UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Central Hudson Gas & Electric Corp., *et al.*	)	
v.	)	Docket Nos. EL21-66-000
New York Independent System Operator, Inc.	)	
	)	
New York Independent System Operator, Inc.	)	ER21-1647-000
	)	(not consolidated)

PROTEST OF THE CITY OF NEW YORK, NATURAL RESOURCES DEFENSE COUNCIL, SUSTAINABLE FERC PROJECT, AND MULTIPLE INTERVENORS

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.211 (2021), the City of New York, Natural Resources Defense Council,[1] Sustainable FERC Project,[2] and Multiple Intervenors[3] (collectively referred to as "Consumer Stakeholders") respectfully submit this consolidated Protest to the Section 205 and 206 Filings submitted in the above-captioned dockets on April 9, 2021 by Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation d/b/a National Grid ("National Grid"), New York State Electric & Gas Corporation ("NYSEG"), Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation ("RG&E") (collectively, "Complainants" or "NYTOs"). The NYTOs' Section 206

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[1] 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.

[2] 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.

[3] 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.

Filing ("Complaint") is brought against the New York Independent System Operator, Inc. ("NYISO") to amend the Open Access Transmission Tariff ("OATT") and the Market Administration and Control Area Services Tariff ("Services Tariff") (collectively, "NYISO Tariffs").[4] The NYTOs' Section 205 Filing ("Tariff Filing") seeks to amend the OATT administered by the NYISO to reflect the amendments proposed in the Complaint (hereinafter the "Section 205 Filing").[5] For the reasons explained below, the Consumer Stakeholders oppose the relief being sought by the NYTOs and request that the Commission reject the NYTOs' Complaint and associated Section 205 Filing (collectively, the "Filings").

I. BACKGROUND

The Filings seek to amend NYISO's OATT to change who supplies the capital to fund System Upgrade Facilities ("SUFs") and/or System Deliverability Upgrades ("SDUs") that are caused by the interconnection of a new electric resource. SUFs/SDUs are the "modifications or additions to the existing New York State Transmission System" that are required for the proposed resource to connect reliably to the system.[6] Once built, the SUFs/SDUs are owned, operated, and maintained by the individual NYTOs as part of their transmission system.

The existing funding approach was established in 2004 at the NYTOs' request as an independent entity variation to the *pro forma* Large Generator Interconnection Procedures

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[4] A *Notice of Complaint* was issued by the Commission on April 12, 2021 in Docket No. EL21-66-000 establishing an April 29, 2021 comment deadline for the Complaint. A *Notice of Extension of Time*, issued by the Commission on April 28, 2021, extended said deadline to May 7, 2021.

[5] A *Combined Notice of Filing #1* was issued by the Commission on April 9, 2021 in Docket No. ER21-1647 establishing an April 30, 2021 comment deadline for the Section 205 Filing. A *Notice of Extension of Time*, issued by the Commission on April 28, 2021, extended said deadline to May 7, 2021.

[6] Attachment S of the OATT sets the definitions for "System Upgrade Facilities" and "System Deliverability Upgrades."

("LGIP") and Large Generator Interconnection Agreement ("LGIA") codified in Order 2003.[7] Under the existing funding approach, the interconnecting generator funds SUFs/SDUs with its own source of capital, and this cost is incorporated into the costs – and presumably bids - of the generator. The NYTOs seek to amend this approach by establishing their unilateral option to provide the funding for—and earn their regulated rates of return on—SUFs/SDUs; however, SUFs/SDUs would continue to be paid for by the interconnecting generator and incorporated into the cost of the generator. In short, the NYTOs seek to replace the interconnecting generator's source of capital to fund SUFs/SDUs with their own capital so that they can earn their regulated rates of return on the generator's investment.

The NYTOs allege that the current approach under the NYISO Tariffs fails to provide them with an opportunity to earn a return for the risks associated with owning, operating, and maintaining SUFs/SDUs, which Complainants allege is unjust and unreasonable under Sections 205 and 206 of the FPA according to Supreme Court and District of Columbia Court of Appeals precedent.[8]

The NYTOs' desire to self-fund SUFs/SDUs is a reversal to its position just a few years ago. On December 15, 2016, the Commission issued a NOPR proposing reforms to its regulations and the *pro forma* LGIP and LGIA to improve certainty and transparency in the interconnection

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[7] *New York Indep. Sys. Operator, Inc. New York Transmission Owners*, 108 FERC ¶ 61,159 (2004); *see* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 11 (In Order 2003, the Commission found that a standard set of procedures "will minimize opportunities for undue discrimination and expedite the development of new generation, while protecting reliability and ensuring that rates are just and reasonable." *Id*.).

[8] The NYTOs rely on the following Supreme Court and D.C. Circuit cases as supporting their requested relief: *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) ("*Bluefield*"); *Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) ("*Ameren*").

process and to enhance the interconnection process.[9] The NOPR proposed a number of revisions, including a proposal on self-funding of network upgrades by a transmission owner. Specifically, it proposed to modify the *pro forma* LGIA to require agreement between a transmission owner and an interconnecting generator before the transmission owner may elect to fund network upgrades.[10] The NYTOs asserted that the Commission-approved NYISO Tariff does not allow for a transmission owner to self-fund network upgrades, and thus the proposal was not applicable to the NYISO.[11] The NYTOs requested that the Commission "ensure that any final rule accommodates and preserves existing independent entity variations, such as the NYISO's limitations on self-funding of network upgrades that are *superior* to the NOPR proposal."[12]

Of note, now the NYTOs seek to establish their unilateral option to provide the funding for, and earn their regulated rate of return on, SUFs/SDUs via two separate filings that have not been consolidated: (1) the Section 205 Filing to amend Section 25.5.4 of the NYISO OATT (the "Core Amendment"); and, (2) the Complaint to amend NYISO's OATT and Services Tariff to implement the Core Amendment. While the NYTOs brought both filings separately and assert that they did so because neither filing is dependent on the other, the fundamental issues associated with the NYTOs' proposal are determinative in both Filings and accordingly, the Consumer Stakeholders respectfully submit this Protest in opposition to both Filings made by the NYTOs.[13]

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9 *Reform of Generator Interconnection Procedures and Agreements*, 157 FERC ¶ 61,212 (2016) ("NOPR").

10 NOPR at P 64.

11 *Id*.

12 *Id*. (emphasis added) (The Commission ultimately did not include its self-funding proposal in the final rule because the *Ameren* decision was issued shortly before the Commission's rulemaking order. *See* Order No. 845, Reform of Generator Interconnection Procs. & Agreements, 163 FERC ¶ 61043, P. 122 (2018).).

13 The Consumer Stakeholders' Protest to each of the Filings is filed in the associated docket.

II. PROTEST

A. The Filings Should Be Rejected Because NYTOs Have Not Met Their Burdens of Proof Pursuant to Sections 205 and 206 of The Federal Power Act ("FPA")

1. The Section 205 Filing should be rejected because the NYTOs did not show that the Core Amendment is lawful

The NYTOs seek to establish the Core Amendment—*i.e.*, their unilateral option to provide the funding for, and earn their regulated rates of return on, the SUFs/SDUs—in their Section 205 Filing. To prevail on a Section 205 claim, the challenger must establish that an adjustment to the rate is lawful. Under FPA Section 205, the Commission considers whether the proposal before it is just and reasonable and not unduly discriminatory or preferential, including whether a proposed deviation is consistent with or superior to the pro forma OATT, and not whether an alternative approach might also be just and reasonable.[14]

Just and reasonable rates are those that "involve[] a balancing of consumer and investor interests."[15] The primary purpose of this standard is the protection of consumers from excessive rates and charges, and to effectuate the purpose, the Commission is empowered, either on complaint or on its own initiative, to investigate the lawfulness of a rate in a newly filed schedule.[16] When a utility files a new rate schedule with the Commission, the Commission can take one of three actions: (1) it can reject the filing outright; (2) it can order a hearing and, in addition, may suspend the new rate for up to five months; or (3) it can accept the rate schedule immediately.[17]

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[14] 16 U.S.C. § 824d; *see PacifiCorp*, 173 FERC ¶ 61016, P. 20. (2020).

[15] New York Indep. Sys. Operator, Inc., 122 FERC ¶ 61211, 62205 (2008). *See also Fed. Power Comm'n et al. v. Hope Natural Gas Co*., 320 U.S. 591, 603 (Jan. 3, 1944).

[16] *Mun. Light Boards of Reading & Wakefield, Mass. v. Fed. Power Comm'n,* 450 F.2d 1341, 1348 (D.C. Cir. 1971).

[17] *Cities of Anaheim, Riverside, Banning, Colton & Azusa, Cal. v. F.E.R.C.*, 723 F.2d 656, 657 (9th Cir. 1984).

In this case, the Commission should reject the filing outright because the NYTOs failed to meet their burden of proof in their Section 205 Filing.

i. The Core Amendment is unjust and unreasonable

The NYTOs allege that the Core Amendment is in accord with, and authorized by, the express language of the existing Section 25.5.4 of the NYISO OATT.[18] Section 25.5.4 in Attachment S of the NYISO OATT provides:

> Any Connecting or Affected Transmission Owner implementation and construction of (i) System Upgrade Facilities as identified in the Annual Transmission Baseline Assessment or Annual Transmission Reliability Assessment, or (ii) System Deliverability Upgrades as identified in the Class Year Deliverability Study, shall be in accordance with the ISO OATT, Commission-approved ISO Related Agreements, the Federal Power Act and Commission precedent, and therefore shall be subject to the Connecting or Affected Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, *all reasonably incurred costs, plus a reasonable return on investment*. (Emphasis added).

This language, however, does not authorize a unilateral option to provide the funding for, and earn their regulated rate of return on, SUFs/SDUs. It merely provides that NYTOs are entitled to recover "all reasonably incurred costs, plus a reasonable return on investment," which is already provided for under the existing funding approach for SUFs/SDUs.

The existing rate structure provides an opportunity to recover all of their prudently incurred operation and maintenance costs, but the NYTOs make *no investment* upon which they would earn a return because the capital investment for the SUFs/SDUs is made by the interconnecting generator. Indeed, the NYTOs seek to establish a new right that they have never had before, which reaches beyond their own capital infrastructure investments and to those of independent generation developers by creating a unilateral option to provide the funding for the SUFs/SDUs, and thereby replace the funding source of the interconnecting customer.

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[18] Section 206 Filing at 14.

In *Ameren*, the reviewing court recognized that "it is certainly possible, if not probable, that a generator could find an alternative source of capital (including any necessary security) that would be cheaper than that provided by the transmission owner."[19] It further noted that the generators "'have an incentive to find lowest cost funding solutions, while transmission owners do not.'"[20] Providing the NYTOs with the unilateral ability to finance project SUFs/SDUs would thus impede on the market competitiveness of the interconnecting resource and result in increased project costs. Such cost increases would impact consumers, as they would be the ones ultimately paying for the increase through rates – either directly or indirectly.

As noted above, the primary purpose of the just and reasonable rate standard is the protection of consumers from excessive rates and charges. The NYTOs' Core Amendment, however, is unfairly tipped in favor of NYTO shareholder interests because it likely raises costs to interconnecting generators and, indirectly, to end-use consumers with no additional benefit to consumers.[21] Indeed, the Filings are devoid of argument or evidence identifying how this proposal would benefit consumers. As stated by the Supreme Court in *Hope*, "[t]he ratemaking process . . . involves a balancing of the investor and the consumer interests."[22] Without addressing the benefits that would flow to consumers, or at the very least how the Tariff proposal would impact consumers, the balancing standard under *Hope* cannot be overcome in determining whether the

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19 *Ameren Servs. Co. v. Fed. Energy Regul. Comm'n*, 880 F.3d 571, 579 (D.C. Cir. 2018) (*citing Otter Tail Power Co.,* 153 FERC ¶ 61352, P. 29, 56 (2015)).

20 *Id.*

21 *Otter Tail Power Co.,* 153 FERC ¶ 61352, P. 14 (2015) ("[T]he Commission found that the transmission owner's unilateral election to initially fund network upgrades may increase costs of interconnection service by assigning increased capital costs and a security requirement to the interconnection customer with no corresponding increase in service . . ." *citing Midcontinent Indep. Sys. Operator, Inc. Otter Tail Power Co.*, 151 FERC ¶ 61220, P. 49 (2015); *see E.on Climate & Renewables N. Am., LLC*, 137 FERC ¶ 61076, P. 37 (2011).).

22 *Hope*, 320 U.S. at p. 603.

proposal is just and reasonable. The Consumer Stakeholders submit that this omission of record evidence reflects the reality that customers would be harmed by this proposal. Because the NYTOs provided no discussion of customer impact, the Commission should reject the Section 205 Filing.

Importantly, under the NYTOs' Core Amendment, consumers not only would be saddled with the increased costs that result from substituting the interconnecting generators' sources of capital with NYTO funding—it also would result in higher out-of-market contracts from state programs that are facilitating New York's clean energy transition. As the Section 205 Filing acknowledges, New York's Climate Leadership and Community Protection Act[23] ("CLCPA") requires an unprecedented transformation of the electric sector by requiring: 100% zero-emitting electricity sector by 2040, 70% renewable energy by 2030, 9,000 MWs of offshore wind by 2035, 3,000 MW of energy storage by 2030, and 6,000 MW of solar by 2025.[24]

Achievement of New York's nation-leading climate targets is being driven by the state's support for clean energy resources via its Clean Energy Standard, which requires load serving entities ("LSEs") to procure credits associated with the power production of renewable energy and carbon free resources to help create a low carbon energy system. These credits provide out-of-market revenue streams for clean energy resources that are needed to meet state policy goals, which help finance their construction. If project costs for these new clean resources increase because of the increased interconnection costs caused by NYTO funding, then these clean resources would require greater revenues from the state credits, which would compound the increasing costs borne by consumers. Moreover, the Commission has found that increasing revenues for public policy

[23] N.Y. Statutes, Chapter 106 of the laws of 2019 (July 18, 2019).

[24] Section 205 Filing at 7.

resources from out-of-market state credits is not a preferable outcome.[25] The Core Amendment is unjust and unreasonable because it would likely materially increase costs to all New Yorkers, with no commensurate benefit, and thus should be rejected outright.

ii. The Core Amendment is unduly discriminatory or preferential

The Commission should also reject the Section 205 Filing outright because adoption of the Core Amendment is unduly discriminatory or preferential in violation of Section 205 of the FPA. The NYTOs rely almost exclusively on the *Ameren* decision and the Commission's subsequent orders on remand to make the case that the NYISO's current funding approach for SUFs/SDUs is unlawful.[26] Complainants reliance therein is misplaced and overstated.

The District of Columbia Court of Appeals in *Ameren* did not rule on the merits of the underlying Commission order, which Complainants do not acknowledge. Instead, the court in *Ameren* vacated the Commission's orders and remanded the case back to the Commission for further proceedings to develop the record and provide reasoned consideration of the TOs' concerns and the effect of the Commission's orders on the ability of transmission business to attract future capital.[27] To the extent that the Complainants rely on ancillary comments made by the court in the *Ameren* decision, such comments are not the holding of the case and do not carry the force of

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[25] *See Calpine Corp., Dynegy Inc., E. Generation, LLC, Homer City Generation, L.P., Nrg Power Mktg. LLC, Genon Energy Mgmt., LLC, Carroll Cty. Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power Opp, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., Gdf Suez Energy Mktg. Na, Inc., Oregon Clean Energy, LLC & Panda Power Generation Infrastructure Fund, LLC*, 163 FERC ¶ 61236 (2018) (Consumer Stakeholders do not concede that out-of-market revenues for public policy resources have a suppressive effect on the price of capacity or that the Commission's mitigation practices of public policy resources is lawful.).

[26] *See Ameren*; *Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233 (2019) ("Ameren Remand Order"); *Midcontinent Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,084 (2021) ("Compliance Order").

[27] *Ameren*, 880 F.3d 580-82, 586.

law.[28] In fact, the D.C. Circuit declined to reach the merits of the fundamental questions before it, and explained, "we should not do so until the Commission has developed a record by considering that question itself."[29]

Accordingly, contrary to the characterization of the *Ameren* decision by Complainants, *Ameren* does not *per se* result in the NYISO's current funding mechanism for generator interconnection driven system upgrades being proclaimed unjust and unreasonable or unlawful. Absent legal precedent from the courts, the presumption should be that the status quo – which is embodied in tariffs approved previously by the Commission – is just and reasonable, and the NYTOs must provide evidence as to why it is not. Indeed, in the remand cases, the Commission emphasized that the concerns articulated in *Ameren* were "only [applicable] in [Midcontinent Independent System Operator, Inc. ("MISO")] because MISO's interconnection pricing policy is a unique variation from the Order No. 2003 crediting policy."[30]

While the Commission on remand reversed the Commission's prior orders that had disallowed the MISO TOs from funding and earning a return on certain system upgrades, the Commission in its Ameren Remand Order did not address the fundamental questions that had been posed by the *Ameren* court when sending the case back to the Commission for review. Then-Commissioner Glick aptly noted in his dissent that "[b]y simply reversing the vacated orders with nothing more than conclusory statements, the Commission is now in the untenable position of

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[28] *T & J Meat Packing, Inc. v. SEIU, Local 1, AFL-CIO*, 2004 U.S. Dist. LEXIS 6872, FN 13 (D.C. Cir. 2004).

[29] *Ameren*, 880 F.3d 582-84 ("At present . . . we have no need to reach the merits of those questions. Because the Commission failed even to response to these concerns . . . it is sufficient not to require that it do so.").

[30] Order No. 845-A, 166 FERC P 61,137, P 20 (2019); *see also American Elec. Service Corp. v. PJM Interconnection, L.L.C.*, 167 FERC P 61,121, P 56 (2019); see also *PJM Interconnection L.L.C.*, 167 FERC P 61,120, P 67 (2019).

neither addressing the reasons for the court's remand nor grappling with the Commission's underlying concerns of undue discrimination."[31]

Glick went on to say that in "[t]he Commission's failure to meaningfully address arguments that it is unduly discriminatory to give affected system operators the discretion to unilaterally choose self-funding is arbitrary and capricious and not the product of reasoned decision-making."[32]

As the Section 205 Filing notes, several Commissioners have repeated concerns that a unilateral option of transmission owners to fund network upgrades caused by the interconnection of a new resource could provide opportunities for the transmission owner to treat third-party generation and affiliate-owned generation in a manner that is unduly discriminatory or preferential.[33] The NYTOs dismiss these concerns by alleging that they do not apply to the NYTOs because "with only limited exception, [the NYTOs] are vertically disaggregated and do not have affiliated generation operating within their respective footprints to which they could provide an undue preference."[34] The NYTOs provided this conclusory statement in a footnote, and failed to acknowledge both the real and potential existence of undue preference. Indeed, there are numerous examples of Transmission Owners or their affiliates owning generation within the New York footprint.

For example, Iberdrola S.A. ("Iberdrola") owns approximately 81.5% of outstanding shares of AVANGRID's common stock and is able to exercise significant influence over

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31 *Ameren Remand Order*, Glick, Comm'r, Dissenting ¶1.

32 *Id.* at ¶ 7. *See also* Compliance Order, Clements, Comm'r, concurring ("I write separately to express my concern that MISO's underlying rules on network upgrade funding may not be just and reasonable and may be unduly discriminatory or preferential." At P. 1.).

33 Section 205 Filing at 26-27.

34 *Id*.

AVANGRID's policies and affairs.[35] In a 2009 New York Public Service Commission ("NYPSC") *Order Authorizing Acquisition Subject to Conditions*, the NYPSC approved Iberdrola acquisition of NYSEG and RG&E and allowed Iberdrola to build and own wind connected to the RG&E and NYSEG electric grid.[36] In this Order, the NYPSC stated that "such approval necessarily means that Iberdrola will be allowed to continue to develop and own wind generation in upstate New York."[37] This is relevant to the instant matter because one of the bases for the NYTOs' request to finance and earn a return on investment on SUFs/SDUs is the claim that the State's climate targets will lead to new renewable generation interconnections and corresponding SUFs/SDUs will prevent the NYTOs "from recovering any rate of return for that increasingly significant portion of their business."[38]

First, the noted $1.2 billion in SUFs/SDUs from the Class Year 2019 NYISO studies do not represent a "significant portion" of the NYTOs' business. Second, it is certain that the NYTOs will play a role in meeting and investing in the State's climate targets. In that vein, Iberdrola is permitted to continue to own and develop wind generation in upstate New York, which could further the decarbonization of the State's generation portfolio. Accordingly, the opportunity for generation-owning transmission owners to unduly discriminate between assets in which they have an ownership interest, and assets for which they do not have such an interest could arise through the NYTOs' use of its unilateral election to self-fund SUFs/SDUs.

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35 Novak Testimony, Exhibit NYT-0004, Page 13 of 36.

36 NYPSC Case 07-M-0906, *Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A.*, Order Authorizing Acquisition Subject to Conditions (Jan. 6, 2009).

37 *Id.* at p. 83-84.

38 205 Filing at p. 5; Complaint at pp. 8-10.

Another example of the potential for undue treatment exists under the NYISO's OATT, and a transmission developer's ability to elect to be subject to the Large Facility Interconnection Procedure in order to request Capacity Resource Interconnection Service ("CRIS").[39] This type of arrangement is seen with controllable transmission line projects. Because controllable transmission lines can compete with a generation facility, and New York will need more transmission in the future to bring low cost carbon-free power to load centers in the State, it is likely that controllable transmission lines will play an important role in meeting State policy goals. Again, the opportunity for undue discrimination could arise through the NYTOs' use of its election to self-fund SUFs/SDUs, especially in any instance where there is a difference in cost between its regulated rate of return and the capital source of an interconnecting generator.

As further evidence of the relationships between the NYTOs and affiliated generating assets that could lead to opportunities for undue preference or discrimination, the NYTOs are increasingly operating, and potentially owning, Electric Storage Resources ("ESRs").[40] The NYPSC has directed the state's investor-owned electric utilities to hold competitive procurements for ESRs in which third-party developers build new storage resources that are under contract with the utility for operation and dispatch rights for 10 years.[41] National Grid also recently petitioned

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39 NYISO OATT, Section 30.3.1.

40 *See* 205 Filing at 10; Complaint at 11 ("[I]n an initial step to help New York achieve its energy storage goals, pursuant to a NYPSC Order, in 2019 each Transmission Owner issued a solicitation to procure dispatch rights of up to 10 MW (or in Con Edison's case, up to 300 MW) of bulk electric storage. As a result of such solicitations, Con Edison announced the signing of a contract for dispatch rights to a 100 MW/400 MWh energy storage system, and National Grid has signed two contracts for dispatch rights to a combined total of 30 MW/60MWh of energy storage systems.").

41 NYPSC Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, Order Establishing Energy Storage Goal and Deployment Policy, at 53-54 (Dec.13, 2018); Order Directing Modifications to Energy Storage Solicitations, (April 16, 2021).

the NYPSC for approval to dispatch and wholesale market the output from its energy storage system project located at its East Pulaski Substation to NYISO, in order to aid the Company's understanding of such transactions in advance of the deployment of two larger-scale, bulk ESR projects that are expected to be in service by 2022.[42] The NYPSC has not yet acted on National Grid's petition.

Given the above, there is well founded concern that there could be an "opportunity for generation-owning transmission owners to unduly discriminate between assets in which they have an ownership interest, and assets for which they do not have such an interest."[43] The NYTOs have failed to explain or provide record evidence as to how such conflicts would be treated in the future, should they arise. Accordingly, the NYTOs failed to show that the Core Amendment is not unduly discriminatory or preferential, and therefore, the Commission should reject the Section 205 Filing.

2. The Complaint should be rejected because the current approach to funding SUFs/SDUs is lawful

Pursuant to Section 206 of the FPA, "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant."[44] To be successful in a Section 206 claim, the challenger must present a *prima facie* case demonstrating that the existing rate is unlawful.[45] As set forth in the Commission's regulations, a complainant establishes a *prima facie* case if the complainant: (1) clearly identifies the action or inaction which is alleged to violate

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42 Case 18-E-0130, *In the Matter of Energy Storage Deployment Program*, Petition of Niagara Mohawk Power Corporation d/b/a National Grid for Approval to Dispatch and Wholesale Market the Output from a Utility-Owned Energy Storage System Project (Jan 12, 2021).

43 Compliance Order, Clements, Comm'r, concurring at ¶ 1.

44 16 U.S.C. § 824e.

45 *See Joint Cal. Complainants v. Pacific Gas & Elec Co.*, 163 FERC ¶ 61,112, at P 7 (May 17, 2018).

applicable statutory standards or regulatory requirements; and (2) the complainant explains how the action or inaction violates the applicable statutory standards or regulatory requirements.[46] To that effect, the complainant is required to provide the Commission with evidentiary materials, including documents that support the facts in the complaint.[47] The Complainants have not met either burden. The NYTOs failed to present a *prima facie* case demonstrating that the existing rate is unlawful and, therefore, the Section 206 Filing should be rejected.

i. The NYTOs did not show that the existing funding approach violates the standards set forth in *Bluefield* and *Hope* or that it is otherwise unjust and unreasonable

The NYTOs and Witness Nowak[48] invoke the *Bluefield* and *Hope* decisions by the United States Supreme Court to support their request for the unilateral right to fund, and earn a regulated return, on generator interconnection driven SUFs/SDUs. Both the *Bluefield* and *Hope* decisions focus on the appropriate level of return on utility investment that a public utility is supposed to have an opportunity to recover. Notably, neither *Bluefield* nor *Hope* addresses whether TOs are the appropriate entity to be financing and investing in these interconnecting generator-caused upgrades, which is the key topic at issue in this proceeding; rather, they address at what point the "total effect" of a rate falls below the constitutional floor and becomes a taking of the public utility's propriety without just compensation.[49] In *Bluefield,* the Court opined that "[w]hat annual

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46 See 18 C.F.R. § 385.206(b)(1)-(2) (2017).

47 See 18 C.F.R. § 385.206(b)(8) (2017).

48 Prepared Direct Testimony of Joshua C. Nowak on Behalf of New York Transmission Owners ("Nowak Testimony").

49 *Hope*, 320 U.S. at p. 603 ("[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the [FPA]. Under the statutory standard of 'just and reasonable' it is the result reached not the

rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts."[50] In *Hope,* the Court held that the setting of just and reasonable rates:

> involves a balancing of the investor and the consumer interests . . . that regulation does not insure that the business shall produce net revenues. But . . . that there be enough revenue not only for operating expense, but also for the capital costs of the business. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[51]

Hope, further held that any party seeking to "upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[52]

Witness Nowak claims that the existing funding approach for SUFs/SDUs is unjust and unreasonable because it inhibits the NYTOs' ability to raise capital at necessary levels to provide safe and reliable service.[53] He states "[d]enying TO Funding increases investors' required returns by requiring them to bear the risks associated with an increasing amount of SUFs/SDUs, which inhibits the NYTOs' ability to raise capital at reasonable rates and on reasonable terms."[54] Absent from Nowak's testimony and the Filings is a reckoning with the fact that the NYTOs do not need to earn a return on investments that they do not make because the capital cost is provided entirely

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method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. (Internal citations omitted).).

50 *Bluefield*, 262 U.S. at p. 692-93.

51 *Hope*, 320 U.S. at p. 602-03.

52 *Id*.

53 Nowak Testimony at p. 4.

54 Nowak Testimony at p. 65.

by the interconnecting generator, as well as generally any evidence that the NYTOs lack revenue for operating expenses or that they cannot maintain their credit or attract capital. In fact, utilities have no constitutional right to profits pursuant to both *Bluefield*[55] and *Hope*.[56]

The NYTOs failed to present record evidence that they face material incremental risks for generator interconnection driven upgrades**.** As discussed above, under the NYISO's current funding mechanism for generator interconnection driven upgrades, the developer finances and pays the capital cost of constructing and installing the SUF/SDU, and then the SUF/SDU is transferred to be owned, operated, and maintained by the relevant NYTO. The TO that gains ownership of these system upgrades did not fund or develop the project. This is why the TO is not eligible to earn a return on the capital investment that they did not make. The Filings and accompanying Testimony of Mr. Nowak,[57] however, contain inaccurate and/or irrelevant representations of alleged risk that conflate capital investment with operations and maintenance ("O&M") or draw conclusions without supporting evidence.

It is important to reiterate that under the NYTOs' respective tariffs, each company receives full recovery of its reasonably incurred costs associated with operating and maintaining its system, including operating and maintaining the SUFs/SDUs at issue. Pursuant to 25.5.4 in Attachment S of the NYISO OATT, the NYTOs are afforded the opportunity to recover any reasonably incurred costs, plus a reasonable return on investment, which includes future capital costs associated with any upgraded facilities. No evidence has been presented on the record to suggest that any O&M

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55 *Bluefield*, 262 U.S. at p. 692-93 ("[A public utility] has no constitutional right to profits . . .").

56 *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 288, 88 L. Ed. 333 (1944) ("[R]egulation does not insure that the business shall produce net revenues.").

57 Prepared Direct Testimony of Joshua C. Nowak on Behalf of New York Transmission Owners ("Nowak Testimony").

expense associated with generator interconnection SUFs/SDUs has ever been denied by a regulator. Moreover, the possibility that the NYPSC may examine and disallow some costs as imprudent[58] is no reason for the Commission to preemptively negate that risk. Doing so would unlawfully intrude on matters squarely within the state's jurisdiction. Ultimately, the NYTOs are compensated for their costs and do not earn a return on investment on any O&M for plant that is in service for which they operate and maintain. Simply put, ownership and investment are not synonymous, and an opportunity to earn a return is only appropriate on the investments that the NYTOs make, not on the investments made by interconnecting generators.

The NYTOs argue that their proposal is justified due to the increase of generator interconnections in the NYISO queue stemming from New York's clean energy targets.[59] Specifically, they allege that "a significant number of new renewable generation and energy storage resources that are, or will be, interconnecting to the TOs' systems, [is] causing the need for significant SUFs/SDUs" and thus their alleged "[lack-of-self-funding] problem has become particularly acute."[60] But the NYTOs fail to describe to the Commission how their businesses will participate and play a major role in the State's move towards achieving New York's climate and clean energy mandates.[61] Indeed, in disclosures to investors, the NYTOs have repeatedly cited the beneficial investments associated with attaining those same targets.[62]

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58 See, *e.g.*, Nowak Testimony at 20.

59 *See* Tariff Filing at 9; Complaint at 9-10.

60 Tariff Filing at 5; Complaint at 5.

61 *See generally* 2019 N.Y. Laws Ch. 106 (enacting the CLCPA); N.Y. Pub. Serv. Law § 66-p (electric sector targets); N.Y. Env't Conserv. Law § 75-0107 (statewide greenhouse gas emissions limits).

62 *See e.g.* Avangrid 2020 10-K at 168, https://sec.report/Document/0001634997-21-000024/agr-20201231.htm ("Through New York TransCo, Networks [an Avangrid affiliate] has formed a partnership with Central Hudson Gas and Electric Corporation, Consolidated Edison, Inc.,

The NYTOs are positioned to reap enormous benefit from New York's clean energy transition. For example, all the TO companies have distribution rate plans approved by the NYPSC that specify the capital asset on which the utilities can earn a return on investment. For example, in Con Edison's last rate case, the NYPSC approved a nearly $2 billion annual capital

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National Grid, plc and Orange and Rockland Utilities, Inc. to develop a portfolio of interconnected transmission lines and substations to fulfill the objectives of the New York energy highway initiative, which is a proposal to install up to 3,200 MW of new electric generation and transmission capacity in order to deliver more power generated from upstate New York power plants to downstate New York. On April 8, 2019, New York Transco was selected as the developer for Segment B of the AC Transmission Public Policy Project by the NYISO. The selected project, New York Energy Solution (NYES), replaces nearly 80-year old transmission assets located in the upper to mid-Hudson Valley with streamlined, modernized technology, *to enable surplus clean energy resources in upstate New York and help achieve the State's energy goals*. The total project cost is $600 million plus interconnection costs. NYSEG's contribution as 20% co-owner is $120 million. New York Transco is subject to regulatory approval of its rates, terms and conditions with the FERC. As of December 31, 2020 and 2019, the amount receivable from New York TransCo was $0 and $1 million, respectively. The investment in New York TransCo is accounted for as an equity investment. As of December 31, 2020 and 2019, the carrying value of our New York TransCo investment was $30 million and $26 million, respectively." (Emphasis added).); ConEd 2020 10-K at 37, https://sec.report/Document/0001047862-21-000049/ed-20201231.htm ("In August 2019, following the enactment of the CLCPA, the NYSPSC initiated a proceeding to "reconcile resource adequacy programs with New York State's renewable energy and environmental emission reduction goals. . . ." In May 2020, the NYSPSC initiated a proceeding implementing the Accelerated Renewable Energy Growth and Community Benefit Act to align New York State's electric system with CLCPA goals. In November 2020, New York's investor-owned utilities (including [Consolidated Edison Company of New York, Inc. (CECONY) and Orange & Rockland Utilities, Inc., which along with its utility subsidiary, Rockland Electric Company (together referred to herein as O&R) (O&R, together with CECONY referred to as the Utilities)]) and LIPA filed a comprehensive report in this proceeding, *identifying proactive local transmission and distribution investments in their systems to achieve the goals of the CLCPA* and setting out policy recommendations for how they will identify, prioritize and allocate costs of these and future such projects going forward. *CECONY and O&R have identified approximately $4,500 million and $400 million, respectively, in local transmission investment*. (Emphasis added).).

investment budget, which is targeted, in part, at investments to help New York achieve the climate and clean energy targets set forth in the CLCPA.[63]

Collectively, the NYTOs have identified $6 billion of Phase 1 local transmission and distribution projects, which have already been approved,[64] and another 57 projects that would provide between 12.7 GW and 14.3 GW of incremental headroom capacity for renewable generation in constrained areas to facilitate achievement of the state's 70% renewable energy by 2030 mandate.[65] When the NYTOs do make investments for CLCPA compliance, they are afforded an opportunity to earn a return on those investments, just as they do on all other capital investments.

At issue in this case is not what is a reasonable return as set forth in *Bluefield* and *Hope*, but instead whether the NYTOs can establish a new right that they have never had before. The NYTOs have failed to articulate what benefits, if any, inure to anyone but their shareholders as a result of the Complaint. Such lack of evidence does not overcome their standard of proof under the FPA Section 206.

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63 N.Y. Pub. Serv. Comm'n, Cases 19-E-0065, et al., *Proceeding on Motion of the Commission as to the Rates Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric and Gas Service*, Order Adopting Terms of the Joint Proposal and Establishing Electric and Gas Rate Plan (issued January 16, 2020), p. 38.

64 *See* NYPSC Case 20-E-0197, *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Order On Phase 1 Local Transmission And Distribution Project Proposals (Feb. 11, 2021).

65 *See* NYPSC Case 20-E-0197, *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Initial Report on the Power Grid Study, prepared by the New York Department of Public Service, the New York State Energy Research and Development Authority, The Brattle Group, and Pterra Consulting, at 22-23, figures 2 and 3 (Jan. 19, 2021) (the numbers cited were calculated using the "Total" lines in figure 2 and 3 and subtracting the projects of Long Island Power Authority, which is not one of the NYTOs in this proceeding.).

Of note, the NYTOs claim that they "face regulatory risks, reliability risks, cybersecurity risks, environmental risks, and operational risks for the SUFs/SDUs, but for which the TOs currently recover no return."[66] As evidence of this risk, Witness Nowak points to and attaches to his testimony the public filings (known as the Form 10-K) made by the NYTOs' publicly-traded corporate parents to the extent available. A 10-K is a comprehensive report filed annually by a publicly-traded company about its financial performance and is required by the U.S. Securities and Exchange Commission ("SEC"). The SEC requires this report to keep investors aware of a company's financial condition and to allow them to have enough information before they buy or sell shares in the corporation, or before investing in the firm's corporate bonds. Importantly, while these SEC filings disclose generalized risk faced by the NYTOs' publicly traded corporate parents, they do not specifically disclose any *incremental risk* created by interconnecting generator-funded SUFs/SDUs. Lack of disclosure of the incremental risk caused by interconnecting generator-funded SUFs/SDUs signals that the risk is not material information about the company for an investor to make informed investment decisions. It is therefore, not a material risk to affect the NYTO's ability to attract capital.

The incremental risk caused by interconnecting generator-funded SUFs/SDUs is likely *de minimis* or even net-negative—that is, the upgrade likely provides an (uncompensated) benefit to the TO because it makes the system more reliable, resilient, and fundamentally less risky (and ownership thereof is provided at no cost). Indeed, in the proceeding underlying the *Ameren* decision, the Commission dismissed the specter of incremental risk caused by network upgrades raised by the MISO TOs because the "Transmission Owners [did] not explain how network upgrades should be considered additive to the reliability risk associated with the transmission

[66] Complaint at p. 6.

system prior to the addition of such network upgrades versus potentially mitigating existing reliability risk."[67] In *Ameren*, the Court was dissatisfied with the Commission's dismissal of the issue because it did not attempt to holistically assess all of the various risks and benefits to the transmission owner caused by the addition of the upgrade facilities.[68] The Commission should not accept the NYTOs' invitation to repeat foregoing such a thorough investigation of risk and benefits in this case.

While Witness Nowak attaches a risk catalog to his testimony that identifies alleged risks, based on his evaluation, that *could* affect the revenues of the NYTOs, such catalog is overly broad and speculative. The risk catalog also fails to provide any accompanying quantification and risk analysis about how likely each risk is viewed pursuant to the instant matter of applying such risks as a result of SUFs/SDUs. Even Witness Nowak admits that "[t]hese are not forecasts or projections of outcomes but instead are intended to help identify the range of circumstances that the Companies may encounter and must be prepared to manage (to the extent they are within the TOs control)." Thus, Witness Nowak's risk catalog is non-specific, speculative, and is irrelevant in identifying, with specificity, what increased risks the NYTOs actually face as a result of owning and operating SUFs/SDUs, which they have done without complaint for years. The Consumer Stakeholders submit that the Commission cannot and should not approve Tariff provisions based on speculation and accordingly should reject the Filings. The Filings will instead result in unjust rates and accordingly, harm to consumers.

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67 *Otter Tail Power Co.*, 156 FERC ¶ 61099, P. 17 (2016).

68 *Ameren Servs. Co. v. Fed. Energy Regul. Comm'n*, 880 F.3d 571, 580 (D.C. Cir. 2018).

II. CONCLUSION

WHEREFORE, for the reasons provided above, the Consumer Stakeholders respectfully request that the Commission reject, and deny the relief requested in NYTOs Filings.

Dated: May 7, 2021
Albany, New York

Respectfully submitted,

/s/ Amanda De Vito Trinsey

Amanda De Vito Trinsey
COUCH WHITE, LLP
Counsel for the City of New York
540 Broadway
P.O. Box 22222
Albany, NY 12201-2222
518-426-4600
adevito@couchwhite.com

Dated: May 7, 2021
Albany, New York

/s/ Christopher Casey

Christopher Casey
Senior Attorney
NATURAL RESOURCES
DEFENSE COUNCIL
40 West 20th Street
New York, NY 100110
360-808-7599
ccasey@nrdc.org

Dated: May 7, 2021
New York, New York

/s/ John Moore

John Moore
Senior Attorney and Director
SUSTAINABLE FERC PROJECT
20 N. Wacker Street, Suite 1600
Chicago, IL 60201
312-651-7927
jmoore@nrdc.org

Dated: May 7, 2021
Chicago, Illinois

/s/ Michael B. Mager

Michael B. Mager
COUCH WHITE, LLP
Counsel for Multiple Intervenors
540 Broadway, P.O. Box 22222
Albany, NY 12201-2222
518-426-4600
mmager@couchwhite.com

Dated: May 7, 2021
Albany, New York

CERTIFICATE OF SERVICE

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

Dated at Albany, New York, this 7th day of May, 2021.

/s/ Amanda De Vito Trinsey

Amanda De Vito Trinsey, Esq.