be eligible to allocate and recover the costs of their Designated Public Policy Projects under the OATT.¹¹⁴

As discussed in Part III.C.2 above, certain stakeholders disagreed with the timing of when in the Public Policy Process an NYTO must exercise the NYTOs' ROFR. The NYISO explored several options during its extensive discussions with all interested parties as to the timing of the designation process, each of which had certain benefits and drawbacks, with some approaches not practically feasible to implement. Some of the suggestions included: (i) requiring NYTOs to identify facilities for which it would exercise its ROFR prior to the NYISO soliciting solutions for a proposed need, (ii) requiring an NYTO to exercise such right at the midpoint of the process after projects are known, but prior to the NYISO's evaluation and selection of such projects, and (iii) requiring an NYTO to exercise such right following the NYISO's selection of the more efficient or cost-effective transmission solution, which is similar to the approach in some of other planning regions.

The NYISO determined that requiring NYTOs to exercise their ROFR as a part of the selection process, in addition to the other revisions, results in a balanced approach that provides transparency of the process to interested parties and does not significantly extend the timeframe of the Public Policy Process. The NYISO spent a significant amount of time considering whether there was a point before the NYISO Board's selection of a solution at which the NYTOs' should be required to exercise the NYTOs' ROFR to obtain additional benefits to the process. After consideration of all the comments and positions of the stakeholders, the NYISO determined that requiring NYTOs to exercise the ROFR at an earlier point could substantially delay the completion of the Public Policy Process by requiring the NYTOs to assess and consider a significant number of Public Policy Transmission Upgrades and upgrade permutations—many of which would be associated with projects that would not ultimately get selected. Additionally, the NYISO's proposed mechanism is similar to mechanisms for effectuating the right of transmission providers related to upgrades in other regions with a sponsorship planning model.¹¹⁵

Moreover, the structure of the proposed mechanism to implement the NYTOs' ROFR Rights continues to provide flexibility to non-incumbent transmission Developers in designing and proposing solutions to an identified need. While an upgrade may be designated to the NYTO owning the facility to be upgraded, the ability to propose both new transmission facilities and upgrades to existing transmission facilities provides optionality for non-incumbent transmission Developers to design their projects to best advantage them in the evaluation and

¹¹¹ Proposed new OATT § 31.4.11.3.

¹¹² Proposed new OATT § 31.4.11.3.

¹¹³ Proposed new OATT § 31.4.11.3.

¹¹⁴ Proposed new OATT § 31.4.8.3.3; *see also* Part III.H, *infra*.

¹¹⁵ *See, e.g.*, PJM Operating Agreement, Schedule 6, section 1.5.8.

selection process, even though an upgrade may be designated to the applicable NYTO. Having clear and transparent rules consistent with the requirements of Order No. 1000 allows Developers to make the upfront determinations as to whether or not to include upgrades in their proposals. In addition, the existence of the mechanism to implement the NYTOs' ROFR Rights does not always equate to an NYTO exercising its right, in which case, the upgrade would be designated to the proposing Developer. There a number of considerations for an NYTO in exercising its ROFR over an upgrade, such as the nature of the work, the proposed facility as upgraded, and the required in-service date of the upgrade.

As discussed in Part III.C.2 above, the retention of a non-incumbent transmission Developer's ability to propose upgrades as a part of its overall proposal maintains the competitiveness required by the Commission in Order No. 1000. The NYISO could have considered, consistent with certain other regions' planning processes, entirely removing upgrades subject to a permissible ROFR from the competitive evaluation process.¹¹⁶ However, based on its current sponsorship model and experience in the Public Policy Process, the NYISO believes that the proposed revisions still incent Developers, including non-incumbent transmission developers, to participate and provide innovative solutions.

Certain stakeholders also argued that the presumption in the Public Policy Process should be that the NYTO will not exercise its ROFR and, therefore, not be the Designated Entity for Public Policy Transmission Upgrades. In other words, that the decision that an NYTO must make after the NYISO Board approves the Public Policy Transmission Planning Report should be whether it does or does not want to be the Designated Entity for Public Policy Transmission Upgrades, rather than whether it does not want to be the Designated Entity. The NYISO disagrees. The ISO-TO Agreement and Operating Agreements provide that the NYTO retains its rights incident to ownership of its transmission facilities.¹¹⁷ The NYISO believes that the presumption should be consistent with the NYTOs' reserved rights to upgrade their own facilities. Therefore, the NYTO may elect not to exercise its ROFR and not to be the Designated Entity by expressly notifying the NYISO. In such case, the NYTO's rejection to serve as the Designated Entity will not undermine the evaluation and selection of the project as the more efficient or cost-effective solution. As described above, the project costs are evaluated using the NYISO's independent cost estimates for Public Policy Transmission Upgrades versus using the Developer's cost estimates, including any voluntary Cost Cap.

Ultimately, the NYISO believes that this presumption is a matter of semantics and will not drive any meaningful difference in the impact of the exercise of the NYTOs' ROFR Rights on the process. The NYTO will have notice early in the Public Policy Process of potential Public Policy Transmission Upgrades that impact its system, will be identified as the Designated Entity in the draft Public Policy Transmission Planning Report, and will be extensively involved throughout the stakeholder discussions and the review of the report.¹¹⁸

¹¹⁶ See footnote 70, *supra*.

¹¹⁷ See footnote 12, *supra*.

¹¹⁸ An NYTO that is eligible to be a Designated Entity for a Public Policy Transmission Upgrade will also likely be engaged early on as a Connecting Transmission Owner under the NYISO's Transmission Interconnection

G. Post-Designation Requirements

The NYISO's current Public Policy Process establishes the post-selection obligations for the Developer of a selected Public Policy Transmission Project, along with the requirements for the allocation and the recovery of the costs of the selected projects.¹¹⁹ The NYISO proposes to revise these post-selection requirements to incorporate the changes that may result in more than one Designated Entity—one of which may be an NYTO that exercised its ROFR—developing the selected Public Policy Transmission Project. As described below, the revised post-selection requirements generally apply the same post-selection requirements to Designated Public Policy Project(s) that currently apply to the selected Public Policy Transmission Project, with certain additional requirements to address the circumstances in which there may be multiple, interrelated Designated Public Policy Projects that collectively constitute the selected Public Policy Transmission Project.

1. Approvals and Authorizations

Consistent with its current requirements for the selected Public Policy Transmission Project, the Designated Entity will be subject to the same requirements for its Designated Public Policy Project for obtaining the required project approvals and authorizations.¹²⁰ However, when a portion of a Developer's project that constitutes a Public Policy Transmission Upgrade is designated to the applicable NYTO, the NYISO clarifies that the Developer that submitted the underlying Public Policy Transmission Project is not required to provide any additional information or resources to an NYTO concerning a Public Policy Transmission Upgrade other than what information must currently be disclosed under the Public Policy Process.¹²¹

The revision to Section 31.4.12.1 of the OATT addresses stakeholder concerns regarding the lengths to which a Developer must go to support the development of a Public Policy Transmission Upgrade for which an NYTO has exercised its ROFR. The tariff revision establishes a clear limit to the obligations of the Developer that proposed the selected project. While the NYISO proposes to include coordination provisions among Designated Public Policy Projects that make up a selected Public Policy Transmission Project in the Development Agreement, as further discussed in Part III.F.2 below, the NYISO does not require the Developer to be involved in supporting the obligations that an NYTO takes on when it exercises its ROFR. However, nothing prevents the NYTO from engaging in arms' length negotiations with the Developer for the engineering and other project management work that has been performed on the project to date, and the parties can enter into an agreement for the sharing of additional information.

Procedures for a Developer's proposed solution and through the Public Policy Process reviewing the draft Public Policy Transmission Planning Report as Developers are proposing changes to the NYTO's existing system. *See generally*, OATT § 22.

¹¹⁹ *See* OATT § 6.10; proposed new OATT §§ 31.4.8.3.4, 31.4.12, 31.4.13, 31.4.14, 31.5, 31.7 (Appx. D).

¹²⁰ Proposed revisions to OATT § 31.4.12.1.

¹²¹ Proposed revisions to OATT § 31.4.12.1.

2. Development Agreement

The Developer of the selected Public Policy Transmission Project is also required to enter into a Development Agreement with the NYISO, which governs the terms by which the Developer must develop and place the project in-service by the required in-service date.¹²² The NYISO proposes to revise the requirement to provide that each Designated Entity must enter into a separate Development Agreement in the form contained in Section 31.7 (Appendix D) of Attachment Y to the OATT for its applicable Designated Public Policy Project.¹²³ The NYISO proposes to maintain the same requirements for a Designated Entity to enter into a Development Agreement, regardless of whether the entity is an incumbent or non-incumbent transmission Developer or an NYTO.

In addition, the NYISO proposes to modify certain provisions throughout the Development Agreement to require coordination between the Designated Entities of Designated Public Policy Projects that make up the selected Public Policy Transmission Project in order for the project to be developed consistent with the project proposal selected by the NYISO and to enter into service by the required date.¹²⁴ Such coordination assists with the Designated Entities undertaking the development and construction of their portions of the selected Public Policy Transmission Project and addresses unilateral changes by one Designated Entity that could have an impact on the design or in-service date of another portion of the selected project. While the NYISO remains the party that will review proposed changes in the milestone dates and design of the project under the existing provisions of the Development Agreement, the requirements for coordination remove unnecessary delay in the NYISO serving as the intermediary when reviewing a change in the schedule or design.

The key changes to the Development Agreement are as follows:

- The NYISO proposes: (i) to modify the defined terms in the Development Agreement so that it applies to a Designated Public Policy Project for which a Designated Entity is responsible, and (ii) to revise the recitals and definitions in the agreement to align with the new tariff rules for Designated Public Policy Projects and the potential for different in-service dates for such Designated Public Policy Projects than the overall in-service date for the selected project.
- The NYISO proposes to revise the milestone requirements to indicate that: (i) the NYISO will provide the Designated Entity with the required in-service date for the Designated Public Policy Project, along with the required in-service date for the selected Public Policy Transmission Project, and (ii) that the Critical Path

¹²² OATT §§ 31.4.12.1, 31.7 (Appx. D).

¹²³ Proposed revisions to OATT § 31.4.21.1. The NYISO will tender such agreements as soon as reasonably practicable following its issuance of the final list of the Designated Entities and Designated Public Policy Projects, rather than post selection. Proposed revisions to OATT § 31.4.12.1. In addition, the NYISO made conforming changes to the definition of Development Agreement to account for Designated Public Policy Projects. Proposed revisions to OATT § 31.1.1.

¹²⁴ Proposed revisions to OATT § 31.4.12.1.

Milestones and Advisory Milestones must provide for the Designated Public Policy Project to be in service by the applicable dates.¹²⁵

- The NYISO also clarifies that any milestone that requires action by another Designated Entity must be an Advisory Milestone, rather than a Critical Path Milestone.¹²⁶ This proposed modification is consistent with the Commission's prior requirement for milestones that required action by Connecting Transmission Owners or Affected System Operators to provide that delays of other Transmission Owners cannot result in the termination of this agreement.¹²⁷
- The NYISO proposes to modify provisions allowing a Developer to request an update to its Critical Path Milestones or required project in-service date, or to make a change to its project, to provide that any change requested by a Designated Entity for its Designated Public Policy Project is coordinated with and does not interfere any other related Designated Entities or the grounds for the NYISO's selection of the overall Public Policy Transmission Project.¹²⁸ If a Designated Entity requests such a change, the Designated Entity must now demonstrate that the change does not impact other Designated Public Policy Projects and provide an officer's certificate from the other potentially affected Designated Entities certifying their capability to complete their projects in line with the modified dates or that any project changes will not materially impact the development of the other projects.¹²⁹ The NYISO's approval of such changes will also require its determination that the change will not materially impact the development of another Designated Public Policy Project related to the same selected Public Policy Transmission Project.¹³⁰ In addition, the NYISO proposes revisions to clarify that other Designated Entities will not unreasonably withhold, condition, or delay any required input, information, or certification concerning the requested changes.¹³¹
- The NYISO proposes to specify that the Designated Entity will provide updates and information upon the NYISO's request to assist with the coordination across related Designated Public Policy Projects.¹³²
- The NYISO proposes to revise the default provision to provide that any extensions of the cure period must also account for the impact on the Designated

¹²⁵ Proposed revisions to OATT § 31.7 (Appx. D), Development Agreement Article 3.3.1.

¹²⁶ Proposed revisions to OATT § 31.7 (Appx. D), Development Agreement Article 3.3.1.

¹²⁷ *New York Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,341, at P 67 (2015).

¹²⁸ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.3.4, 3.4.1, 3.4.2, 3.5.

¹²⁹ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.3.4, 3.4.1, 3.4.2, 3.5.

¹³⁰ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.3.4, 3.4.3, 3.4.2, 3.5.

¹³¹ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.3.6, 3.4.3.

¹³² Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.7.

Entity's and other Designated Entities' ability to complete their related projects by the required in-service date(s).¹³³

- The NYISO proposes to revise the termination provisions to make clear that the NYISO will not terminate the agreement on the grounds that the Designated Entity cannot complete its project by the required project in-service date if the delay is due to another Designated Entity.¹³⁴
- In addition, the NYISO proposes to insert an additional termination provision that permits the NYISO to terminate a Development Agreement if another Designated Entity defaults on the development of its related project and the NYISO decides to address the overall need in a future planning cycle.¹³⁵ If a Developer defaults on the development of its Public Policy Transmission Project, the NYISO may currently elect to address the need in a subsequent planning cycle.¹³⁶ As described in Part III.G.4 below, the NYISO has modified these requirements to now apply to a Designated Entity that will not complete its Designated Public Policy Project. Since there could be multiple Designated Public Policy Projects that are part of a selected Public Policy Transmission Project, termination of one or more Designated Public Policy Projects could result in certain project components being unable to proceed, while other related project components are still proceeding, regardless of whether it makes sense for the remaining components to continue. For instance, if the major portion of the project cannot proceed and the NYISO elects to address the underlying need in a subsequent planning cycle, it may no longer make sense to proceed with just an upgrade portion of the project. As revised, the NYISO may terminate the development of that upgrade, but would not use this termination as grounds to bid a Public Policy Transmission Upgrade to another qualified Developer.¹³⁷ In such a scenario, as described below, the Designated Entity of the terminated upgrade project would be eligible to recover its costs.
- The NYISO proposes to modify the cost recovery requirements in the agreement to align with the modifications to the Cost Cap requirements described above.¹³⁸
- The NYISO proposes to modify the Force Majeure requirements to account for potential delays to both the in-service date for the Designated Public Policy Project and, if different, the in-service date for the overall selected Public Policy Transmission Project.¹³⁹

¹³³ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 7.2.

¹³⁴ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 8.1.

¹³⁵ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 8.1.

¹³⁶ OATT § 31.4.12.3.1.2.

¹³⁷ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 8.3; *see also* proposed new OATT Section 31.4.12.3.1.5.

¹³⁸ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 15.3.

¹³⁹ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 15.3.

- The NYISO proposes to revise the description that it is not liable for its review and approval of the Developer's materials to cover both the materials submitted by the Developer of the selected Public Policy Transmission Project and, if different, the Designated Entity developing the Designated Public Policy Project.¹⁴⁰
- Finally, the NYISO proposes to insert certain changes to align the requirements in the Development Agreement for the Designated Public Policy Project with the interconnection requirements for such project.¹⁴¹

3. Designated Entity's Responsibility to Complete the Interconnection-Related Studies in the Transmission Interconnection Procedures

Following selection of a Public Policy Transmission Project, the current OATT requires the Developer to complete the necessary interconnection-related studies for the project to reliably interconnect to the New York State Transmission System. Generally, the step following selection is for the Developer to proceed forward with the Facilities Study under the Transmission Interconnection Procedures ("TIP") under Attachment P of the OATT, unless the project's System Impact Study is still in progress. To provide for the comparable treatment of both incumbent and non-incumbent transmission Developers and to ensure an efficient process following selection, the NYISO proposes minor revisions to the provisions of TIP to provide a clear procedure by which an NYTO, when serving as the Designated Entity of a Designated Public Policy Project, can complete the necessary studies for its assigned Designated Public Policy Project without imposing additional requirements.

First, the NYISO proposes to revise the rules governing the submission of a Transmission Interconnection Application under the TIP to allow an NYTO of a Designated Public Policy Project that is a part of another Transmission Developer's Transmission Interconnection Application for the underlying selected Public Policy Transmission Project clear options on submitting a new application. Specifically, the proposed revisions would allow the NYTO, as a Designated Entity, to join an ongoing Transmission Interconnection Application with the agreement of the original Transmission Developer to further study the Designated Public Policy Projects together.¹⁴² The NYTO would as a condition of joining be jointly and severally responsible with the original Transmission Developer for the study costs of the Transmission Interconnection Application. Any apportionment of the costs would be between the original Transmission Developer and the NYTO, as a Designated Entity. Otherwise, the NYTO would be responsible for the costs associated with submitting a new application.

As an alternative to joining the ongoing application, the NYTO can submit a new and separate Transmission Interconnection Application for just its Designated Public Policy Project portion of the selected project and proceed in parallel. The NYISO will generally perform a cluster for this Transmission Interconnection Application and the ongoing Transmission Interconnection Application submitted by the original Transmission Developer. The NYISO

¹⁴⁰ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Article 15.7.

¹⁴¹ Proposed revisions to OATT, Section 31.7 (Appx. D), Development Agreement Articles 3.2, 4.1, 4.2.

¹⁴² Proposed revisions to OATT § 22.4.1.

proposes explicit tariff revisions that would move the components of the new Transmission Interconnection Application from the existing application, and the NYISO proposes to amend the modification provisions under Section 22.5.4.2 of the OATT to allow for the change without affecting the original Transmission Developer's application.¹⁴³

The proposed revisions also provide that the new Transmission Developer (*i.e.*, the NYTO serving as a Designated Entity) may move directly to the Facilities Study if (i) the SIS for the original Transmission Interconnection Application was completed and the new application contains components from that original application and (ii) there have been no material modifications to the Transmission Project, including the Designated Public Policy Project, since the SIS was performed.¹⁴⁴

The current Transmission Developer of the application in the TIP then can modify its existing application without it being considered a material modification under Section 22.4.4.4 of the OATT. The NYTO then may move directly to the Facilities Study if the SIS has been completed under the existing application. This provision provides for the efficient processing of the selected Public Policy Transmission Project without delays while ensuring that the NYISO, Connecting Transmission Owner(s), and Affected System(s) performed a full review of the Transmission Project under the NYISO's Transmissions Interconnection Standard.

4. Designated Entity's Inability to Complete a Project

The Public Policy Process establishes rules for addressing a Developer's inability to complete a selected Public Policy Transmission Project.¹⁴⁵ Specifically, the NYISO may: (i) address the underlying Public Policy Transmission Need in another planning cycle, (ii) direct the Developer to continue with the development, or (iii) solicit bids from qualified Developers to step in and complete the project.¹⁴⁶ The NYISO proposes to supplement these requirements to account for the potential for multiple Designated Public Policy Projects making up the selected Public Policy Transmission Project.

First, the NYISO proposes to add an option if the Designated Entity that is unable to proceed with its Designated Public Policy Project is an NYTO that exercised its ROFR for a Public Policy Transmission Upgrade that it did not originally propose. In such case, prior to soliciting for bids to complete the Public Policy Transmission Upgrade, the NYISO will first offer the upgrade to the Developer that proposed the Public Policy Transmission Project that included the upgrade, if applicable.¹⁴⁷ If the Developer elects to take on the upgrade, it will be added to the Developer's Designated Public Policy Project.¹⁴⁸ The Developer will include the

¹⁴³ Proposed revisions to OATT § 22.4.1; *see also* proposed revisions to OATT § 22.5.4.2 (expressly excepting from being a material modification, a modification "to remove components of a Transmission Project that were designated to a Designated Entity, as defined in Attachment Y to the ISO OATT, other than the Transmission Developer and for which the Designated Entity submitted a separate Transmission Interconnection Application").

¹⁴⁴ Proposed revisions to OATT § 22.4.2.

¹⁴⁵ OATT § 31.4.12.3.

¹⁴⁶ *Id.*

¹⁴⁷ Proposed revisions to OATT §§ 31.4.12.3.1.2, 31.4.12.3.1.4.

¹⁴⁸ Proposed revisions to OATT § 31.4.12.3.1.4. The Developer will have 30 calendar days to make this determination.

Public Policy Transmission Upgrade in its Development Agreement and will be eligible to allocate and recover the costs of the upgrade through the OATT.¹⁴⁹ Finally, the NYISO proposes to include the same transfer rules for this scenario that apply when transferring an incomplete project that has been bid out.¹⁵⁰

Second, as described in Part III.G.2 above, the NYISO may terminate the Development Agreement of a Designated Entity's Designated Public Policy Project because (i) another Designated Entity defaulted on the development of related Designated Public Policy Project and (ii) the NYISO determined to address the underlying Public Policy Transmission Need in another planning cycle.¹⁵¹ As noted above, in such case, the Developer may recover all of the necessary and reasonable costs incurred and commitments made up to the notice of termination of the Development Agreement, including reasonable and necessary expenses incurred to implement an orderly termination of the project, to the extent permitted by the Commission in accordance with its regulations on abandoned plant recovery.¹⁵² This is consistent with the NYISO's planning requirements in other cases in which a Developer's project is terminated for grounds outside of its control.¹⁵³ The NYISO will allocate such costs on a load ratio share basis, unless otherwise determined by the Commission, which costs can be recovered by the Designated Entity under the OATT.¹⁵⁴

H. Cost Allocation and Cost Recovery

The NYISO proposes to revise the cost allocation and cost recovery rules for its Public Policy Process to accommodate the proposed structure to identify one or more Designated Public Policy Projects that comprise the selected Public Policy Transmission Project and that will be assigned to a specific Designated Entity to develop, construct, finance, operate, and maintain.¹⁵⁵ Specifically, the NYISO proposes to make minor revisions to the process for prescribing the cost allocation methodology for a Public Policy Transmission Need to account for the possibility of more than one Designated Entity for a Public Policy Transmission Need and the cost recovery rules to incorporate the new terms.

Section 31.5.5.4 of Attachment Y to the OATT establishes the process for determining the cost allocation methodology applicable to a selected Public Policy Transmission Process to address a Public Policy Transmission Need. As a first step, this process requires the NYISO to file with the Commission any cost allocation methodology prescribed by the NYPSC for the Public Policy Transmission Need.¹⁵⁶ As a second potential step, a Developer may also propose within 30 days of its project's selection an alternative methodology for the NYSPC's

¹⁴⁹ Proposed revisions to OATT § 31.4.12.3.1.4.

¹⁵⁰ Proposed revisions to OATT § 31.4.12.3.1.4.

¹⁵¹ Proposed revisions to OATT, § 31.7 (Appx. D), Development Agreement Article 8.3; *see also* proposed new OATT § 31.4.12.3.1.5.

¹⁵² Proposed new OATT § 31.4.12.3.1.5.

¹⁵³ *See, e.g.*, OATT §§ 31.5.5.3, 31.5.6.

¹⁵⁴ Proposed new OATT § 31.4.12.3.1.5; proposed revisions to OATT §§ 31.5.5.3, 31.5.6.3.2.

¹⁵⁵ Proposed revisions to OATT §§ 31.5.1.1, 31.5.1.7, 31.5.5.1, 31.5.5.3.

¹⁵⁶ OATT § 31.5.5.4.1. Nothing in the process requirements deprives the NYTO or other Developers from any rights they have under Section 205 of the FPA to submit a filing to propose an alternative cost allocation methodology. *Id.* §§ 31.5.5.4, 31.5.5.4.1.

consideration, and in the event the Developer and NYPSC do not identify a mutually agreeable methodology, the Developer may file such methodology with the Commission.¹⁵⁷ In the absence of the Commission accepting a methodology prescribed by the NYPSC or proposed by a Developer, the NYISO's process provides for using a load ratio share cost allocation methodology.¹⁵⁸

The NYISO proposes several minor changes to this process to address the potential for multiple Designated Public Policy Projects that constitute the selected Public Policy Transmission Project. First, the NYISO proposes to revise from 30 to 60 days the timeframe for a Designated Entity to submit a proposed cost allocation methodology to the NYPSC. The NYISO proposes to modify the timeframe to account for the 30-day period post selection for an NYTO to determine if it wishes to be responsible for a Designated Public Policy Project, when that project is comprised of Public Policy Transmission Upgrades that were originally proposed by another Developer. Second, the NYISO proposes revisions to the requirements concerning the NYPSC's review of proposed alternative cost allocation methodologies to account for the potential of multiple Designated Entities proposing cost allocation methodologies.¹⁵⁹

The NYISO also proposes minor conforming revisions to the cost recovery rules for its Public Policy Process to establish that the rules apply to a Designated Public Policy Project that is a Public Policy Transmission Project, or a part of such project, selected by the NYISO as the more efficient or cost-effective transmission solution to address a Public Policy Transmission Need.¹⁶⁰

I. Miscellaneous Tariff Changes

The NYISO proposes to make the following additional clarifications and clean-up revisions to the OATT in connection with including a mechanism to account for and implement the NYTOs' ROFR Rights, as well as several non-substantive changes, such as correcting spacing in the portions of the revised tariff. Specifically, the NYISO proposes to update the general description of the Public Policy Process consistent with the modifications to the process described in this filing. The NYISO proposes to revise the definitions of "Public Policy Transmission Planning Process" and "Public Policy Transmission Planning Report" in Section 31.1.1 of the OATT to account for the new designation process. Additionally, the proposed revisions revise the summary of the Public Policy Process in Sections 31.1.5 and 31.4.1 of the OATT to update the process description to account for the new designation process. Finally, in revising the definitions contained in Section 31.1 of the OATT, the NYISO proposes to also make a ministerial change to relocate the definition of "Public Policy Requirement" in Section 31.1.1 to maintain an alphabetical order of terms.

¹⁵⁷ OATT § 31.5.5.4.2.

¹⁵⁸ *Id.* § 31.5.5.4.3.

¹⁵⁹ Proposed revisions to OATT §§ 31.5.5.4.2.1, 31.5.5.4.2.2, 31.5.5.4.2.3.

¹⁶⁰ Proposed revisions to OATT §§ 6.10.1, 31.5.6.3.

IV. Requested Effective Date

The NYISO requests that the Commission accept the proposed tariff revisions with an effective date of the date of this filing—October 8, 2021. With the requested effective date, the NYISO proposes that the tariff revisions will apply prospectively in the current 2020-2021 planning cycle of the Public Policy Process.

On August 3, 2020, the NYISO commenced its Public Policy Process for the 2020-2021 planning cycle by soliciting for proposed transmission needs that interested parties believe are being driven by Public Policy Requirements and for which the NYISO should solicit and evaluate transmission solutions.¹⁶¹ On March 18, 2021, the NYPSC issued an order that determined that New York State’s Climate Leadership and Community Protection Act constitutes a Public Policy Requirement driving the need for additional transmission facilities to (i) deliver the output of offshore wind generating resources based on a transmission need to add at least one new intertie cable to increase the export capability between NYISO’s Zone K to Zones I and J to ensure the full output from at least 3,000 MW of offshore wind is deliverable from Long Island to the rest of the State, and (ii) upgrade associated local transmission facilities to accompany the expansion of the proposed offshore export capability (hereinafter, “Long Island Offshore Wind Export PPTN”).¹⁶² In accordance with the OATT, the NYISO issued a solicitation on August 12, 2021, seeking proposed solutions to the Long Island Offshore Wind Export PPTN.¹⁶³ The NYISO’s solicitation stated that all proposed solutions—both Public Policy Transmission Projects and Other Public Policy Projects—are due by October 11, 2021 and specified the applicable requirements for submitting a proposal.

As described in Part III.C.1 above, the NYISO specifically structured the proposed tariff revisions, together with coordinating amendments to the NYISO’s Public Policy Transmission Planning Process Manual, to serve as prospective changes that would apply to the process in evaluating proposed solution to the Long Island Offshore Wind Export PPTN. The NYISO, under its existing tariff rules, revised the Data Submission for Public Policy Transmission Projects form to receive the project information from Developers in a format that will work in concert with the proposed changes to the rules once the proposed revisions go into effect.

Additionally, the NYISO has continuously advised potential Developers, NYTOs, and other interested parties in the current planning cycle of the Public Policy Process that: (i) the NYISO’s foundational agreements and OATT afford the NYTOs a ROFR to build, own, and recover the cost of upgrades to their existing facilities, including those proposed as a part of another Developer’s proposal, and (ii) the NYISO is seeking tariff revisions to implement the NYTOs’ ROFR Rights that will apply in the current planning cycle of the Public Policy Process

¹⁶¹ 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>.

¹⁶² See Order Addressing Public Policy Requirements for Transmission Planning Purposes, *In the Matter of New York Independent System Operator, Inc.’s Proposed Public Policy Transmission Needs for Consideration for 2020*, NYPSC Case No. 20-E-0497, *et al.* (March 19, 2021) (“NYPSC PPTN Order”).

¹⁶³ See Long Island Offshore Wind Export PPTN Solicitation.

(including satisfying the Long Island Offshore Wind Export PPTN). The NYISO also advised prospective Developers of the intended application of the proposed revisions in the solicitation for the Long Island Offshore Wind Export PPTN, as well as numerous NYISO working groups.¹⁶⁴ Based on the data submission form and the advance notice, Developers have been fully aware that, if accepted by the Commission, the proposed rules to implement the NYTOs' ROFR Rights would apply in the administration of the Public Policy Process for the Long Island Offshore Wind Export PPTN.

Based on the current deadline for proposed solutions, the NYISO anticipates that it could potentially require three months to issue an initial draft of the Viability and Sufficiency Assessment to stakeholders for their review, depending on, among other things, the number of proposals. If the tariff provisions proposed herein are accepted by the Commission by mid-December 2021, the NYISO can implement the additional, concurrent process of identifying the list of new transmission facilities and Public Policy Transmission Upgrades for projects proposed to meet the Long Island Offshore Wind Export PPTN transmission need (as discussed in Part III.D above) while stakeholders and interested parties are reviewing the Viability and Sufficiency Assessment. Accordingly, the NYISO respectfully requests that the Commission issue an order by December 16, 2021, which will provide for a near seamless incorporation of the proposed tariff revisions into the current Public Policy Process.

In the event that the Commission's action occurs later than December 16, 2021 and following the NYISO's posting of the initial draft of the Viability and Sufficiency Assessment for comment, the NYISO has proposed a transition rule in Section 31.4.6.5.1.2 of the OATT to apply to the current planning cycle of the Public Policy Process with an ongoing need (e.g., Long Island Offshore Wind Export PPTN). Specifically, the NYISO would post a list of new transmission facilities and Public Policy Transmission Upgrades following the issuance of an order on this filing. That posting would start the 20-day comment period for parties, and the NYISO would then post a final version of the list for Developers to decide whether to continue

¹⁶⁴ See, e.g., Long Island Offshore Wind Export PPTN Solicitation (explicitly acknowledging the effort underway to establish a mechanism to effectuate the right of Transmission Owners related to upgrades to their existing facilities); see also NYISO Presentation: *Long Island Offshore Wind Export PPTN Upgrade* (August 18, 2021), available at [https://www.nyiso.com/documents/20142/23873690/04%20LI OSW Export ESPWG.pdf/3972184f-f245-09fb-4ece-3c58eb78f62f](https://www.nyiso.com/documents/20142/23873690/04%20LI%20OSW%20Export%20ESPWG.pdf/3972184f-f245-09fb-4ece-3c58eb78f62f); NYISO Presentation: *Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process* (August 11, 2021), available at [https://www.nyiso.com/documents/20142/23643061/4%20UpgradeMechanism BIC 08.11.2021 FINAL.pdf/81139ad9-b4f8-42ea-51ee-32389b798aa5](https://www.nyiso.com/documents/20142/23643061/4%20UpgradeMechanism%20BIC%2008.11.2021%20FINAL.pdf/81139ad9-b4f8-42ea-51ee-32389b798aa5); NYISO Presentation: *Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process* (August 2, 2021), available at [https://www.nyiso.com/documents/20142/23468463/09a UpgradeMechanism ESPWG-TPAS 20210802.pdf/1ab152fc-e6f2-c38b-5461-9ac1521847f9](https://www.nyiso.com/documents/20142/23468463/09a%20UpgradeMechanism%20ESPWG-TPAS%202010802.pdf/1ab152fc-e6f2-c38b-5461-9ac1521847f9); NYISO Presentation: *Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process* (July 23, 2021), available at <https://www.nyiso.com/documents/20142/23262467/08%20UpgradeMechanism.pdf/80756d9e-8f2a-c459-b912-b5327e90b4d2>; NYISO Presentation: *Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process* (June 22, 2021), available at <https://www.nyiso.com/documents/20142/22444873/04%20Mechanism%20to%20Implement%20TO%20ROFR%20over%20Upgrades%20in%20the%20PPTN.pdf/7a55bf84-95a0-47c6-cff1-2a7d904be526>; NYISO Presentation: *Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process* (July 12, 2021), available at <https://www.nyiso.com/documents/20142/22935516/UpgradeMechanism.pdf/dd78cd15-b70d-b560-352d-7b685d870a2b>.

with the evaluation of their transmission proposals within 60 days of the initial posting of the list. While there could be a degree of re-study required during the evaluation process if the Commission acts after December 16, 2021, Developers will still have the option to withdraw their projects from consideration in the evaluation process without incurring any post-withdrawal Public Policy Process study costs.¹⁶⁵ Moreover, the earlier in the process that the NYISO is able to implement the new tariff requirements, the less need for re-study and related study costs.

There is significant value to the Public Policy Process from the Commission accepting the proposed revisions to be effective for the Long Island Offshore Wind Export PPTN. There is a high potential that solutions proposed to satisfy the current need will include upgrades to the existing transmission facilities. Providing certainty early in the process (*i.e.*, before extensive evaluation is performed) will not only limit any potential impact to Developers but will also support the efficient administration of the process for the Long Island Offshore Wind Export PPTN. In the absence of a mechanism to account for and implement the NYTOs' ROFR Rights in the Public Policy Process, disputes will likely arise and be brought before the Commission creating unnecessary administrative burdens and delays in the development and construction of a potential transmission solution. The consequences of such disputes and delays could affect the competitiveness of the Public Policy Process for the current planning cycle, as well as for addressing future needs.

V. List of Documents Submitted

The NYISO respectfully submits the following documents with this filing letter:

- Order on Petition for Declaratory Order, 175 FERC ¶ 61,038 (2021) (Attachment I);
- Figure regarding “Overview of Proposed Public Policy Transmission Planning Process With a Mechanism to Implement the NYTOs' ROFR Rights” (Attachment II);
- Affidavit of Zachary G. Smith, Vice President, System and Resource Planning (Attachment III);
- A clean version of the proposed revisions to the OATT (Attachment IV); and
- A blacklined version of the proposed revisions to the OATT (Attachment V).

¹⁶⁵ See OATT § 31.12, Appendix I, Section 8.5 (providing for the termination of the Study Agreement for Evaluation of Public Policy Transmission Projects following a Developer's withdrawal of its project from further consideration). Developer would, however, be responsible for the study costs incurred up to the date of its withdrawal of its project from further consideration.

VI. Communications and Correspondence¹⁶⁶

All communications, pleadings, and orders with respect to this proceeding should be directed to the following individuals:

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* Carl F. Patka, Assistant General Counsel
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VII. Service

The NYISO will send an electronic link to this filing to the official representative of each its customers, to each participant on its stakeholder committees, to the New York Public Service Commission, and to the New Jersey Board of Public Utilities. In addition, a complete copy of the documents included with this filing will be posted on the NYISO's website at www.nyiso.com.

VIII. Conclusion

Wherefore, the NYISO respectfully requests that the Commission 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

¹⁶⁶ The NYISO respectfully requests waiver of 18 C.F.R. § 385.203(b)(3) (2021) to permit service on counsel in multiple locations.

Honorable Kimberly D. Bose

October 8, 2021

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Commission issue an order by December 16, 2021, given the current ongoing Public Policy Process to address the Long Island Offshore Wind Export PPTN.

Respectfully submitted,

/s/ Brian R. Hodgdon

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