

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

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

**PROTEST OF MULTIPLE INTERVENORS, CITY OF NEW YORK,
CONSUMER POWER ADVOCATES, NATURAL RESOURCES
DEFENSE COUNCIL, AND SUSTAINABLE FERC PROJECT**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ Multiple Intervenors,² City of New York, Consumer Power Advocates,³ Natural Resources Defense Council,⁴ and the Sustainable FERC Project⁵ (collectively, “New York Consumer Advocates”) respectfully submit this Protest in response to the Petition for Declaratory Order (“Petition”) filed by the New York Independent System Operator, Inc. (“NYISO”) on August 18, 2020 in the above-captioned docket.

In the Petition, the NYISO requests that the Commission issue a declaratory order: (a) ruling that the New York Transmission Owners (“NYTOs;” *i.e.*, the investor-owned utilities in

¹ 18 C.F.R. § 385.211.

² Multiple Intervenors is an unincorporated association of approximately 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout New York State.

³ Consumer Power Advocates is an alliance of large not-for-profit institutions in the greater New York City region and some of the largest employers and energy users in New York State.

⁴ Natural Resources Defense Council is a national nonprofit environmental organization, headquartered in New York City, with more than three million members and activists nationwide and over 40,000 members in New York State. The organization is committed to the preservation and protection of the environment, public health, and natural resources.

⁵ The Sustainable FERC Project is a partnership of state, regional and national environmental and other public interest organizations working to expand the deployment of clean energy resources into America’s electricity transmission grid and to reduce and eventually eliminate carbon pollution from the U.S. power sector.

New York with captive customers) possess a federal right of first refusal (“ROFR”) to build, own, and recover the costs of upgrades to their transmission facilities pursuant to Order No. 1000;⁶ (b) confirming the NYISO’s understanding of how this ROFR should be implemented under its Open Access Transmission Tariff (“OATT”); and (c) clarifying specific points relating to the definition of an upgrade.⁷

For the reasons set forth herein, the New York Consumer Advocates protest the NYISO’s Petition and urge the Commission to deny the Petition because of the harm it could cause to competitive (*i.e.*, non-incumbent) transmission developers, the NYISO’s Public Policy Transmission Planning Process (“PPTPP”), and especially to New York consumers who would be forced to pay excessive amounts for new transmission infrastructure. The New York Consumer Advocates are very concerned that the relief sought would impair significantly the future competitiveness of the NYISO’s PPTPP, potentially to the point of eliminating any meaningful competition for the development of new transmission lines throughout the New York Control Area. Further, the relief sought is inconsistent with the competitive agenda established and reaffirmed by the Commission for more than 20 years. In short, the relief sought in the Petition is contrary to the public interest.

If, *arguendo*, a ROFR exists under Order No. 1000, the nature of the ROFR should be modified to minimize the harm it could cause to competitive transmission developers, the NYISO’s PPTPP, and especially to New York consumers who would be denied the benefits of

⁶ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) (“Order No. 1000”), *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) (“Order No. 1000-A”), *order on reh’g and clarification*, 141 FERC ¶ 61,044 (2012) (“Order No. 1000-B”) (hereinafter collectively referred to as “Order No. 1000”).

⁷ Petition at 1.

competition in transmission development and associated potential savings. Specifically, the NYISO's proposed definition of an upgrade subject to a ROFR appears overbroad in certain respects and insufficient in others. Given New York State's preference that new transmission lines be developed within existing utility rights-of-way,⁸ it appears that the NYISO's expansive definition of upgrade would bring virtually all future potential transmission projects within the scope of the alleged ROFR. That is, most new transmission projects would be considered upgrades since they will involve existing utility infrastructure to some extent.

Additionally, the New York Consumer Advocates are troubled by the NYISO's proposal that the NYTOs be authorized to exercise ROFRs – and thereby essentially take over from competitive developers all or substantially all of transmission projects proposed and selected under the PPTPP – but not be bound by either the competitive developer's bid price or cost containment commitment. If a ROFR is deemed applicable to a competitive developer's transmission project selected under the PPTPP, the developer's bid price and cost containment commitment should be deemed part and parcel of the project to which the ROFR applies. Thus, the NYTOs should not be authorized to exercise ROFRs selectively to portions of competitive developers' transmission projects (*i.e.*, the scopes of work deemed an upgrade) but not others (*i.e.*, the bid prices and any cost containment commitments).

If the Commission determines that the alleged ROFR is valid and appropriate, it should require that the ROFR be exercised at the outset of the NYISO's process to seek proposals to satisfy a public policy-based transmission need, not after the competitors in the process have

⁸ See "Building on Success," Governor Cuomo's 2014 State of the State Policy Book at 62-63, available at <https://www.ny.gov/sites/ny.gov/files/atoms/files/2014-SOS-Book.pdf>; and NYPSC Cases 12-T-0502, *et al.*, Examination of Alternating Current Transmission Upgrades, Order Authorizing Modification of the Process to Allow for Consideration of Alternative Proposals (issued February 21, 2014) at 4.

expended significant time, effort, and cost to develop detailed project proposals. Doing so would help ameliorate some of the anti-competitive effects of a ROFR.

ARGUMENT

As a preliminary matter, the New York Consumer Advocates note that declaratory orders to terminate a controversy or remove uncertainty are discretionary. The Commission may deny the NYISO’s petition for a declaratory order as it deems appropriate.⁹ Through its Petition, the NYISO is seeking to materially revise the PPTPP, an action that should be pursued via Federal Power Act Sections 205 or 206, as appropriate. That is, the relief sought in the Petition would result in changes to the PPTPP as it relates to participation by different entities, and the NYISO’s evaluation and selection of projects (discussed below). The Commission could decide that these matters should be considered further in the NYISO’s governance process and may only be resolved via tariff modifications, as opposed to through the requested tariff “interpretations” that are not broadly supported by stakeholders.

POINT I

THE REQUESTED DECLARATORY ORDER WOULD IMPAIR SIGNIFICANTLY THE FUTURE COMPETITIVENESS OF THE NYISO’S PUBLIC POLICY TRANSMISSION PLANNING PROCESS

⁹ See, e.g., 5 U.S.C. § 554(e) (2018) (stating that, under the Administrative Procedure Act, the “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty”); *Continental Oil Co. v. FPC*, 285 F.2d 527, 527 (5th Cir. 1961) (*per curiam*); *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) (noting that “there is ample authority for the proposition that Commission action on petitions for declaratory order is discretionary with the agency”); accord *Morgan Stanley Capital Group, Inc.*, 119 FERC ¶ 61,298, at P 17 (2007) (Commission “has discretion as to whether to issue a declaratory order in particular circumstances in order to terminate a controversy or remove uncertainty”); *Ark. Power & Light Co.*, 35 FERC ¶ 61,358, at 61,818 (1986) (granting of petition for declaratory order “is a matter of agency discretion”).

There can be no dispute that, for decades, this country’s energy public policy has been focused on introducing and fostering competition in order to lower prices for consumers. Indeed, the Supreme Court has said that “the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.”¹⁰

The Public Utility Regulatory Policies Act of 1978¹¹ and the Energy Policy Act of 1992¹² are prime examples of Congressional action to support competition in the electric industry and encourage private investment as an alternative to monopolistic utility companies. The landmark Order No. 888 is a prime example of the Commission’s similar efforts. Indeed, the Commission explains that Order No. 888 is “designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers.”¹³ The Supreme Court upheld the Commission’s actions, finding that the Commission has broad authority over electricity transmission.¹⁴ In affirming Order No. 888, the Courts also have held that the Commission has broad authority to take action where it finds undue discrimination.¹⁵

¹⁰ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

¹¹ 92 Stat. 2117, 16 U.S.C. § 2601, *et seq.*

¹² 106 Stat. 2776.

¹³ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁴ *New York v. FERC*, 535 U.S. 1 (2002).

¹⁵ *See, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 687688 (D.C. Cir. 2000).

Order No. 1000 was a logical extension of the Commission’s pro-competition agenda in that it provided broad opportunities for competition among developers – utility and competitive companies – to construct transmission facilities needed to satisfy evolving public policies. Pertinent to this matter, Order No. 1000 directed transmission providers to remove from Commission-jurisdictional tariffs and agreements “any provisions that grant a federal [ROFR] to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation.”¹⁶ The Commission found that ROFRs “restrict[] the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process” in a manner that is “unjust and unreasonable because it may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the inclusion of higher-cost solutions in the regional transmission plan.”¹⁷ ROFRs thus can affect jurisdictional transmission rates by “depriv[ing] customers of the benefits of competition in transmission development, and associated potential savings”¹⁸ Moreover, the Commission determined that ROFRs “create opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within existing regional transmission planning processes.”¹⁹ In Order No. 1000, the Commission acted to eliminate ROFRs for transmission facilities that are selected in a regional transmission plan for purposes of cost allocation “in accordance with [its] duty to maintain competition.”²⁰

¹⁶ Order No. 1000 (136 FERC ¶61,051) at P 7.

¹⁷ *Id.* at P 284.

¹⁸ *Id.* at P 285.

¹⁹ *Id.* at ¶ 285.

²⁰ *Id.* at ¶ 286.

Now, however, the NYISO seeks to undo the progress the Commission has made and to undermine its long-standing efforts to promote competition by asserting that the NYTOs have the effective ability to control transmission development in the New York Control Area. That is, given the State of New York's preference for new transmission to be developed within existing rights-of-way, as noted above, the NYISO's request essentially seeks to allow the NYTOs to trump the ability of competitive developers to build new transmission in New York. In the same way that the Commission adopted open access to transmission facilities, it should ensure that the PPTPP remains competitive and all interested transmission developers – whether incumbents or competitive companies – have similar abilities to participate in the process.

The NYISO engages in three types of planning activities: (i) reliability planning, (ii) economic planning, and (iii) public policy planning. To date, all of the major transmission projects developed in New York within the last decade have been in response to Public Policy Transmission Needs. Pursuant to the PPTPP, when the New York State Public Service Commission (“NYPSC”) determines that a transmission need driven by public policy requirements exists, the NYISO conducts a competitive solicitation of potential Public Policy Transmission Projects and Other Public Policy Projects to address said need.²¹ The NYISO is responsible for evaluating all proposals submitted in the PPTPP and selecting the more efficient or cost-effective transmission solution to address the identified public policy requirements.

Thus far, the NYISO has completed three cycles of the PPTPP, selecting several transmission projects to be developed. Where the NYPSC identified a policy-based transmission need, the PPTPP solicitations have been very competitive, attracting numerous proposals from the NYTOs (directly and through their affiliates) and competitive developers. Robust competition in

²¹ The PPTPP is established and implemented via Attachment Y of the NYISO's OATT.

the PPTPP inures to the benefit of consumers as it facilitates better, more efficient transmission projects being proposed, and more cost-effective projects being selected for development.

The NYISO's position with respect to the existence of a ROFR, coupled with a very-broad definition of upgrade (discussed *infra*), is problematic for the future competitiveness of the PPTPP given New York's predilection that transmission projects be located in existing utility rights-of-way. In the Petition, the NYISO recognizes such predilection, asserting that: "in practice, there is a high likelihood that proposed transmission solutions to address a transmission need in the NYISO's planning processes will be located within existing rights of way due to the unique circumstances in New York."²² The NYISO further acknowledges that "[t]he NYPSC, which is responsible for identifying Public Policy Transmission Needs and for siting transmission projects in New York, has expressed an intent that new transmission projects be located to the extent possible in existing rights of way."²³

The strong preference, if not requirement, that future Public Policy Transmission Projects be sited within existing utility rights-of-way necessitates interactions between the NYTOs and entities selected to develop new transmission projects under the PPTPP.²⁴ Consequently, if, *arguendo*, all or most transmission projects interfacing with or modifying the NYTOs' existing

²² Petition at 14. The NYISO describes such unique circumstances as follows: "New York's power needs are largely located in the highly-populated southeastern portion of the state, including New York City and Long Island, while generation resources that serve that demand are spread across the state. Throughout New York, there are limited rights of way to develop new transmission to deliver the generation and serve these areas due to various environmental and agricultural impact concerns."

²³ *Id.*; citations omitted.

²⁴ *Id.*, recognizing that due to this preference, proposed projects likely will be located within rights-of-way, and "will in many cases interface with or modify NYTOs' existing transmission facilities."

transmission facilities are deemed upgrades and subject to a ROFR, the competitiveness – and, ultimately, the benefit and the viability – of the PPTPP is likely to suffer, possibly significantly.

New York Consumer Advocates contend that competitive developers would possess little to no incentive to expend substantial resources designing, engineering, pricing, and bidding to develop transmission projects under the PPTPP if all or a substantial portion of those projects, if selected for development by the NYISO, would be deemed upgrades and subject to a ROFR pursuant to which said projects simply could be taken over by one or more of the NYTOs. Absent active participation by competitive developers, the competitiveness – and, thus, the usefulness – of the PPTPP would decline, probably precipitously. Moreover, if, as the NYISO proposes (addressed further, *infra*), the NYTOs are authorized to exercise ROFRs without being in any way bound by competitive developers' bid prices or cost containment commitments, there is little reason to doubt that ROFRs would be exercised at a high frequency, thereby further undermining the competitiveness of the PPTPP.

New York Consumer Advocates also are concerned that, if the relief sought by the NYISO is granted, the future competitiveness of the PPTPP would decline because the NYTOs would be less motivated to participate aggressively therein. In the first three cycles of the PPTPP, the NYTOs have sponsored proposals and competed directly and indirectly with competitive developers. If, however, changes to the PPTPP discourage competitive developers from competing therein, NYTOs may face significantly less competition and then perceive much less pressure to “sharpen their pencils” in the development of proposals. Alternatively, if competitive developers do choose to continue sponsoring proposals in the PPTPP, the NYTOs may cease doing so, instead choosing to rest on their ROFRs and simply take over all or substantial portions of projects selected by the NYISO.

As to the scope of the ROFRs, the NYISO interprets upgrades to include any “improvement to, addition to, or replacement of a part of an existing transmission facility.”²⁵ It acknowledges, however, that “the distinction in the definition between an upgrade and an entirely new transmission facility is not always clear in scenarios where the Developer proposes to retire or decommission a NYTO’s existing facility.”²⁶

The NYISO’s interpretation/definition of upgrades is overly expansive. If a competitive developer were to propose to replace an existing 115 kV transmission line with a 230 kV transmission line by removing the existing 115 kV line and rebuilding a 230 kV line on new structures, with new insulators, *etc.*, in the same right-of-way with the same substations, that would be deemed an upgrade subject to a ROFR.²⁷ Similarly, if a competitive developer were to propose relocating an existing substation to accommodate a proposed project by building a new 345 kV substation near the existing substation and routing all transmission circuits from the existing substation into the replacement substation and removing the existing substation, that, too, would be deemed an upgrade subject to a ROFR.²⁸

New York Consumer Advocates are concerned that New York’s strong preference that new transmission projects be developed in existing rights-of-way, coupled with the NYISO’s expansive definition of what constitutes an upgrade subject to a ROFR, would lead to a scenario where virtually all potentially-proposed projects under the PPTPP would be deemed upgrades, thereby

²⁵ *See, e.g.*, Petition at 17.

²⁶ *Id.* at 18; *see also id.* at 19 (acknowledging that “the distinction between an upgrade and an entirely new transmission facility will not be as clear in circumstances where non-incumbent Developers propose to retire or decommission NYTOs’ existing transmission facilities”).

²⁷ *Id.*, Attachment A at Example 3.

²⁸ *Id.*, Attachment A at Example 7.

undermining the competitiveness of that process to the detriment of consumers. Such an outcome is not in the public interest.

Consistent with the Commission's pro-competition agenda, generally, a PPTPP that promotes or at least facilitates competition helps to ensure that new transmission projects subject to socialized cost recovery from captive customers are developed cost-effectively. If the PPTPP is modified as proposed by the NYISO, the future lack of competitiveness is likely to lead to higher costs to customers as the NYTOs would have little incentive to minimize or control their costs. In other words, the NYISO's position with respect to ROFRs and the definition of upgrades, if adopted, would be harmful to consumers.

POINT II

ANY EXERCISE OF THE ROFR SHOULD INCLUDE THE COMPETITIVE DEVELOPER'S BID PRICE AND COST CONTAINMENT COMMITMENT

For the reasons set forth in Point I, the Commission should deny the Petition. If it does not, the Commission should order the NYISO to modify the ROFR consistent with Points II and III herein to minimize the harm an expansive ROFR would cause to competitive transmission developers, the PPTPP, and especially to New York consumers who would be deprived of the benefits of competition in transmission development, and the associated potential savings.

In its Petition, the NYISO seeks clarification that if a NYTO exercises a ROFR, it is deemed the Developer of the upgrade under the NYISO OATT.²⁹ Thus, under the PPTPP, if a competitive developer is selected because it has proposed the most efficient and cost-effective project, but all or a substantial portion of the project is deemed an upgrade under the NYISO's definition, one or more NYTOs would be accorded a ROFR (as applicable) and, should that ROFR

²⁹ Petition at 15-17.

be exercised, the NYTOs would “step into the shoes” of the competitive developer and be deemed the Developer of the upgrade. Notably, however, the NYTOs would not be bound to the economic aspects of the competitive developer’s proposal. Rather, the NYTOs would be authorized to: (a) recover all of their costs to construct the upgrade, irrespective of what the competitive developer may have bid for that work; and (b) disregard the competitive developer’s cost containment commitment.³⁰ In other words, the NYTOs could develop a transmission project after completely eradicating the cost criteria that led to the project’s selection by NYISO. New York Consumers disagree with this proposed approach.

The approach described in the Petition would offer the NYTOs all of the potential benefits of a ROFR without any of the accompanying obligations. For instance, under the NYISO’s approach, if (i) Competitive Developer X advances a transmission proposal in the PPTPP with a bid of \$500 million and a commitment to refrain from seeking recovery of 30% of any cost overrun, (ii) the NYISO selects Developer X’s proposal as the most efficient and cost-effective project compared to all others submitted, (iii) Developer X’s proposal is deemed an upgrade under the NYISO’s proposed definition, then (iv) Incumbent NYTOs can exercise a ROFR and assume that project, but not be bound by either Developer X’s bid price or its cost containment commitment, and (v) conceivably, the NYTOs could spend \$1 billion or more on the same project and be permitted to fully recover their actual costs from consumers. Under such scenario, the economic harm to consumers could be enormous.

³⁰ *Id.* at 15-16. Earlier this year, the Commission accepted tariff provisions approved by stakeholders and advanced by the NYISO incorporating the ability of developers to propose cost containment commitments, and have those commitments evaluated, in the PPTPP. *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098 (2020).

New York Consumer Advocates contend that if, *arguendo*, the Commission concludes that the NYTOs should possess a ROFR with respect to transmission projects selected under the PPTPP that are deemed upgrades, then such ROFR should be contingent upon acceptance of the original developer's bid price and cost containment commitment, if any. In other words, to accord full meaning and benefit to a competitive solicitation process such as the PPTPP, an option – such as a ROFR – to assume a competitive developer's chosen transmission project should not be divorced from the accompanying bid price and cost containment commitment.

From the perspective of consumers, the bid price and any cost containment commitment are as integral to the project as the route chosen or equipment to be utilized. As part of the evaluation process, the NYISO assesses the cost caps and cost containment provisions proposed by each developer. This is one of a number of metrics that the NYISO uses to evaluate and select the more efficient or cost-effective transmission solution to a Public Policy Transmission Need.³¹ Under the approach described in the Petition, the NYTOs would be able to develop transmission solutions after negating critical criteria that may have resulted in a lower ranking for the project. It is inequitable to competitive developers and consumers (who ultimately pay for projects developed under the PPTPP) to allow a NYTO to exercise a ROFR and takeover a project designed and advanced successfully by a competitive developer without also subjecting that NYTO to the developer's bid price and cost containment commitment.

Contrary to the NYISO's proposal, incorporating a developer's bid price and cost containment commitment into ROFRs could mitigate at least some of the anti-competitive effects associated with ROFRs and the proposed, expansive definition of upgrade. Being bound by a meaningful cost containment commitment may cause the NYTOs to decline to exercise ROFRs in

³¹ See *New York Ind. Sys. Operator, Inc.*, 170 FERC ¶ 61098, at P 11 (2020).

at least some circumstances (*e.g.*, when it would cost them – and consumers – more to do the work), thereby helping to restore an incentive for competitive developers to participate actively in future PPTPPs (and preserving the best possible economic outcome for consumers).

Under the NYISO’s proposal, however, the NYTOs would have little reason to decline to exercise each and every ROFR because they would be permitted to recover all of their prudently-incurred costs associated with constructing the upgrade, irrespective of whether such costs are substantially higher than that proposed by a competitive developer willing to proceed under a cost containment commitment. A significant concern with the NYISO’s approach is that every time a ROFR is exercised, consumers would lose the benefit of the competitive developer’s cost containment commitment, thereby exposing them to potentially much higher costs.

As presented by the NYISO, the NYTOs’ ROFR is equivalent to an option to construct a transmission project under the PPTPP. Under the NYISO’s proposed approach, the NYTOs would be accorded that option without regard to a competitive developer’s bid price and any cost containment commitment. However, the ISO-TO Agreement does not contain any such option; each NYTO retained “the right to build, acquire, sell, merge dispose of, retire, use as security, other otherwise transfer or convey all or any part of its assets”³² That is, this language does not allow the NYTOs to interfere with the NYISO’s competitive PPTPP solicitations or to change the NYISO OATT as it pertains to the selection of PPTPP projects. However, by allowing the NYTOs to intercede and take over the physical project without also being bound by the economic aspects of the proposal upon which the project was selected, the NYISO is effectively nullifying a portion of its OATT, and it is seeking to do so in a manner that is anticompetitive.

³² Petition at 7, quoting Section 3.10(c) of the ISO-TO Agreement.

In the event the Commission determines that the NYTOs have an ROFR over projects proposed by competitive developers, the Commission should determine that the ROFR must be exercised on an all or nothing basis, meaning that the right applies to the entirety of the physical and economic aspects of the competitive developer's project and the NYTOs cannot selectively exercise it as to the physical aspects only.

POINT III

ANY RIGHT OF FIRST REFUSAL SHOULD BE EXERCISED AT THE OUTSET OF THE PROCESS

A corollary point – which is ignored in the Petition – pertains to the scope of the rights at issue in the Petition. Even if the NYTOs have an ROFR over the use of their rights-of-way, they do not have any legal ability or authority to take the intellectual property of the competitive developers or to block competition. The declaratory order sought by the NYISO, however, would facilitate both outcomes. Even if the Commission determines that the NYTOs have an ROFR over the use of their rights-of-way, it should not allow the NYTOs to exercise that ROFR in an anti-competitive manner.

The Commission can better balance the interests of the NYTOs with the interests of other affected market participants, particularly the competing competitive developers and the captive consumers who are required to bear the costs of the transmission projects. This balance can be achieved by requiring the NYTOs to exercise (or decline to exercise) any recognized ROFR at the outset of the PPTPP.

Every two years, the NYISO conducts a solicitation for transmission needs driven by public policy requirements and forwards the proposals received to the NYPSC for consideration.³³ If the

³³ NYISO OATT, Section 31.4.2.

NYPSC finds that any such needs exist, the NYISO conducts a second solicitation, this time for specific project proposals.³⁴ Once those proposals are received, the NYISO performs a detailed evaluation of both their technical merits and their cost-effectiveness.³⁵

In the Petition, the NYISO proposes that the NYTOs would have the opportunity to exercise their ROFR, if applicable, after the NYISO completes its viability and sufficiency analysis.³⁶ In other words, the NYTOs would be permitted to wait until the middle of the process and after their competitors have spent substantial sums and significant effort on designing, engineering, and costing out their project proposals.³⁷ As an aside, the New York Consumer Advocates note that the Commission has allowed transmission developers, as part of their formula rate cases, to recover all of their development costs regardless of whether their projects are selected.³⁸ If the NYTOs are required to exercise their ROFR, if applicable, before the NYISO seeks detailed project proposals, competitive developers would know at the outset whether and what portions of the public policy-driven transmission project(s) are truly available for competitive development. They then could focus their efforts on those portions of the project(s), thereby limiting their costs and perhaps allowing their staffs and consultants to simultaneously pursue multiple transmission projects. Equally important, the development costs borne by captive

³⁴ NYISO OATT, Section 31.4.3.

³⁵ NYISO OATT, Sections 31.4.6 and 31.4.8.

³⁶ Petition at 15.

³⁷ The New York Consumer Advocates have heard anecdotally that developers can spend millions of dollars and thousands of hours of effort in designing their projects and preparing their submissions to the NYISO.

³⁸ *See, e.g., NextEra Energy Transmission New York, Inc.*, 161 FERC ¶ 61,138 (2017) at PP 26-28.

customers would be reduced as there would no longer be a need for multiple developers to incur recoverable costs for projects that ultimately would be undertaken by the NYTOs.

At the same time, if required to exercise an ROFR at the outset of the solicitation process, the NYTOs would not be harmed or adversely impacted by abiding by fairer rules. The general parameters of the public policy-driven transmission projects are known to all once the NYPSC issues its determinations, and the NYTOs would have the same opportunity as their competitors to decide whether they want to undertake the projects, or the portions of the projects within their rights-of-way. Inasmuch as all of the NYTOs own transmission infrastructure have been operating in the New York Control Area for many decades, and have detailed knowledge of the electric system, they are or should be well able to make this decision at the beginning of the process and in a timely manner. There is no legitimate need for them to review or consider the detailed project proposals prepared by their competitors before deciding whether to exercise their ROFRs.

Indeed, the NYTOs have far more knowledge about the proposed projects – including the vagaries of the terrain, potential development complications, and environmental considerations – than their competitors because they own and maintain the rights-of-way at issue and presumably already have constructed other utility infrastructure on, in, over, or through those rights-of-way. By virtue of their ownership or control of the rights-of-way, the NYTOs presumably also have familiarity, if not working relationships, with adjacent and nearby landowners and the communities and municipalities in which the rights-of-way are located. Thus, they should be better positioned than competitive developers, all or most of whom lack such knowledge in preparing detailed technical designs and cost estimates for the proposed projects.

While this alternative approach still would have a chilling effect on the competitive process contemplated by the Commission in Order No. 1000 and accord the NYTOs a preference over

competitive developers, it would be less harmful than the outcome sought by the NYISO in the Petition. Further, this approach provides the NYISO with more accurate and complete information upon which to evaluate all competing proposals. That is, the NYISO would have the ability to compare the NYTOs' proposed project on an equal basis to the projects proposed by other developers (*e.g.*, a competitive developer may propose a project that uses a former railroad or municipal right-of-way as an alternative to a utility right-of-way) and determine which project is more efficient and cost-effective, as required by Section 31.4 of the OATT. This approach also provides the best opportunity to limit the detrimental consumer impacts discussed *supra* as the NYTOs' potential unwillingness to make cost containment commitments would be taken into account in the NYISO's comparative evaluation of proposed projects.

Another benefit of this approach is that it places some constraints on the NYTOs to limit their costs, and possibly to consider emulating the competitive developers by agreeing to cost containment, in whole or in part. That is, since their proposals will be considered competitively with those of the competitive developers, there could remain opportunities for a competitor's project to be selected (*e.g.*, if that project uses telecommunications or municipal rights-of-way as an alternative). The Commission should therefore modify the declaration sought by the NYISO to better protect consumers and increase the potential for the selected projects to be constructed at lower costs.

In the Petition, the NYISO refers extensively to the various foundational agreements with the NYTOs regarding the scope of rights they retained. Importantly, none of those documents discuss the timing for the exercise of the NYTOs' rights. None of those documents similarly give the NYTOs the right to take the designs, drawings, and other intellectual property of their competitors. Notwithstanding the absence of any such provisions, the NYISO asks the

Commission to declare that it is acceptable for the NYTOs to exercise their ROFR in the middle of the solicitation process and for the NYTOs to take, without compensation, the designs and plans submitted by their competitors.³⁹ The alternative proposed here would ameliorate these concerns and increase the fairness of the process to the competitive developers.

For all of these reasons, in the event the Commission finds that the NYTOs have a ROFR for projects that would be located wholly or partially within their rights-of-way, the Commission should require that the ROFR be exercised at the outset of the NYISO project proposal solicitation process. If the NYTOs choose not to exercise their ROFR, they should be considered to have lost their right to do so and should not be allowed a second opportunity to exercise it later in the process.

³⁹ The NYISO and NYTOs have confirmed in stakeholder meetings that the NYTOs are given copies of such materials during the review process. The New York Consumer Advocates understand that this sharing occurs largely because of the NYTOs' knowledge of the existing infrastructure and role in the interconnection process.

CONCLUSION

For the procedural and substantive reasons set forth herein, the Commission should deny the NYISO's request for a declaratory order in this matter. The Petition seeks to materially revise the PPTPP through the requested tariff "interpretations" that are not broadly supported by stakeholders; such significant changes should be pursued via filings under Federal Power Act Sections 205 or 206, as appropriate. Moreover, the requested declaratory order would impair significantly the future competitiveness of the PPTPP in a manner that discriminates against competitive transmission developers and would deny New York consumers the benefits of competition in transmission development, particularly the reduced costs commonly arising from competitive solicitations. In the event the Commission decides to issue a declaratory order, it should (i) limit or modify the scope of the ROFR to require that any exercise of that right include the competitive developer's bid price and cost containment commitment, and (ii) require that any ROFR be exercised at the outset of the project solicitation process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Protest of Multiple Intervenors, City of New York, Consumer Power Advocates, and Natural Resources Defense Council has been served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Albany, New York, this 17th day of September, 2020.

/s/ Elizabeth Wolf _____

Elizabeth Wolf