November 2, 2021

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426


Dear Secretary Bose,

Attached for filing in the above-referenced proceeding, please find the Protest of the New York State Public Service Commission, New York State Energy Research and Development Authority, Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and Sustainable FERC Project. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service.

Please contact me at (518) 473-4953 with any questions.

Very truly yours,

Justin J. Fung
Assistant Counsel

Attachment
UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. EL22-2-000

PROTEST OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION,
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY,
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"),\(^1\) New York State Public Service Commission
("NYSPSC"),\(^2\) New York State Energy Research and Development Authority ("NYSERDA"),\(^3\)
Multiple Intervenors,\(^4\) City of New York ("City"), Consumer Power Advocates ("CPA"),\(^5\) Natural
Resources Defense Council ("NRDC"),\(^6\) and the Sustainable FERC Project\(^7\) (collectively, the

\(^1\) 18 C.F.R. § 385.211.

\(^2\) The views expressed herein are not intended to represent those of any individual member of
the NYSPSC. Pursuant to Section 12 of the New York Public Service Law, the Chair of the
NYSPSC is authorized to direct this filing on behalf of the NYSPSC.

\(^3\) NYSERDA is a public benefit corporation in the State of New York with a mission to advance
clean energy innovation and investments to combat climate change, improving the health,
resiliency, and prosperity of New Yorkers and deliver benefits equitably to all.

\(^4\) Multiple Intervenors is an unincorporated association of approximately 55 large industrial,
commercial, and institutional energy consumers with manufacturing and other facilities
located throughout New York State.

\(^5\) CPA 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.

\(^6\) NRDC 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.

\(^7\) Sustainable FERC Project is a partnership of state, regional, and national environmental and
“New York Consumer Advocates”) respectfully submit this Protest in response to the tariff filing, pursuant to Section 206 of the Federal Power Act, by the New York Independent System Operator, Inc. ("NYISO") in the above-captioned docket on October 8, 2021 (hereinafter, the “Filing”). In accordance with the Combined Notice of Filings #1 issued by the Commission on October 14, 2021, comments and protests of the Filing are due on November 2, 2021.

In the Filing, the NYISO seeks to modify its existing Public Policy Transmission Planning Process (“Public Policy Process”) and implement new procedures by which a New York Transmission Owner (“NYTO”) can exercise a right of first refusal (“ROFR”) regarding portions of another Developer’s project (“Public Policy Transmission Project”) that are designated by the NYISO as “upgrades” (“Public Policy Transmission Upgrades”). The NYISO’s proposal, which failed to incorporate input from stakeholders other than the NYTOS, was rejected soundly by the Management Committee, garnering only 42.38% support, well short of the requisite 58% threshold required to approve motions.

Many of the issues raised by the Filing previously were before the Commission in Docket No. EL20-65-000, in response to a petition for declaratory order by the NYISO. The Commission ruled therein, inter alia, that although a ROFR existed in certain circumstances, the NYISO’s Open Access Transmission Tariff (“OATT”) did not support the proposed finding that

other 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.

8 16 U.S.C. § 824e.
9 As detailed, infra, under the NYISO’s proposal, a NYTO technically does not even have to exercise a ROFR; rather, the Filing proposes that all ROFRs be deemed to have been exercised unless affirmatively declined by a NYTO.
if a NYTO exercises its ROFR for upgrades to its existing transmission facilities, the NYTO should be treated under existing OATT provisions as the Developer for the upgrade portion of a larger Public Policy Transmission Project.\textsuperscript{11} Based on such finding, the Commission did not reach a conclusion on certain issues, such as whether cost containment should apply to upgrades and the timing of when a ROFR should be exercised as part of the NYISO’s Public Policy Process.\textsuperscript{12}

In a concurring opinion, Commissioner Clements anticipated many of the concerns advanced herein by the New York Consumer Advocates.\textsuperscript{13} Commissioner Clements noted how the NYISO’s Public Policy Process has been successful to date – an opinion generally shared by the New York Consumer Advocates – but expressed concern that the continuation of such success depends upon how the NYISO implements the Commission’s ruling that NYTOs possess ROFRs.\textsuperscript{14} Commissioner Clements opined that “it is hard to imagine how NYISO can continue to leverage competitive forces in the planning process for consumers’ benefit if NYTOs are permitted to stifle competition through their exercise of rights of first refusal over upgrades within a new transmission project.”\textsuperscript{15} Commissioner Clements also identified certain critical issues that were supposed to be resolved in the NYISO’s stakeholder process – but which were not, such as: “whether NYTOs will be permitted to: exercise a right of first refusal in the middle of or after a competitive solicitation process is complete [or] assume responsibility for upgrades in a regionally selected project without abiding by the winning bidder’s cost containment commitment ….”\textsuperscript{16}


\textsuperscript{12} Id. at P 42.

\textsuperscript{13} See id., Concurrence of Commissioner Clements.

\textsuperscript{14} Id. at P 3.

\textsuperscript{15} Id. at P 4.

\textsuperscript{16} Id.
SUMMARY OF ARGUMENT

For the reasons set forth herein, the New York Consumer Advocates protest the NYISO’s Filing and urge the Commission to deny it. The New York Consumer Advocates focus their protest on the following four aspects of the NYISO’s proposal.

First, the Commission should reject the proposal because exempting NYTOs exercising ROFRs from having to incorporate the bids and/or the cost containment proposals of non-incumbent transmission developers would be unjust and unreasonable. As explained herein, the NYISO is proposing that NYTOs exercising ROFRs be accorded all of the benefits of the Public Policy Process – such as access to cost allocation and cost recovery through the NYISO’s tariff – without being subject to any cost limitations, irrespective of the bids and the cost containment proposals submitted by non-incumbent transmission developers to complete work subsequently taken over by NYTOs. The NYISO’s proposed approach would undermine the benefits sought to be realized for consumers through the use of a competitive solicitation process, as well as the incorporation of cost containment proposals therein.

Second, and relatedly, the Commission should reject the proposal because excluding from consideration by the NYISO in its evaluation any and all cost containment proposals submitted to complete work that may – or may not – be taken over by a NYTO via exercise of a ROFR would be unjust and unreasonable. The NYISO’s proposal would diminish the benefits of competition by potentially exempting large portions of transmission projects proposed under the Public Policy Process from cost containment proposals, even for work that is not subject to an exercised ROFR.

Third, the Commission should reject the proposal because allowing a NYTO to wait until the end of the Public Policy Process, after the winning transmission project or projects are selected, before electing whether or not to exercise a ROFR would be unjust and unreasonable. The New
York Consumer Advocates fear that adoption of this approach would discourage participation in the Public Policy Process by non-incumbent transmission developers, thereby reducing competitive forces and increasing costs to consumers.

Fourth, the Commission should reject the proposal because not requiring a NYTO to affirmatively exercise a ROFR but, rather, treating all ROFRs identified by the NYISO as having been exercised absent a NYTO’s formal rejection of a particular ROFR at the end of the Public Policy Process would be unjust and unreasonable. The New York Consumer Advocates contend that where a ROFR is found to exist, the NYISO should require the NYTO to indicate affirmatively its intention to exercise said ROFR. Contrary to the proposal, ROFRs should not be assumed or deemed to have been exercised through non-action.

ARGUMENT

There can be no dispute that, for decades, the nation’s energy public policy has been focused on introducing and fostering competition in order to lower prices for consumers. The U.S. Supreme Court concluded 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.”

The Public Utility Regulatory Policies Act of 1978 and the Energy Policy Act of 1992 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 further highlights the Commission’s efforts to promote competition. The

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19 106 Stat. 2776.
Commission has explained 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.”

Order No. 1000 was a logical extension of the Commission’s pro-competition policies in that it provided broad opportunities for competition among developers of transmission projects needed to satisfy evolving public policies – including competition between incumbent utilities and non-incumbent transmission developers. Although the Commission prohibited ROFRs only in certain circumstances (e.g., transmission facilities selected in regional transmission plans for purposes of cost allocation), its rationale for doing so is relevant here. 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.” The Commission further concluded that ROFRs can impact jurisdictional transmission rates by “depriv[ing] customers of the benefits of competition in transmission development, and associated potential savings ….”

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22 Order No. 1000 at P 284.

23 Id. at P 285.
While the Commission has allowed utilities to maintain ROFRs in certain circumstances, the Commission has retained authority over how such ROFRs may be implemented. In response to the NYISO Petition, the Commission stated:

“parties protesting NYISO’s Petition raise concerns that confirming that the NYTOs have a federal ROFR over upgrades that are part of a Developer’s proposed transmission project will stifle competition. They point to uncertainties concerning when in the planning process a NYTO may exercise its ROFR over upgrades and whether a NYTO exercising a ROFR must abide by any cost containment provision in the selected Developer’s bid. We agree that these are important questions, and we will evaluate these and other implementation issues when NYISO proposes specific tariff provisions to implement the ROFR.”

24 April 2021 Declaratory Order at P 32 (emphasis added).

As demonstrated below, the NYISO’s Filing seeks to implement ROFRs into the existing Public Policy Process in a manner likely to hinder competition and raise costs to consumers. It reflects considerable input from NYTOs but seemingly none from any other party or interest.25 The Filing would not result in just and reasonable rates and, therefore, should be rejected by the Commission.

**POINT I**

THE NYISO'S PROPOSAL ALLOWING NYTOS TO EXCLUDE NON-INCUMBENT TRANSMISSION DEVELOPERS' COST CONTAINMENT PROPOSALS FROM THE EXERCISE OF THEIR ROFRS IS UNJUST AND UNREASONABLE

In response to the NYISO Petition, the New York Consumer Advocates (not including the NYSPSC26 or NYSERDA) argued that the ROFR would undermine competitive transmission

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24 In its Filing, the NYISO states that its proposed revisions to the OATT “will protect the interests of all affected parties, particularly non-incumbent Developers as well as the NYTOs.” (Filing at 7.) Notwithstanding such statement, however, the NYISO sided on all major issues with the NYTOs and not a single non-incumbent transmission developer or consumer party supported the NYISO’s proposal at the Management Committee.

25 The NYSPSC filed a separate Protest in Docket No. EL20-65-000 on September 17, 2020.
development in New York at a time when the State has emphasized building new transmission within existing rights-of-way. They also argued that the principle of open access should apply equally to planning and development processes, and incumbent and competitive transmission companies should have equal opportunities to participate in those processes. In the April 2021 Declaratory Order, the Commission confirmed the existence of the NYTOs’ existing right because the New York Consumer Advocates did not provide concrete evidence supporting their concerns.27

Although there have not been any decisions made over the past six and a half months that demonstrate these competitive concerns, the New York Consumer Advocates submit that there is evidence supporting their concerns. In Docket No. EL20-65, LSP Transmission Holdings II, LLC and LS Power Grid New York, LLC provided evidence of the harm arising from similar ROFRs.28 Further evidence of the anti-competitive concerns with this proposal comes from the actions of market participants in the underlying NYISO process. It is fair to say that most, if not all, active market participants support competition and routinely support NYISO initiatives that enhance competition. The fact that a majority of market participants refused to support this proposal suggests broad anti-competitive concerns associated therewith.

In the Filing, the NYISO offers an Affidavit from Zach Smith, its Vice President of System and Resource Planning, to support the proposal. Mr. Smith notes that this proposal could cause competitive developers to choose not to respond to a solicitation.29 While he expresses concern that uncertainty regarding the nature of the NYTOs’ rights could “reduce the pool of potential

27 April 2021 Declaratory Order at P 37.
29 Filing, Attachment III at ¶ 10.
more efficient or cost-effective transmission solutions,” he disregards that the proposal could have the exact same effect and that the lack of NYTO cost containment could make an otherwise cost-effective solution cost-ineffective.30

The Commission should not wait until after consumers have been harmed to act. Moreover, this proceeding involves far more than a declaration of the NYTOs’ rights; granting the requested relief would undermine competition in New York, create a distinctly unlevel playing field and unfair process, and expose consumers to unnecessarily higher costs.

First, as proposed, the ROFR would apply to projects or parts of projects affecting the NYTOs’ existing transmission facilities and/or located within the NYTOs’ existing rights-of-way. In the stakeholder process, the NYISO and NYTOs asserted that it is appropriate for the NYTOs to wait until the end of the selection process, and after the NYISO Board of Directors (“Board”) has selected one or more developers for each project, to decide whether to exercise any ROFR (or, more accurately, whether to reject the automatic application of any ROFR). The argument supporting this timing is that it allegedly would be too burdensome for the NYTOs to evaluate each project proposal advanced by competitive developers, which they claim would be required under an earlier deadline for exercising ROFRs. The New York Consumer Advocates assert that this argument lacks merit.

At issue are facilities and property acquired, designed, constructed, maintained, owned, and operated by the NYTOs – in most instances for many decades. Each of the NYTOs has, or should have, intimate knowledge of their own facilities and properties. As prudent utility

30 Id. at ¶ 9. In the stakeholder process and in the Filing, the NYISO points to the independent cost estimate it relies upon to select projects as some sort of protection. That cost estimate is irrelevant because it is not binding on any NYTO or developer; as a preliminary estimate, it would not form a basis for a prudence finding if the actual, unconstrained costs were substantially higher.
companies, all of the NYTOs engage, or should engage, in system planning and examine the present and future needs of their customers and systems. All of the NYTOs also participate extensively in the NYISO’s Bulk Power System planning processes. Moreover, in 2012, the NYTOs prepared a Statewide Transmission Assessment and Reliability Study that identified and described 18 major transmission projects to upgrade the Bulk Power System. Thus, any argument that they would have difficulty in assessing proposals to upgrade their own transmission facilities should be met with significant skepticism.

Second, as discussed above, the Commission decided to introduce competition into the electric industry in order to reduce consumers’ energy costs. That is, monopolistic utilities lack motivation to reduce costs because captive customers have no options. In contrast, when multiple entities compete to serve customers, there is extensive motivation for the competitors to minimize their costs. Indeed, it is a broadly accepted economic principle that competitive markets can increase economic efficiency and produce lower costs to consumers.

The principle applies equally to transmission development. The NYISO has conducted three solicitations for transmission needed to serve public policies. Each of the solicitations has resulted in robust participation by non-incumbent developers. Significantly, the New York Consumer Advocates understand that all of the non-incumbents have offered some form of cost containment as part of their proposals. In contrast, the NYTOs have strenuously opposed cost containment. The New York Consumer Advocates’ foremost objection to the Filing and ROFR proposal relates to this very issue. The NYTOs want the ability to step into the shoes of their

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competitors in all respects save one – cost containment. That is, they apparently are willing to agree to build the same project as part of the Public Policy Process, presumably in the same or a similar manner as their competitors, but they are unwilling to commit to non-incumbent developers’ bids or cost containment proposals offered for the project.

Thus, under today’s rules, if the NYISO selects a non-incumbent which submitted a $500 million bid with cost containment, customers would pay no more than $500 million for the project even if the final cost for the project is higher. However, under the proposed ROFR process, a NYTO conceivably could charge customers $1 billion or more for the exact same project. Without cost containment, a NYTO faces little pressure to try to minimize or otherwise control its costs, and customers would have virtually no recourse against the NYTO. This deficiency makes the ROFR proposal in the Filing unjust and unreasonable, and anti-competitive.

Since the NYSPSC has stated a preference that new transmission be constructed to the maximum extent possible within existing rights-of-way, the potential for the ROFR to be invoked frequently – perhaps in every solicitation – is very high. Over time, the repeated exercise of the ROFR by the NYTOs is very likely to chill any interest by non-incumbents in responding to NYISO solicitations. While the NYTOs’ shareholders would be enriched, consumers would suffer by being forced to incur unnecessarily-high costs – the same circumstances that led the Commission to adopt Order No. 888. The Commission should not allow this cycle to occur.

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32 The New York Consumer Advocates acknowledge the possibility of commencing a prudence proceeding, but the likelihood of success in demonstrating imprudence is extremely low while the cost of pursuing a prudence claim may be very high.

33 As addressed, infra, this is especially true given the NYISO’s proposal to require non-incumbent transmission developers to participate for the entirety of the process, only to run the risk of having a NYTO exercise a ROFR and takeover a non-incumbent’s project at the very end, after such project has been selected by the NYISO Board for development.
The need for more transmission, and for upgrades to existing transmission, in New York is not new. According to the STARS Report, until a few years ago, no major transmission lines had been constructed in New York since the 1980s, and 85% of the transmission lines are over 40 years old.\textsuperscript{34} In 2010, the cost of congestion was estimated at $1.1 billion.\textsuperscript{35} For decades, the NYTOs could have invested in new transmission across New York State, but they chose not to do so. The STARS Report identified 18 needed transmission projects, but the NYTOs did not pursue any of those projects.

Now, when the NYISO conducts a competitive solicitation to address the very same and some other transmission needs, the NYTOs appear unwilling to compete and demonstrate why their projects should be selected. Instead, the ROFR proposal would allow the NYTOs to let others evaluate, design, engineer, and select the projects, and only then step in, after the Public Policy Process concludes, and take over others’ work product (but not their bids or cost containment proposals). The Commission should not allow the NYTOs to avoid competing for the right to construct new transmission and earn a return associated therewith.

If the Commission determines that it is acceptable for the NYTOs to avoid such competition and simply take over projects as proposed by non-incumbents, the Commission should still reject the Filing because it allows the NYTOs to cherry-pick only some aspects of the non-incumbents’ projects. The Commission should hold that for a ROFR construct to be acceptable, the NYTOs must accept the entirety of the selected proposal – the design and the cost, inclusive of any cost containment that was part of the proposal. If the developer of the selected project proposed to construct it for a set amount, the NYTO should be required to accept or reject the

\textsuperscript{34} STARS Report at 2.

\textsuperscript{35} Id.
project at the same bid price. If the developer proposed a cost containment mechanism which limits customers’ exposure to cost overruns, the NYTO should be required to accept the project subject to the same mechanism. In other words, bid prices and cost containment proposals should not be excluded from ROFRs, as proposed by the NYISO.

In holding that the NYTOs have a right of first refusal, the Commission did not find that the right was unlimited or unfettered. Importantly, the Commission declined to make any findings related to cost recovery, cost allocation, or cost containment, stating that such issues would be considered now, when the implementation details are submitted for approval.\textsuperscript{36} It is fair and equitable for the Commission to hold here that the exercise of the right should be an all-or-nothing proposition. Such a holding would ensure that there is a proper balancing of customer and shareholder interests and protect customers from exposure to excessive and unjust costs – costs that they would not incur but for exercise of the ROFR.

\textbf{POINT II}

\textbf{THE NYISO’S PROPOSAL EXCLUDING CONSIDERATION OF ALL COST CONTAINMENT PROPOSALS FOR WORK THAT MAY – OR MAY NOT – BE SUBJECT TO AN EXERCISED ROFR IS UNJUST AND UNREASONABLE}

As detailed in Point I, \textit{supra}, the New York Consumer Advocates protest the NYISO’s proposal to exempt NYTOs exercising ROFRs from non-incumbent transmission developer bids and cost containment proposals. For the reasons set forth below, the New York Consumer Advocates also protest the NYISO’s proposal to exclude from consideration all cost containment proposals submitted for work that may – or may not – be subject to an exercised ROFR.\textsuperscript{37} The

\textsuperscript{36} April 2021 Declaratory Order at P 42.

\textsuperscript{37} This aspect of the proposal was introduced by the NYISO very late in the process and described
NYISO’s proposal would diminish the consumer benefits associated with cost containment commitments, thereby reducing competition in a manner that undermines the competitive solicitation process.

In its Filing, the NYISO proposes changes to its selection process “to clarify that the NYISO will not consider any voluntary Cost Cap to the extent it includes any Public Policy Transmission Upgrades as Included Capital Costs. The NYISO will only evaluate the Cost Cap for new transmission facilities that are part of the Included Capital Costs.” (Filing at 20-21; footnotes omitted.) In other words, when the NYISO evaluates proposals to attempt to select the more efficient or cost-effective Public Policy Transmission Project, it would ignore any and all cost containment commitments submitted that encompass upgrades, irrespective of whether a ROFR is exercised by the NYTO.\footnote{Absent any competitive pressure from having to match a non-incumbent transmission developer’s bid or cost containment proposal, NYTOs almost certainly will exercise ROFRs, thereby reducing competition.}

One of the main considerations in selecting projects under the Public Policy Process should be cost. Indeed, one would hope and expect that a competitive process would result in the best and most cost-effective projects being identified for selection. The NYISO’s proposal, however, would deprive consumers of the benefit of cost containment commitments, seemingly without reason. For instance, when a non-incumbent transmission developer proposes a cost containment commitment, it clearly would be in consumers’ interests for such commitment to be considered by the NYISO in its evaluation process.

The NYISO has proposed that NYTOs exercising ROFRs be exempted from non-incumbent transmission developer bids and cost containment proposals – a proposal being as a clarification, a characterization with which the New York Consumer Advocates disagree.
protested herein. (See Point I, supra.) While the New York Consumer Advocates oppose such proposal, there also is no compelling justification for refusing to consider cost containment proposals encompassing upgrades for which ROFRs are not exercised. For other aspects of the Public Policy Process, there is no practical difference between a transmission project comprised of new facilities and one that includes upgrades for which a ROFR is not exercised.

As a practical matter, if the NYISO exempts NYTOs exercising ROFRs from non-incumbent transmission developer bids and cost containment proposals, but does not require ROFRs to be exercised until the very end of the process, after the supposedly more efficient or cost-effective Public Policy Transmission Project is selected, the NYISO has no way to consider cost containment proposals where a ROFR is rejected (i.e., because the selection process is over). If, on the other hand, the NYISO were to require ROFRs to be exercised or rejected earlier in the Public Policy Process (see Point III, infra), then it would be able to consider such cost containment proposals and potentially select them for the benefit of consumers.

In the April 2021 Declaratory Order, the Commission noted the NYISO’s expectations that “developers’ Order No. 1000 transmission projects will likely modify NYTOs’ existing transmission facilities,” and “there is a high likelihood that Order No. 1000 transmission projects will be located within existing rights-of-way due to the unique circumstances in New York.”39 While the NYISO now touts Commissioner Clements’ statement in her concurrence that the Public Policy Process “has been a bright spot in the Order No. 1000 landscape,”40 it ignores her concerns that “it is hard to imagine how NYISO can continue to leverage competitive forces in the planning process for consumers’ benefit if NYTOs are permitted to stifle competition through their exercise

39 April 2021 Declaratory Order at P 12 (footnote omitted).
40 Filing at 2 (citing April 2021 Declaratory Order, Commissioner Clements Concurrence at P 3).
of rights of first refusal over upgrades within a new transmission facility project.” Consumers now are confronted with a proposal whereby the NYTOs would be able to wait until the very end of the process to decide whether or not to exercise ROFRs, and not only would they be exempted from any bids and cost containment proposals submitted by non-incumbent transmission developers for such work, but the NYISO would not even consider cost containment proposals submitted with respect to ROFRs that are not exercised.

The Commission should strive to ensure that the NYISO’s Public Policy Process continues to utilize competitive forces to benefit consumers. Precluding the consideration of cost containment proposals for work subject to a ROFR that may not even be exercised clearly is contrary to consumers’ interests.

**POINT III**

**THE PROPOSAL TO ALLOW THE NYTOS TO DELAY EXERCISING (OR DECLINING) THE ROFR UNTIL AFTER THE NYISO SELECTS A PROJECT IS UNJUST AND UNREASONABLE**

The NYISO’s proposal would allow a NYTO to wait until the very end of the Public Policy Process to determine whether it will or will not proceed with building a Public Policy Transmission Upgrade. The New York Consumer Advocates oppose this aspect of the proposal because it is an unreasonable application of the ROFR, would have an anti-competitive result by discouraging non-incumbent developers from proposing projects involving upgrades to NYTO facilities, and would leave a potential void in having a developer selected to pursue an upgrade.

Under the NYISO’s proposed tariff language, any proposed transmission facilities that constitute Public Policy Transmission Upgrades would be identified and listed early in the

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41 Id. at 4.
solicitation process, along with the NYTO that owns such facility(ies). However, the associated NYTO would have up to 30 calendar days after a transmission solution is selected by the NYISO Board to decline to exercise its ROFR for any portion of the selected solution that constitutes a Public Policy Transmission Upgrade. The NYISO claims that this proposed mechanism would “continue[] to provide flexibility to non-incumbent transmission developers in designing solutions to an identified need” because it “provides optionality for the non-incumbent transmission Developers to design their projects to best advantage them in the evaluation and selection process, even though an upgrade may be designated to the applicable NYTO.”

Contrary to the NYISO’s assertions, the proposal would inject uncertainty into the Public Policy Process, and would have a chilling effect on the competitive process contemplated by the Commission in Order No. 1000. Under the proposed framework, non-incumbent developers would not know whether or not they will have the opportunity to build, own, and recover the costs of a transmission upgrade until a month after a preferred solution already has been selected. In these circumstances, non-incumbent developers are less likely to spend substantial money or time developing project proposals involving Public Policy Transmission Upgrades, particularly if there is a significant risk that the designated NYTO will simply take over those parts of the transmission project at the very end of the process. This directly contradicts Order No. 1000 in that it will “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.”

The likelihood of a NYTO stepping in at the end of the process is amplified by the NYISO’s proposal to remove cost containment for Public Policy Transmission Upgrades, as discussed

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42 Filing at 27-28.
43 Order No. 1000 at P 284.
above. Without cost containment, an incumbent transmission owner would not face the risk of being saddled with excessive capital costs after it has elected to build the upgrade (*i.e.*, if there are cost overruns, the NYTO would still be allowed to recover those costs). Similarly, the NYTO would not face competition from non-incumbent developers for potential Public Policy Transmission Upgrades, because those developers also would be prohibited from including cost containment commitments as part of their proposals. All else being equal, an NYTO would have no compelling reason not exercise a ROFR.

The New York Consumer Advocates submit that NYTOs instead should be required to affirmatively exercise their ROFR to build Public Policy Transmission Upgrades when the NYISO first lists and classifies such facilities. This approach would maintain transparency and competitiveness in the Public Policy Process, and allow developers to propose innovative transmission solutions that include potential upgrades to existing facilities without forcing them to also accept significant risks and uncertainties, while recognizing the existence of an ROFR for the NYTOs as determined by the Commission in its April 2021 Declaratory Order.

Requiring that the ROFR be exercised early in the solicitation process does not adversely harm the NYTOs, who have owned and operated their transmission infrastructure in New York for many decades, and possess detailed knowledge about the needs and requirements of their

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44 The New York Consumer Advocates also note that the NYISO proposes to utilize an independent consultant to estimate the capital costs associated with the Public Policy Transmission Upgrade. (Filing at 23.) This effectively would mean that for purposes of project evaluation, the cost of a potential system upgrade would not vary depending on whether it is proposed by an incumbent or non-incumbent developer.

45 As discussed in Part IV, *infra*, the New York Consumer Advocates also oppose the aspect of the NYISO’s proposal whereby the NYTOs would not have to affirmatively exercise any ROFR, but instead could remain silent and be defaulted into the role of a Designated Entity for a Public Policy Transmission Upgrade.
electric systems. The NYTOs presumably already would have a broad understanding about the potential costs to upgrade their transmission facilities, and would be in a good position to determine whether or not they should exercise their ROFRs when the Public Policy Transmission Upgrades are identified. The NYISO fails to present a compelling reason why it is unduly burdensome to require an early exercise of the NYTOs’ ROFRs simply because several proposals involving upgrades may exist. Moreover, absent any cost containment requirements for transmission upgrades – an outcome opposed by the New York Consumer Advocates – there would be no risk to the incumbent NYTO of electing to exercise a ROFR early in the solicitation process and then being saddled with excessive capital costs after-the-fact.

Conversely, requiring NYTOs to exercise their ROFRs once the NYISO identifies the Public Policy Transmission Upgrades would provide greater clarity to developers and allow them to make more-informed decisions. For example, a developer would be able to tailor its proposal to account for both situations where it would or would not be responsible for building a transmission upgrade. Once the NYTO has elected to exercise or reject its ROFR, the developer then can decide whether it should continue with a comprehensive evaluation of its proposed transmission solution, and incur the additional costs associated with that evaluation. Giving prospective developers additional information with which to develop their transmission solutions, while also allowing for cost containment measures to be considered and implemented, would enhance the competitiveness of the Public Policy Process, consistent with the directives of Order No. 1000, and ensure that rates are just and reasonable.

For all the foregoing reasons, the Commission should reject the aspect of the NYISO’s proposal that would enable NYTOs to wait until the very end of the Public Policy Process to exercise any ROFR to build, own, and recover the costs of a Public Policy Transmission Upgrade.
Instead, the Commission should adopt the recommendation set forth in this protest and direct that NYTOs be required to exercise any ROFR early in the solicitation process, once the NYISO has identified the Public Policy Transmission Upgrades associated with any proposals received.

**POINT IV**

**THE NYISO’S PROPOSAL TO ASSUME THE EXERCISE OF ROFRs WITHOUT ANY AFFIRMATIVE ACTION ON THE PART OF NYTOs IS UNJUST AND UNREASONABLE**

The NYISO proposes that to the extent any portion of a selected transmission project is deemed an upgrade and subject to a ROFR, such ROFR would be deemed exercised by the applicable NYTO unless it affirmatively rejects the ROFR. This proposed approach is backwards and should be rejected. A NYTO possessing a ROFR over transmission work deemed an upgrade should elect whether or not to exercise such ROFR; such election should not be assumed, but, rather, should require affirmative action on the part of the NYTO.

In its Filing, the NYISO discusses how a developer submitting a transmission project selected under the Public Policy Process would be deemed a “Designated Entity” for purposes of developing such project. It then states: “[t]he NYISO will separately designate any portion of the selected transmission project that satisfies the definition of a Public Policy Transmission Upgrade for purposes of the NYTOs’ ROFR Rights to the applicable NYTO. In such case, the NYTO will also be a Designated Entity responsible for developing the upgrades as a separate Designated Public Policy Project, unless the NYTO elects to forego this designation.” Thus, the NYISO is

46  See, e.g., Filing at 12.
47  Filing at 12; see also id. at 26-27.
proposing that ROFRs be deemed elected without any action whatsoever by a NYTO, and that an
affirmative decision only be required if the NYTO decides not to exercise a ROFR.

In support of its proposal, the NYISO advances two arguments. First, the NYISO argues
that assuming a ROFR is exercised without any formal action by the NYTO somehow is consistent
with its underlying agreement with the NYTOs:

The ISO-TO Agreement and Operating Agreements provide that the NYTO retains
its rights incident to ownership of its transmission facilities. The NYISO believes
that the presumption should be consistent with the NYTOs’ reserved rights to
upgrade their own facilities. Therefore, the NYTO may elect not to exercise its
ROFR and not to be the Designated Entity by expressly notifying the NYISO.48

This argument lacks merit.

Whatever rights may have been reserved by the NYTOs in their agreements with the
NYISO are merely what bestow the ROFR in the first place. Importantly, however, ROFRs still
need to be exercised. The fact that a NYTO is entitled to upgrade its facilities does not mean that
it will in fact do so. Indeed, up until that point in time, the NYTO had failed to undertake the
upgrade work in question.

In the context of the Public Policy Process, a ROFR arises when a non-incumbent
developer proposes a transmission project that includes one or more upgrades to a NYTO’s
existing facilities. In such cases, the NYTO could have proposed to do such work on its own, and
in many instances failed to do so over multiple decades. Absent the Public Policy Process, a
NYTO seeking to upgrade its own transmission facilities indisputably would need to make an
affirmative election to do so. Thus, it does not make sense to relieve NYTOs of the obligation to
affirmatively exercise a ROFR simply because a non-incumbent transmission developer advances
one or more proposals in the Public Policy Process that include upgrades to a NYTO’s facilities.

48 Filing at 28 (citation omitted).
If NYTOs are going to be accorded the right to take over portions of projects designed and proposed by non-incumbent developers, and thereby avail themselves of the NYISO’s tariff for cost allocation and cost recovery purposes, they should, at a minimum, be required to make an affirmative election to exercise any ROFRs identified by the NYISO.

Next, the NYISO argues that whether or not NYTOs are required to affirmatively exercise ROFRs “is a matter of semantics and will not drive any meaningful difference in the impact of the NYTOs’ ROFR Rights on the process.” 49 The New York Consumer Advocates strenuously disagree. The exercise of a ROFR triggers numerous obligations, and all stakeholders – and the Commission – should be free of any doubt as to a NYTO’s intent.

For the reasons detailed above, a NYTO exercising a ROFR should be subject to the non-incumbent developer’s bid and/or cost containment proposal for that work. Irrespective of whether or not the Commission adopts this position, a NYTO exercising a ROFR assumes a myriad of obligations. For instance, any costs incurred by a NYTO on an upgrade for which cost allocation and cost recovery via the NYISO’s tariff is sought must be incurred prudently. Additionally, because upgrades likely only will comprise a portion of the transmission project(s) selected by the NYISO under the Public Policy Process, the NYTO(s) performing such upgrades will be required to complete such work on a timely basis so as to not delay completion of work by other developers. In these and presumably other instances, it would be preferable for a NYTO exercising a ROFR to make an affirmative election to do so, rather than having the NYISO assume it was the NYTO’s intent based on the absence of any action.

The New York Consumer Advocates protest the NYISO’s Filing – which was rejected soundly in the governance process – because it is one-sided in favor of the NYTOs and,

49 Filing at 28.
consequently, contrary to consumer interests and not likely to produce just and reasonable rates. While the NYISO’s primary proposals – namely to: (i) exempt NYTOs from the bids and cost containment proposals of non-incumbent transmission developers when exercising a ROFR, (ii) prohibit even the consideration of non-incumbent transmission developers’ cost containment proposals that encompass upgrade work, and (iii) wait until the very end of the Public Policy Process before requiring a decision by NYTOs as to whether or not to exercise a ROFR are the most problematic and objectionable from the perspective of the New York Consumer Advocates, the proposal to allow NYTOs to exercise ROFRs through inaction clearly illustrates that the Filing presents an unfair and inequitable process tilted to favor one set of stakeholders – the NYTOs.

**CONCLUSION**

For the reasons set forth herein, the New York Consumer Advocates respectfully request that the Commission find that the ROFR proposal advanced by the NYISO in this matter will lead to unjust and unreasonable rates, lacks a proper balance between consumer and shareholder interests, and is not consistent with the Commission’s competitive principles. Based on these findings, the Commission should reject the Filing.

Respectfully submitted,

Robert Rosenthal
Robert Rosenthal
General Counsel
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
By: David Drexler
Managing Attorney
Three Empire State Plaza
Albany, NY 12223-1350
518-473-8178
david.drexler@dps.ny.gov

Peter J. Costello
Peter J. Costello
General Counsel and Secretary
NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY
By: Sunny S. Joshi
Senior Counsel
17 Columbia Circle
Albany, NY 12203-6399
518-862-1090
sunny.joshi@nyserda.ny.gov
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

Cullen Howe
Cullen Howe, Senior Advocate
NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th Street
New York, NY 10011
212-727-2700
chowe@nrdc.org

Kevin M. Lang
Kevin M. Lang
COUCH WHITE, LLP
Counsel for the City of New York
540 Broadway
P.O. Box 22222
Albany, NY 12201-2222
518-426-4600
klang@couchwhite.com

Catherine Luthin
Catherine Luthin
Executive Director
CONSUMER POWER ADVOCATES
865 State Route 33
Ste 3 PMB 1077
Freehold NJ 07728
732-774-0005
catherine.luthin@luthin.com

John Moore
Senior Attorney and Director
SUSTAINABLE FERC PROJECT
20 North Wacker Street, Suite 1600
Chicago, IL 60201
312-651-7927
moore.fercproject@gmail.com

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Freehold, New Jersey

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Chicago, Illinois
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Protest of New York State Public Service Commission, New York State Energy Research and Development Authority, Multiple Intervenors, Natural Resources Defense Council, City of New York, Consumer Power Advocates, and Sustainable FERC Project 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 2nd day of November, 2021.

/s/ Justin J. Fung
Justin J. Fung