

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

Central Hudson Gas & Electric Corp., et al.)	
)	Docket No. EL21-66-000
Complainants,)	
)	
v.)	
)	
New York Independent System Operator, Inc.)	
)	
Respondent.)	
)	
)	
Central Hudson Gas & Electric Corp., et al.)	Docket No. ER21-1647-000
)	(Not Consolidated)

**COMMENTS OF THE
AMERICAN CLEAN POWER ASSOCIATION,
ALLIANCE FOR CLEAN ENERGY NEW YORK,
INDEPENDENT POWER PRODUCERS OF NEW YORK, INC.,
NEW YORK BATTERY AND ENERGY STORAGE TECHNOLOGY CONSORTIUM,
AND U.S. ENERGY STORAGE ASSOCIATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ the American Clean Power Association (“ACP”), Alliance for Clean Energy-New York, Inc. (“ACE NY”), Independent Power Producers Of New York, Inc. (“IPPNY”), New York Battery and Energy Storage Technology Consortium (“NY-BEST”) and the U.S. Energy Storage Association (“ESA”)², collectively “NY

¹ 18 C.F.R. § 385.211 (2021).

² The views and opinions expressed in this filing do not necessarily reflect the official position of each individual member of the NY Interconnection Customers.

Interconnection Customers”, submit these Comments in response to the New York Transmission Owners (“NYTOs”)³ filing of their response⁴ to the FERC Staff’s Deficiency Letter⁵.

I. BACKGROUND

On April 9, 2021, the NYTOs submitted dual filings⁶ with the goal of forcing the New York Independent System Operator (“NYISO”) to implement unilateral Transmission Owner (“TO”) Funding for transmission system upgrades associated with the generation interconnection process, namely System Upgrade Facilities (“SUFs”) and System Deliverability Upgrades (“SDUs”).

On May 7, 2021, the NY Interconnection Customers filed a Protest⁷ of those filings. In the Protest, the NY Interconnection Customers respectfully requested that the Commission deny the Complaint and reject the Tariff Filing for multiple reasons, which included:

- None of *Ameren*, *Bluefield* or *Hope* provide an unqualified right for the NYTOs to earn a rate of return on network upgrades;
- NYTOs provide no evidence to satisfy the standards in *Bluefield* and *Hope*;
- NYTOs ignore express determinations from the Commission that *Ameren* does not apply to all regions;
- Publicly available information clearly demonstrates that, notwithstanding the application of generator funding of SUFs and SDUs and collectively as

³ Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corp. d/b/a National Grid, New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corp.

⁴ *The New York Transmission Owners*, Amendment to NYISO OATT Adopting TO Funding Mechanism, Deficiency Letter Response, Docket No. ER21-1647-000, July 8, 2021 (“Response”).

⁵ Deficiency Letter issued by the Staff of the Federal Energy Regulatory Commission, Docket No. ER21-1647-000, June 8, 2021.

⁶ *Central Hudson Gas & Electric Corp., et. al. v. New York Independent System Operator*, Complaint Requesting Fast Track Processing, Docket No. EL21-66-000, April 9, 2021 (“Complaint”). Also, *The New York Transmission Owners*, Amendment to NYISO OATT Adopting TO Funding Mechanism, Docket No. ER21-1647-000, April 9, 2021 (“Tariff Filing”).

⁷ Protest of the American Clean Power Association, et. al., Dockets Nos. EL21-66 and ER21-1647, May 7, 2021 (“Protest”).

SUFs/SDUs (“Existing Funding Approach”) in the NYISO region since at least 2009, no NYTO has had an issue attracting capital in order to serve the public interest. This shows that the standards of *Bluefield* and *Hope* in regard to SUFs/SDUs are not applicable here;

- The “risks” NYTOs identify are pure speculation. NYTOs do not identify a single risk from the Existing Funding Approach that has ever impaired their ability to attract capital or resulted in a rating agency downgrade that might impair serving the public interest. Further, the examples of risk that the NYTOs identify have no relation to SUFs/SDUs, have never involved SUFs/SDUs (or other network upgrades in other regions of the United States), and are of the type of risks that are regularly recovered in rates approved by a state commission. Hence, these “risks” are “baked-in” and are already accounted for by prospective investors in the NYTOs;
- NYTOs continue to ignore that the reason they no longer earn a rate of return on SUFs/SDUs *is because they requested it*. Following Order No. 2003, NYISO, with the support of the NYTOs, asked the Commission to approve “participant funding” in New York. Under this approach, the NYTOs no longer were required to reimburse an interconnection customer for amounts provided to fund SFUs/SDUs, and thereby *asked* that they no longer have an opportunity to earn a rate of return, as Order No. 2003 provided, by rolling the cost into transmission rate base. Should the NYTOs wish to return to the pre- Order No. 2003 paradigm and earn that rate of return, they are free to seek approval to unwind the independent entity variation, but the Commission should not indulge a collateral attack on that decision here;
- The NYTOs’ requested relief would result in unjust and unreasonable rates (i) for interconnection customers, who would be subjected to a variety of increased costs for interconnection service and with no corresponding increased benefit, and (ii) for consumers in New York who would bear the increase in costs in power purchase rates; and
- The NYTOs’ requested relief would allow for undue discrimination among similarly situated interconnection customers that compete in the NYISO market.

On May 24, 2021, the NYTOs filed a Motion to Leave and Answer.⁸ On June 8, 2021, the Staff of the FERC issued a Deficiency Letter in which the NYTOs were asked to respond to eight questions. On July 8, 2021, the NYTOs submitted their Response to the eight questions.

⁸ Central Hudson Gas & Electric Corp., et. al., Motion for Leave and Answer, Dockets Nos. ER21-1647 and EL21-66, May 24, 2021.

II. COMMENTS ON NYTOs' RESPONSE TO THE DEFICIENCY LETTER

NY Interconnection Customers provide comments on the NYTOs' response to FERC's Deficiency Letter below. Before doing so, NY Interconnection Customers note that the NYTOs state in the introduction to their response that, "Time is of the essence to adopt TO Self-Funding."⁹ The Commission should not be swayed by this hyperbole. NYTOs act as if 'the ship is sinking,' but have yet to provide any evidence of harm incurred. Certainly, the NYTOs have failed to demonstrate a level of harm required by the long-established legal precedent in *Bluefield* and *Hope*. NYTOs' responses to the Commission Staff's Deficiency Letter added no additional information to make their case.

A. The NYTOs' proposal poses a significant threat of discrimination.

NYTOs contend their proposal will not violate the "no undue discrimination" standard in the Federal Power Act.¹⁰ NY Interconnection Customers disagree. If TO Funding is adopted, it will dramatically increase the cost for independent entities to develop new generation in the state of New York.¹¹ This has the potential to drive out independent generation. If that occurs, it provides an opportunity for unregulated affiliates of NYTOs to step in and fill the gap. NYTOs, thus, will have proposed means for their unregulated affiliates to benefit. The Commission recognized this scenario in Order No. 2003-A:

We disagree that it is unduly discriminatory to allow an independent Transmission Provider to propose innovative cost recovery methods, including participant funding, while requiring a non-independent Transmission Provider to continue to use more traditional pricing required by Order No. 2003 for new interconnections. This different treatment is fair because the two types of Transmission Providers are

⁹ NYTOs Response at 3.

¹⁰ *Id* at 5-6.

¹¹ Protest at 21.

not similarly situated. As we have explained, when implemented by an independent Transmission Provider which does not have an incentive to discourage new generation by competitors, new cost recovery methods including participant funding can yield efficient competitive results. However, because of their inherent subjectivity, new approaches such as participant funding [or TO Funding] could allow a non-independent Transmission Provider to propose methods that frustrate the development of new generating facilities that will compete with its own [or its unregulated affiliates].¹²

There is nothing “independent” with the proposal for TO Funding. The NYISO would not be involved whatsoever in the decision to apply the funding and cost variation. The decision to apply TO Funding would be elected solely by the non-independent TO. And while the NYTOs state that they have no incentive to unduly discriminate in making their funding election decisions, they also state that they will first assess whether they are able to and want to self-fund the relevant upgrades before making the election - which is itself an obvious opportunity to create disparate impacts between customers.¹³ Thus, the Commission stated that it “would find any policy that creates opportunities for such discriminatory behavior to be unacceptable.”¹⁴

B. Assessment by investors of risk occurs in the context of the overall company enterprise, and therefore the market-determined cost of capital is also based on the overall enterprise.

In response to Question 2a, the NYTOs disclose a fundamental inconsistency in their overall TO Funding proposal. While on the one hand, the NYTOs sometimes single out SUFs/SDUs, the NYTOs here repeat their correct assertion that, once put into service, the SUFs/SDUs become inseparable parts of a TO’s transmission system. As the NYTOs’ response states, “The transmission assets required by one customer are not severable from the transmission

¹² Order No. 2003-A at 691.

¹³ NYTOs Response at 5-6.

¹⁴ Order No. 2003 at P 696.

assets required of another, for all these assets together form one integrated system.”¹⁵ Along these same lines, the SUFs/SDUs are not operationally distinct parts of the overall TO’s transmission system – but unlike other transmission facilities, SUFs/SDUs have the characteristic of costing the TO zero dollars to construct. Thus, these facilities do not represent traditional utility “investments.”

There is no need to, as the NYTOs propose, separate out these parts of the transmission system for purposes of covering any alleged risks that may accompany them. As part of the overall system and the overall rate base, these facilities are treated just like any other part of the system when it comes to risk. That is, the market cost of capital required by investors is based on the *overall risk* of the entire company enterprise, and it compensates investors for this overall risk. This is often referred to as the “baked-in” phenomenon. The investment made for any given piece of the system is not separately accounted for, nor is the risk associated with any given piece. Once SUFs/SDUs are rolled into the whole company enterprise, each of the NYTOs’ investors receive compensation for any alleged risks associated with the SUFs/SDUs via the cost of capital that the market determines is appropriate for the new, updated whole company enterprise. The NYTOs claim that the only way to address added risks for their investors is to add dollars to their rate bases. But there is another, more natural and automatic way that increased risk leads to greater compensation, and that is by increases in the rate of return that investors require.¹⁶ This is exactly what will happen when and if SUFs/SDUs grow to be significant in size and increase the risk of the TO’s company enterprise. If there is a risk issue, it will not be uncompensated. As detailed in the May 7 Protest (and reflected in the NYTOs’ own

¹⁵ NYTOs Response at 8.

¹⁶ Affidavit of Michael S. Goggin, Docket Nos. EL21-66 and ER21-1647, May 7, 2021 at 16 (“Goggin Testimony”).

securities filings), any “risks” to investors associated with SUFs/SDUs are either nonexistent or immaterial.¹⁷

The NYTOs also fail to show that the alleged risks are uncompensated in their responses to Questions 3a and 3b. As described in Section II.B above, compensation of risk is based on the whole enterprise. In the NYTOs’ response to Question 3a, they correctly state, “Because the investor does not have the option to invest only in a portion of the public utility’s business, the Commission looks to determine the return that a reasonable investor would require to invest in the public utility’s entire enterprise.”¹⁸ Once again, the NYTOs’ own statement undermines their entire case. That there is no need to add dollars to the rate base, because the NYTOs are financially healthy, and the return required by investors for investing in the overall enterprise changes as the risks of the overall enterprise change – if, in fact, SUFs/SDUs change the NYTOs’ risk profiles at all.

C. The return on equity (ROE) will not be known in advance, supporting the NY Interconnection Customers’ position that any transition to TO Funding must occur later than the NYTOs propose.

In response to Question 3a, NYTOs state they “will make one or more Section 205 filings to establish an appropriate ROE(s) for TO Self-Funding”¹⁹ Thus, not only have the NYTOs failed to provide evidence showing there is an *actual need* for TO Funding from a *Bluefield* and *Hope* perspective, but the costs that would be assessed to independent generation and borne by ratepayers in New York if the TO Funding proposal were adopted are not known because a key element – the ROE, which is *the* factor that increases the cost from the status quo Existing Funding

¹⁷ See Protest at 16-18, Goggin Testimony at 2-15.

¹⁸ NYTOs Response at 9.

¹⁹ NYTO Response at 7.

Approach – will evidently be filed with the Commission at some other undefined time. This is yet another ground for the Commission to dismiss the NYTOs’ dual filings.

Moreover, the fact that the ROE(s) that would be applied have not yet even been filed with the Commission supports NY Interconnection Customers’ previously-stated position that any transition to TO Funding (if it is accepted by the Commission) must occur much later, and with much more advance notice, than NYTOs propose.²⁰ In fact, given this ROE information, any implementation should only occur after that ROE(s) has been filed with and accepted by the Commission. This is important because, as the Commission knows, ROE cases are complex, and the outcome would materially impact the viability of projects that would be affected by the resulting ROE. Here, the NYTOs’ ROE filings could take on a whole new layer of complexity because they may need to be unique to TO Funding (*i.e.*, apply only to SUFs/SDUs).

D. A switch to TO funding of interconnection upgrades will create a “gold plating” incentive for TOs where none now exists now.

In their Response, the NYTOs’ answer to question 3a raises the issue of ‘gold plating’ interconnections. Transmission upgrades for the NYISO's Comprehensive Reliability Planning Process (Attachment Y) go through a stakeholder planning process at the NYISO. Public policy transmission plans are subject to both the NY Public Service Commission's approval of need and the NYISO's selection process for least cost and greatest benefit. Local transmission expansion plans are also subject to New York State Public Service Commission review and approval. Further, transmission upgrades are sometimes competitive, ensuring lowest-cost implementation solutions that meet sufficiency criteria of future planning years. In contrast, the scope of SUF work

²⁰ Protest at 30.

required for the interconnection process is only partially governed by the NYISO, and does not involve review or approval by the New York Public Service Commission.

Most of the scope of work for interconnection projects would be considered stand alone SUFs (i.e., facilities that would not be necessary but for the operation of a specific generator). The most common expenses in this category are protection requirements and the point of interconnection (POI) switching station. TOs largely control the scope of work, not through the Open Access Transmission Tariff that is subject to stakeholder review, but through local design criteria. TOs invariably make the decisions on specific matters such as protection requirements and specifications for the POI switching stations.

If the TO Funding proposal were approved, the TOs would be financially incentivized to enact stringent local design criteria and push interconnection costs as high as possible to ensure maximum shareholder return for these upgrades. This perverse incentive is often referred to as “gold plating.” In the public policy and reliability arena, this incentive is tempered by the above-mentioned planning processes. For developers’ stand alone SUFs, there is no natural mechanism to align the TO costs of upgrades with the least cost that meets the sufficiency criteria. Accordingly, the TO Funding proposal, by putting interconnection costs into the TOs’ rate bases, would worsen cost control incentives. With the exception of stand alone SUFs for which an interconnection customer exercises its option to build, each NYTO would have every incentive to find the highest-cost vendors to inflate the base upon which it would earn a rate of return.

E. If the NYTOs have experienced under-earning in recent years, it does not follow that SFUs/SDUs are to blame.

In their response to Question 3b, the NYTOs state that, “the NYTOs have consistently under-earned on their ROEs relative to their state-authorized ROEs.”²¹ This information is revealing. First, a *claim* of under-earning in and of itself does not meet the Supreme Court’s standard. The Supreme Court in *Hope* explained that, in determining rates:

the fact that the method employed to reach that result may contain infirmities is not then important ... It is the product of expert judgment which carries a presumption of validity. And he who would 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.²²

Hope requires the Commission to render a decision that is “the product of expert judgment” that results in just and reasonable “consequences.” That expert judgment must be based on facts. Here, the NYTOs have not provided facts to enable the Commission to determine that NYTOs’ alleged under-earning warrants a shift to adopt TO Funding as the remedy to meet the *Hope* standard. And even if the NYTOs proved that they were under-earning, that too does not rise to the level of the *Hope* standard because, as the Courts have explained, under-earning is not sufficient for a finding that the entity faces enterprise risk.²³

Second, NYTOs admit “numerous factors can contribute to a utility under-recovering its costs, rendering it not possible to isolate a single variable without making certain assumptions” as to why the NYTO is under-recovery/under-earning.²⁴ Yet, the NYTOs claim, with no evidence whatsoever, that “SFUs/SDUs ‘have contributed’ to the TOs under-earning their allowed

²¹ NYTOs Response at 13.

²² *Hope*, 320 U.S. at 602 (internal citations omitted).

²³ See *P.R. Tel. Co. v. Telecomms. Regulatory Bd. of P.R.*, 665 F.3d 309 (1st Cir. 2011); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1949); *Fed Power Comm’n v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974).

²⁴ NYTOs Response at 13.

ROEs...”²⁵ This claim is obviously unsupported. Moreover, the NYTOs claim TO Funding is the panacea for their alleged under-earning. It is unjust and unreasonable to force interconnection customers to bear higher costs for generation interconnection service through TO Funding when, by the NYTOs’ admission, “numerous factors” might be contributing to the NYTOs’ claimed (but not proven) under-earning woes.²⁶ NYTOs’ admission demonstrates they have failed to meet their burden under Federal Power Act standards.²⁷

Third, if the NYTOs are under-earning, the NYTOs’ “state-authorized ROEs” also must be considered. This is particularly relevant because the NYTOs explain “the vast majority of the NYTOs’ revenue requirements [are] recovered through their respective retail rates including recovery of projected operation and maintenance (O&M) costs, which includes projected O&M costs for SUFs/SDUs.”²⁸ The state-authorized ROEs may be one of the “numerous factors” or they may be single biggest factor why the NYTOs are under-earning (*if*, of course, they even are under-earning). State-authorized ROEs are not a Commission-jurisdictional matter. If the NYTOs need to increase their state-authorized ROEs to address any perceived under-earning, they should pursue that in the proper forum.

F. The *Hope* standard is not met by merely pointing to other RTOs/ISOs that are allowed to charge TO Funding to their interconnection customers.

The Commission should give no weight to NYTOs’ attempt to compare their ability to attract capital and earn a return to “other enterprises having corresponding risks,” *i.e.*, the TOs of the Midcontinent Independent System Operator (MISO).²⁹ The fact that MISO TOs currently are

²⁵ NYTOs Response at 14.

²⁶ NYTOs Response at 13.

²⁷ *See* 16 U.S.C. 824d(e).

²⁸ NYTOs Response at 11.

²⁹ NYTOs Response at 15.

allowed to charge TO Funding pricing (the legality of which is currently before the United States Court of Appeals for the D.C. Circuit) does not mean NYTOs should automatically be permitted to charge TO Funding. There must be a supporting showing of need. NYTOs have failed to provide evidence of any actual need that meets the *Hope* standard. The *Hope* comparison is not ‘provide to a NY utility what a MISO utility receives.’ Indeed, although NYTOs may represent here that MISO transmission owners are “peers,” NYTOs provide no evidence that they are any less able to attract capital than MISO transmission owners and they ignore completely that transmission owners in every other RTO/ISO, which could just as easily be considered “peers,” are *not* permitted to charge Self-Funding pricing.³⁰ The *Hope* standard demands that the NYTOs demonstrate a need for such an opportunity on their own merits. NYTOs have not done that. The specific ROE that MISO utilities earn in transmission rates might be used for comparative purposes, but the NYTOs’ specific ROE is not at issue in these dual dockets. The NYTOs have not filed yet (apparently) to revise their ROEs.

G. In gauging the relative size of SUFs/SDUs, the proper rate base comparison to which SUFs/SDUs should be made is to the overall enterprise’s rate base, not just its transmission rate base.

In their answer to Question 6, the NYTOs state that the total amount of SUFs/SDUs installed since Class Year 2009 represents 6.89% of the TOs’, NYPA’s, and LIPA’s net transmission plant.³¹ But investors do not invest in just one portion of a utility’s system. They invest in the whole enterprise, as the NYTOs agree.³² It is therefore the whole enterprise’s size

³⁰ NYTOs Response, Testimony at 7-8. NYTOs note that PJM transmission owners recently filed a self-funding proposal with the Commission in Docket No. ER21-2282, but the Commission has not acted on this proposal and any suggestion that NYTOs are less able than PJM transmission owners to attract capital is entirely speculative. *Id.*

³¹ NYTOs Response at 19.

³² NYTOs Response at 9.

(in investment dollar terms) that is relevant. Adding in the distribution plant of the NYTOs, at a minimum, is necessary to get a proper gauge of the relative size of the SUFs/SDUs. Doing so would lower the 6.89% relative size of SUFs/SDUs to something significantly less than half that amount – but as the proponent of the rate change in this proceeding, the NYTOs bear the burden of proof as to the scope of SUFs/SDUs relative to their overall plant, and they have not done so.

H. The NYTOs’ response to Question 7 did not refute the principle that replacing old equipment with new equipment enhances reliability.

NY Interconnection Customers have shown that SUFs/SDUs improve reliability by replacing old equipment with new equipment that will improve the reliability of the entire system. This flows from the observation that old equipment is at a greater risk to fail than is new equipment.³³ The NYTOs attempt to refute this point by stating “...focusing on the near-term performance and benefits to the grid is misleading because NYTOs would own and operate such facilities for the life of the transmission plant without compensation for these risks.”³⁴ As discussed above, the NYTOs’ allegation that they do not receive compensation for reliability risks is incorrect, because their risks are compensated through their ROE for their whole systems. The NYTOs also fail to acknowledge that replacement of old equipment with new equipment *reduces* their risk as their overall systems become more reliable. Just like the concept of “present value” holds that a benefit that is received soon, in terms of dollars, is preferred over a benefit that is received later, so too is it true that a reliability enhancement that is experienced sooner is preferred over one that is experienced later. This is analogous to the improved reliability that is experienced when replacing an aged car with a brand new car. The improvement is immediate and real.

³³ Goggin Testimony at 10, 13.

³⁴ NYTOs Response at 21.

Finally, the NYTOs' response to Question 7 indicates that the NYTOs "account for assets based upon plant accounting categories and not based upon the reason why it was installed (*e.g.*, not upon distinctions based upon whether the asset is a modification/replacement or new facility)." ³⁵ This further undermines their claims that SUFs/SDUs increase risks to the NYTOs or their investors – because if the NYTOs cannot account for which assets were built as upgrades, then SUFs/SDUs are well and truly "baked in" to the entire enterprise, as discussed above. If the NYTOs cannot distinguish the facilities and risk profiles of SUFs/SDUs, then the same must be assumed for their investors.

³⁵ NYTOs' Response at 20.

III. CONCLUSION

As demonstrated in the NY Interconnection Customers' May 7 Protest, the Commission should reject both the Complaint and Tariff Filing. Nothing in the NYTOs' Response to the Deficiency Letter changes that position, and the NY Interconnection Customers have herein submitted additional comments on the Response that highlight the fatal flaws and serious weaknesses of the NYTOs' positions. Therefore, NY Interconnection Customers again respectfully urge the Commission to deny the Complaint outright and reject the Tariff Filing.

Respectfully submitted,

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July 29, 2021

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this pleading has been served this day upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 29th day of July 2021.

/s/ Gabe Tabak

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