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May 2, 2017

**SENT VIA ELECTRONIC FILING**

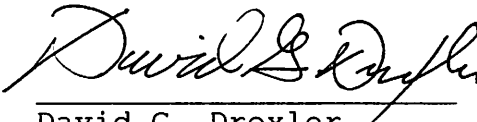
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Re: Docket No. ER17-1310-000 - New York Independent System  
Operator, Inc.

Dear Secretary Bose:

Attached, for filing in the above-referenced proceeding, please find the Motion and Answer of the New York State Public Service Commission. The parties have also been provided a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions regarding the attached, please feel free to contact me at (518) 473-8178.

Very truly yours,

  
David G. Drexler

Attachment  
cc: Service List

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

New York Independent System            )           Docket No. ER17-1310-000  
Operator, Inc.                            )

**MOTION FOR LEAVE TO FILE ANSWER AND ANSWER  
OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION**

**INTRODUCTION AND EXECUTIVE SUMMARY**

Pursuant to Section 31.5.5.4.1 of the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (Tariff), the NYISO is directed to file, "within 60 days," the "particular cost allocation and recovery methodology" prescribed in connection with a Public Policy Transmission Need that is identified by the New York State Public Service Commission (NYPSC). On March 27, 2017, in accordance with this provision, the NYISO filed proposed Tariff revisions on behalf of the NYPSC (Tariff Filing). The Tariff Filing explained that the NYPSC identified a Public Policy Transmission Need with respect to relieving the persistent transmission congestion across certain electrical interfaces, referred to as Central East and Upstate New York/Southeast New York (UPNY/SENY), and prescribed particular methodologies for allocating the costs among the beneficiaries and for containing cost recovery.

The Tariff Filing described the NYPSC's proceeding to address this transmission congestion, including a lengthy public notice and comment process that resulted in the identification of a preferred cost allocation methodology. Specific Tariff revisions were attached to effectuate this methodology "whereby 75% of project costs are allocated to the economic beneficiaries of reduced congestion, while the other 25% of the costs are allocated to all customers on a load-ratio share."<sup>1</sup> This allocation would result in approximately 90% of the project costs being allocated to the downstate region in order to reflect that the primary benefit of the projects would be reduced congestion into downstate load areas. The remaining amount would be allocated upstate to recognize various benefits to those customers in the form of increased reliability and reduced operational costs.

In addition, the Tariff Filing requested that the Commission direct any developer, which is selected to construct the transmission facilities, to apply the NYPSC's preferred cost containment methodology. Under the NYPSC's recommended approach, the developer(s) and ratepayers would be responsible for a 20%/80% share, respectively, of any cost overruns above the bid(s) used to select the projects, and would similarly

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<sup>1</sup> Tariff Filing at p. 4.

share 20%/80% of any savings where actual construction costs are below the bid(s). In addition, developers would forgo any incentive adders to the return on equity, as applied to the cost overruns. This approach for containing cost recovery was designed to preserve the integrity of the NYISO's competitive bidding process and ensure that a project remains "cost-effective" if selected by the NYISO on that basis.

In response to the Federal Energy Regulatory Commission's (Commission) notice soliciting comments on the Tariff Filing, several pleadings were submitted. Various parties filed comments supporting both aspects of the Tariff Filing, including the proposed cost allocation and cost containment methodologies.<sup>2</sup> The only substantive objection to the cost allocation methodology was raised by several New York State Assembly members, who suggested that a greater allocation should be made to upstate, but did not provide an alternative allocation. Procedural and legal objections were raised by New York Transco, LLC (NY Transco) and the indicated New York Transmission Owners (NYTOs), which filed protests requesting that the Tariff Filing be accepted "for informational purposes"

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<sup>2</sup> Comments in support of the Tariff Filing were filed by: 1) the City of New York, Multiple Intervenors, and Consumer Power Advocates; 2) NextEra Energy Transmission New York, Inc.; 3) ITC New York Development, LLC; and, 4) LSP Transmission Holdings, LLC and North American Transmission, LLC (LS Power).

only.<sup>3</sup> In addition, LS Power sought limited clarification that the NYPSC's preferred cost containment methodology should not preclude the NYISO from considering more stringent measures.

This Answer addresses the claims raised by NY Transco and the NYTOs, and clarifies the NYPSC's preferred cost containment methodology, as suggested by LS Power. As discussed herein, the contentions presented by NY Transco and the NYTOs are contrary to Section 31.5.5.4.1 of the Tariff and prior Commission orders which explicitly acknowledge the NYPSC's role to prescribe a cost allocation methodology associated with the underlying public policy requirement, and the NYISO's obligation to ensure that such methodology is filed with the Commission for "approval" rather than filing it merely for informational purposes. These protests are unfounded and represent a collateral attack on the Commission's prior orders.

Moreover, the protests present an illogical view of the NYISO Tariff that depends upon a developer filing its own cost allocation approach under Section 205 of the Federal Power Act in order for the NYPSC's methodology to be considered. The protests, however, fail to recognize or acknowledge that a

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<sup>3</sup> The indicated NYTOs include Consolidated Edison Company of New York, Inc., Central Hudson Gas & Electric Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and, Rochester Gas and Electric Corporation. See, NYTO Protest at p. 2; NY Transco Protest at p. 6.

developer is not required to make such a filing. As a result, under the construct urged by NY Transco and the NYTOs, the NYPSC's preferred cost allocation and cost recovery methodologies may never be considered by the Commission. This outcome would be contrary to the plain language in the NYISO Tariff, the Commission's prior orders, and, notably, the NYTOs joint filing with the NYISO in support of the tariff provisions they now oppose. For these reasons, the arguments raised in the protests lack merit and should be rejected.

With regard to LS Power's comments, it seeks clarification that the NYPSC's preferred methodology for containing cost recovery should not "prohibit consideration of alternative cost containment provisions, including a developer accepting 100% of the risk of cost overruns."<sup>4</sup> According to LS Power, such alternatives may provide a "more robust cost containment arrangement that would provide ratepayers with enhanced benefits," and should therefore be considered as part of the NYISO's selection process.<sup>5</sup>

The NYPSC hereby clarifies that the 20%/80% mechanism for containing cost recovery is intended to serve as a minimum standard, and should not preclude developers from pursuing more

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<sup>4</sup> LS Power Comments at p. 7.

<sup>5</sup> Id.

stringent cost containment approaches. The NYPSC sought to ensure the 20%/80% methodology would serve as a baseline by having developers submit bids to the NYISO that reflected that mechanism, as well as "alternative risk-sharing proposals."<sup>6</sup> The Commission should provide this clarification in requiring any developer(s) selected by the NYISO to apply meaningful cost containment measures. Additionally, the Commission should direct the NYISO to evaluate the developers cost containment methodologies as part of its selection process and to ensure cost recovery is limited accordingly.

**MOTION FOR LEAVE TO ANSWER**

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure (18 C.F.R. §§385.212 and 385.213), the NYPSC hereby submits its Motion for Leave to Answer the protests of NY Transco and the NYTOs and to clarify matters raised by LS Power.<sup>7</sup> The NYPSC requests that the Commission accept this Answer because it presents information that clarifies procedural, legal, and factual matters in the record. These clarifications are needed to ensure that the

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<sup>6</sup> Tariff Filing, Appendix E at p. 45, and Appendix F at pp. 48-49.

<sup>7</sup> The views expressed herein are not intended to represent those of any individual member of the NYPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the NYPSC is authorized to direct this filing on behalf of the NYPSC.

Commission avoids reaching a determination that is procedurally improper and based on factual inaccuracies and mischaracterizations presented by other parties.

The Commission should also accept this Answer so that the NYPSC can respond to arguments advanced for the first time in the protests. It would be prejudicial for the Commission to consider such arguments without providing interested parties with the ability to present opposing viewpoints.

Although answers to answers are generally discouraged, the Commission has accepted answers, similar to those provided here by the NYPSC, because they clarify the record and provide information that will assist the Commission in its decision making process.<sup>8</sup> Accordingly, the Commission should accept the NYPSC's Answer to ensure a complete and accurate record.

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<sup>8</sup> See, e.g., Entergy Louisiana, LLC, 156 FERC ¶61,146 (issued August 31, 2016) at P5, 15 (accepting an Answer to a Motion for Leave to Answer because it provides information that assisted the Commission in its decision-making process); see also Michigan Electric Transmission Company, 156 FERC ¶61,025 (issued July 8, 2016) at P6, 14; Midcontinent Independent System Operator, Inc., 155 FERC ¶61,130 (issued May 3, 2016) at P7, 25.



## DISCUSSION

### I. The Tariff Filing Is Explicitly Authorized Under the NYISO Tariff and Is Consistent With Commission Precedent Finding That The NYPSC's Cost Allocation Approach Will Be Filed For "Approval"

In response to the Commission's request for a timeline explaining how a regional cost allocation method for public policy transmission projects will be established without unnecessary delays, the NYISO and NYTOs proposed a process that included the NYISO filing within 60 days "any cost allocation method prescribed by the underlying public policy requirement."<sup>9</sup> Additional procedures were identified if no such cost allocation method was prescribed or the transmission developer wants to propose a different method. The NYISO and NYTOs clearly intended that this process, which commenced with the filing of the NYPSC's prescribed cost allocation methodology, would ascertain whether the Commission "accepts a cost allocation method" other than the default load-ratio allocation to all load serving entities.<sup>10</sup> The Commission approved this process and found that it adequately addressed the need for a timeline for "determining the applicable cost allocation method."<sup>11</sup>

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<sup>9</sup> Docket No. ER13-102, NYISO, Order on Rehearing and Compliance, 151 FERC ¶61,040 (issued April 16, 2015), at ¶118-119.

<sup>10</sup> Id. at ¶120 (emphasis added).

<sup>11</sup> Id. at ¶121 (emphasis added).

Prior to approving this process, the Commission recognized that the costs of a public policy transmission project may be proposed to be allocated as part of the associated public policy requirement or identified by the NYPSC. As the Commission explained,

[the] NYISO will file any such proposed cost allocation mechanisms with the Commission for approval. This additional requirement that NYISO file each proposed cost allocation method with the Commission for approval ensures that the Commission will review each proposed cost allocation method to determine whether it is just and reasonable and not unduly discriminatory or preferential.<sup>12</sup>

The NYTOs and NY Transco present an illogical and inconsistent interpretation of the NYISO Tariff whereby the NYPSC's cost allocation and cost containment methodologies should be filed for "informational purposes only."<sup>13</sup> This view ignores the NYTOs' and NYISO's joint compliance filing that included the Tariff provision they now oppose, as well as the Commission's precedent approving the Tariff; it would also require a developer to file its own cost allocation approach under Section 205 of the Federal Power Act in order for the NYPSC's methodology to be considered. The protests, however, fail to recognize or acknowledge that a developer is not

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<sup>12</sup> Docket No. ER13-102, NYISO, Order on Compliance Filing, 143 FERC ¶61,059 (issued April 18, 2013), at ¶325 (emphasis added).

<sup>13</sup> See, NYTO Protest at p. 2; NY Transco Protest at p. 6.

required to make such a filing. As a result, under the construct urged by the NYTOs and NY Transco, the NYPSC's preferred cost allocation and cost recovery methodologies may never be considered by the Commission. This outcome would clearly be illogical given the Tariff language and prior Commission decisions cited above. The Commission should therefore reject the strained interpretation urged by the NYTOs and NY Transco, as well as their collateral attacks on the Commission's prior orders.

**II. The Methodology For Containing Cost Recovery Should Be Clarified To Allow For More Stringent Measures**

It is notable that two parties with competing bids pending before the NYISO were supportive of the NYPSC's preferred cost containment measures. In fact, LS Power seeks to go beyond the NYPSC's methodology and requests clarification that that the NYISO will consider a more stringent alternative. In developing the proposed containment on cost recovery, the NYPSC was indeed mindful of other developers being able to propose other approaches, and specifically encouraged developers to do so.<sup>14</sup> The NYPSC continues to be supportive of any such approaches that would be more protective of ratepayers. Therefore, the Commission should view the NYPSC's preferred

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<sup>14</sup> Tariff Filing, Appendix E at pp. 11 and 45, and Appendix F at pp. 48-49.

20%/80% developer/ratepayer methodology as a minimum baseline, while more stringent measures may be selected.

LS Power suggests that a "binding cost containment with a well-defined construction cost cap," would present a better approach for ratepayers than the NYPSC's 20%/80% approach. The NYPSC did not intend to preclude consideration of such alternatives, however, so long as the risks of cost overruns do not jeopardize the successful completion of the transmission project. The NYPSC's proposed methodology accordingly allows for updates to reflect "additional, identifiable, and verifiable costs necessary to comply with [NYPSC]-imposed modifications and mandates that could not have been reasonably anticipated in formulating the initial bid price."<sup>15</sup> These additional costs, however, would need to exceed a materiality threshold of 5% above the initial bid price.<sup>16</sup> It appears that LS Power envisions a similar approach by providing for "limited and very specific carve outs."<sup>17</sup>

Therefore, the NYPSC recommends that its preferred approach for cost containment be required, as a minimum, to preserve the integrity of the NYISO's competitive selection process, and to ensure that a project is truly identified as the

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<sup>15</sup> Tariff Filing, Appendix E at p. 45.

<sup>16</sup> Id.

<sup>17</sup> LS Power comments at p. 9.

most "cost-effective." The Commission's action is clearly warranted under these circumstance to ensure developers will have the incentive to bid competitively and to prevent the unlimited recovery of costs beyond the estimates submitted by developers and relied upon by the NYISO in selecting a project.

### **CONCLUSION**

For the reasons discussed above, the Commission should grant the NYPSC's Motion for Leave to file its Answer. This Answer will contribute to a complete and accurate record, and assist the Commission in its decision-making process. In rendering its decision, the Commission should reject the protests filed by NY Transco and the NYTOs, and find that the NYPSC's preferred methodologies for cost allocation and containment of cost recovery, as clarified above, are just and reasonable, and not unduly discriminatory or preferential.

Respectfully submitted,

**/s/ Paul Agresta**

Paul Agresta  
General Counsel  
New York State Public Service  
Commission

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Dated: May 2, 2017  
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

A handwritten signature in black ink, appearing to read "David G. Drexler", written over a horizontal line.

David G. Drexler  
Managing Attorney  
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Albany, NY 12223-1305  
(518) 473-8178

Dated: Albany, New York  
May 2, 2017