

154 FERC ¶ 61,268  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

New York Independent System  
Operator, Inc.

Docket No. ER16-835-000

ORDER ON TRANSMISSION FORMULA RATE AND INCENTIVE AND  
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 31, 2016)

1. On January 29, 2016, the New York Independent System Operator, Inc. (NYISO)<sup>1</sup> submitted under section 205 of the Federal Power Act (FPA),<sup>2</sup> on behalf of the New York Power Authority (NYPA), a proposal by NYPA to replace its existing stated rates for the NYPA Transmission Adjustment Charge in Attachment H of the NYISO Open Access Transmission Tariff (OATT) with a transmission cost-of-service formula rate template (formula rate) and formula rate implementation protocols (protocols) to determine NYPA's annual transmission revenue requirement (ATRR).<sup>3</sup> NYPA also submitted a new Rate Schedule 15 to NYISO's OATT that will enable it to recover its project-specific ATRR associated with the Marcy South Series Compensation Project (MSSC

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<sup>1</sup> NYPA states that "NYISO is submitting this filing in FERC's e-Tariff on NYPA's behalf solely in its role as the Tariff Administrator ... [and] NYISO takes no position on any substantive aspect of the filing." NYPA January 29, 2016 Transmittal Letter at n.2 (NYPA Transmittal Letter).

<sup>2</sup> 16 U.S.C. § 824d (2012).

<sup>3</sup> New York Independent System Operator, Inc., NYISO Tariffs, [NYISO OATT, 6.15 OATT Schedule 15 - Rate Mechanism Recovery NYPA MSSCF, 0.0.0](#), [NYISO OATT, 14.2-14.2.2 OATT Att H Attachment 1 to Attachment H, 9.0.0](#), [NYISO OATT, 14.2.3-14.2.3.1 OATT Att H - NYPA Formula Rate, 0.0.0](#), and [NYISO OATT, 14.2.3.2 OATT Att H - NYPA Formula Rate Implementation Proto, 0.0.0](#).

Project)<sup>4</sup> and future projects, determined using the formula rate, through a facilities charge that utilizes the participant-funded cost allocation agreement embodied in the settlement agreement recently filed and accepted by the Commission in Docket No. ER15-572-000.<sup>5</sup> Additionally, NYPA requests a transmission incentive for participating in NYISO's organized market. NYPA also requests that the Commission grant waiver of certain filing requirements. NYPA requests that the Commission accept the formula rate, protocols, and an overall return on equity (ROE) of 9.15 percent, to be effective April 1, 2016. Further, NYPA agrees to make refunds to customers for any collection based on an ATRR that exceeds what the Commission accepts as just and reasonable.<sup>6</sup>

2. As discussed below, we accept NYPA's proposed formula rate and protocols to Attachment H of the NYISO OATT for filing, to be effective April 1, 2016, as requested, and set them for hearing and settlement judge procedures. We grant NYPA's proposed transmission rate incentive and Rate Schedule 15 that establishes the cost allocation for the MSSC Project. Further, we grant NYPA's requested waiver of certain filing requirements and exempt NYPA from filing fees.

### **I. Background**

3. As a political subdivision of the State of New York and a corporate municipal instrumentality, NYPA states that it is a "state instrumentality" within the definition of section 201(f) of the FPA;<sup>7</sup> therefore, it is exempt from Part II of the FPA.<sup>8</sup>

4. NYPA states that it is engaged in the generation, sale and transmission of electric power and energy at wholesale and retail in New York. NYPA states that its transmission facilities directly interconnect with the transmission systems of all of the investor-owned utilities in New York, as well as interconnect with adjoining control areas through interconnections to utility systems in Vermont, and the Canadian Provinces of

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<sup>4</sup> NYPA states that the MSSC Project is one of the three Transmission Owner Transmission Solutions Projects (TOTS Projects) included in the Reliability Contingency Plan adopted by the New York Public Service Commission to address the possible closure of the Indian Point Energy Center nuclear facility.

<sup>5</sup> *N. Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,196 (2016) (NY Transco Settlement Order); *see also N. Y. Indep. Sys. Operator, Inc.*, Offer of Partial Settlement, Docket No. ER15-572-004 (filed Nov. 15, 2015) (NY Transco Settlement).

<sup>6</sup> NYPA Transmittal Letter at 33.

<sup>7</sup> 16 U.S.C. § 824f (2012); *see* NYPA Transmittal Letter at 5.

<sup>8</sup> NYPA Transmittal Letter at 5.

Ontario and Quebec. NYPA explains that it has no distribution facilities and virtually all of its customers are connected to the transmission and distribution systems of other public utilities. NYPA further explains that the Commission has previously recognized that, unlike other transmission owners in New York, NYPA does not have a defined, integrated service area; instead, its “customers are located in the service area of other transmission providers, and ... pay for service based on the costs of the transmission providers where the loads are located.”<sup>9</sup>

5. NYPA states that, when NYISO was formed, NYPA, NYISO, and the other New York Transmission Owners<sup>10</sup> agreed to establish in the NYISO OATT a NYPA-exclusive charge, the NYPA Transmission Adjustment Charge. It asserts that the purpose of the NYPA Transmission Adjustment Charge<sup>11</sup> is to recover any shortfall in NYPA’s ATRR that is not recovered under other agreements under which NYPA directly bills its own customers for transmission services.<sup>12</sup> NYPA explains that its existing ATRR of \$175.5 million is a product of a Commission-approved settlement agreement.<sup>13</sup> According to NYPA, its filing at the time indicated that NYPA’s 2012 rate increase was

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<sup>9</sup> *Id.* at 6 (citing *Central Hudson Gas & Elec. Corp.*, 103 FERC ¶ 61,143, at P 30 (2003)).

<sup>10</sup> The NYISO OATT defines NYPA and the original signatories to the agreements that formed NYISO as “Member Systems” which are the “eight Transmission Owners that comprise the membership of the New York Power Pool.” The New York Power Pool includes the Central Hudson Gas & Electric Corp., Consolidated Edison Co. of New York, Inc., New York State Electric & Gas Corp., Niagara Mohawk Power Corp. (Niagara Mohawk), Orange and Rockland Utilities, Inc., Rochester Gas and Electric Corp., NYPA, and the Long Island Power Authority (LIPA). NYISO OATT, Schedule 1.13 and 1.14 (Definitions).

<sup>11</sup> NYPA Transmittal Letter at 6-7 (citing NYISO OATT, Attachment H, section 14.2.2.2.1). NYPA states that it calculates the NYPA Transmission Adjustment Charge by deducting from its Commission-approved ATRR a number of directly-recovered revenue streams, such as revenues from transmission services, the sale of transmission congestion contracts, and congestion rents. That portion of its ATRR not recovered from those separate sources is recovered as a monthly surcharge assessed to all customers taking transmission service under the NYISO OATT.

<sup>12</sup> *Id.* at 6, n.25 (citing *Cent. Hudson Gas & Elec. Corp.*, 86 FERC ¶ 61,062, at 61,212, *order on reh’g*, 88 FERC ¶ 61,138, at 61,403-04 (1999)).

<sup>13</sup> *Id.* at 7 (citing *N. Y. Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,017 (2013); *see also* NYPA Application, Appendix C (Testimony of Scott Tetenman) at 7 (S. Tetenman Test.)).

“the first in a probable series of proposed increases that will likely culminate in NYPA requesting, in some future filing, authorization to implement a formula rate in order to make annual updates to its transmission [revenue requirement].”<sup>14</sup>

## II. Summary of NYPA’s Filing

6. As detailed below, NYPA proposes OATT revisions to replace its existing stated revenue requirement in Attachment H to the NYISO OATT with a formula rate and protocols to develop its revenue requirement.<sup>15</sup> NYPA explains that it is proposing to convert its current stated revenue requirement into a formula rate because it anticipates the need for significant transmission life extension, upgrade, and maintenance projects on its existing transmission system that will require significant capital expenditures in the next decade.<sup>16</sup> NYPA states that some of its existing transmission system facilities are more than 70 years old and that, despite their age, these transmission facilities continue to perform vital transmission functions for New York electricity customers.<sup>17</sup> NYPA states that, in December 2012, the NYPA Board of Trustees approved a transmission life extension and modernization program, which consists of approximately 20 major projects or tasks to be completed through the late 2020s.<sup>18</sup> NYPA anticipates investing approximately \$726 million in the transmission life extension and modernization program needed on the NYPA transmission system through 2025.<sup>19</sup>

7. NYPA explains that its proposed formula rate incorporates a base ROE of 8.65 percent and a 50 basis point adder for participation as a NYISO transmission owner. NYPA projects its ATRR to increase by approximately \$14.5 million in the first year to \$190 million with the formula rate and incentives requested herein.<sup>20</sup> NYPA provides a rate impact analysis demonstrating that the increase in the NYPA Transmission Adjustment Charge would be approximately 8 cents per MWh. For residential customers the typical bill impact would be less than one-tenth of 1 percent or about 5 cents per

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<sup>14</sup> *Id.* at 2-3 (citing Ex. No. PA-1 at 4).

<sup>15</sup> *See* NYISO OATT, Attachment H, section 14.2.2.4 (NYPA Transmission Adjustment Charge Calculation Information).

<sup>16</sup> NYPA Transmittal Letter at 14; S. Tetenman Test. at 7-9.

<sup>17</sup> S. Tetenman Test. at 7-9.

<sup>18</sup> *Id.* at 8-9; *see also* Ex. PA-105 at 28.

<sup>19</sup> Ex. PA-105 at 28.

<sup>20</sup> Ex. PA-102, SCH Summary, Line 10, “Net Adjusted Revenue Requirement.”

month.<sup>21</sup> In addition, NYPA explains that its proposed formula rate contains stated values for depreciation and amortization rates, and stated values for post-retirement benefits other than pensions (PBOP). NYPA also proposes to use its actual capital structure, capped at 60 percent equity.

8. In addition, NYPA proposes to use its formula rate to determine project-specific revenue requirements if the costs of such transmission project should be allocated and recovered through an alternative mechanism other than the NYPA Transmission Adjustment Charge.<sup>22</sup> As an example, NYPA explains that the NY Transco Settlement reflects a participant-funded cost allocation agreement that NYPA proposes to use to allocate its revenue requirement associated with the MSSC Project after that project is placed in service.<sup>23</sup> Therefore, NYPA's proposed Rate Schedule 15 will incorporate as an input and recover NYPA's MSSC Project ATRR using a new charge that reflects the participant-funded cost allocation agreed to in the NY Transco Settlement.

9. NYPA argues that this feature also could be used if NYISO directs NYPA to build an Order No. 1000<sup>24</sup> project for which there is a beneficiaries-pay cost allocation specified in the NYISO OATT or identified through the regional planning and developer selection process. NYPA further argues that this formula rate mechanism imposes no double recovery risk, because all of NYPA's costs will be recovered through a single formula rate and the template will independently determine a distinct revenue requirement for the NYPA Transmission Adjustment Charge, as well as individual project-specific revenue requirements for any costs that are assigned to specific non-NYPA Transmission Adjustment Charge projects.<sup>25</sup>

10. NYPA states that the protocols prescribe NYPA's annual update process, which refreshes the calculation of its ATRR. According to NYPA, the protocols also govern the specific procedures for notice, requests for information, review and challenges to the annual update. NYPA states that the protocols provide for a July 1 through June 30 rate

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<sup>21</sup> S. Tetenman Test. at 28-29.

<sup>22</sup> NYPA Transmittal at 4.

<sup>23</sup> *Id.* at 4-5.

<sup>24</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>25</sup> *Id.* at 17.

year and are consistent with the Commission's pronouncements regarding (1) the scope of participation in the information exchange process; (2) the transparency of the information exchange; and (3) the ability of interested parties to challenge NYPA's implementation of the formula rate as a result of the information exchange.<sup>26</sup>

11. NYPA requests that the Commission accept the proposed tariff records, to be effective April 1, 2016, without suspension or hearing. NYPA states that the Commission should accept NYPA's formula rate without suspension because the Commission has found that, as a non-jurisdictional utility, "NYPA is not subject to the Commission-imposed rate suspension and refund obligations under section 205 of the FPA."<sup>27</sup> NYPA states that it voluntarily agrees to make refunds in the event that the Commission finds that its formula rate are unjust and unreasonable.<sup>28</sup> Specifically, NYPA asks that any refunds and interest be effectuated through the annual True-Up mechanism built into the formula rate. In addition, NYPA requests that, based on its status as a non-jurisdictional utility, it be exempt from the Commission's filing fees and from compliance with any requirements of section 35.13 of the Commission's regulations.<sup>29</sup>

### **III. Notice of Filing and Responsive Pleadings**

12. Notice of the filing was published in the *Federal Register*, 81 Fed. Reg. 6252 (2016), with interventions and comments due on or before February 19, 2016. The deadline was subsequently extended to and including February 24, 2016.<sup>30</sup>

13. Notices of intervention and timely motions to intervene were filed by Central Hudson Gas and Electric Corporation; City of New York (City); Municipal Electric Utilities Association of New York (Municipal Utilities); Multiple Intervenors;<sup>31</sup> the

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<sup>26</sup> *Id.* at 31-32.

<sup>27</sup> *Id.* at 33 (citing *N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, at PP 29, 31 (2012) (*NYISO*)).

<sup>28</sup> *Id.* at 30, 33-34.

<sup>29</sup> *Id.* at 35 (citing 18 C.F.R. § 381.108; *NYISO*, 140 FERC ¶ 61,240 at PP 36-37; *City of Vernon, Cal.* Opinion No. 479,111 FERC ¶ 61,092, at P 44 (2005)).

<sup>30</sup> *N.Y. Indep. Sys. Operator, Inc.*, Notice of Extension of Time, Docket No. ER16-835-000 (issued Feb. 18, 2016).

<sup>31</sup> Multiple Intervenors is an unincorporated association of 60 large industrial, commercial, and institutional energy consumers with manufacturing and other facilities located throughout the State of New York.

New York Association of Public Power (NYAPP); Niagara Mohawk; the New York State Public Service Commission (New York Commission); LIPA; and the Indicated Transmission Owners (Indicated TOs).<sup>32</sup>

14. On February 19, 2016, NYAPP filed comments. On February 24, 2016, Niagara Mohawk, the New York Commission, City, Indicated TOs, Municipal Utilities, and Multiple Intervenors submitted comments and/or protests to the filing. Also, on February 24, 2016, LIPA submitted comments and request for clarification. On March 10, 2016, NYPA submitted an answer in response to the comments and protests (NYPA Answer), and subsequently, Niagara Mohawk and the Indicated TOs filed motions to answer NYPA's answer.<sup>33</sup>

15. Finally, on March 28, 2016, NYPA filed a motion to answer Niagara Mohawk's answer (NYPA March 28 Answer) and, on March 29, 2016, NYPA filed a motion to answer the Indicated TOs' answer (NYPA March 29 Answer).

#### **IV. Discussion**

##### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2015), prohibits an answer to a protest and an answer unless otherwise ordered by the decisional authority. We accept the answers filed by NYPA, Niagara Mohawk, and Indicated TOs because they provide information that assisted us in our decision-making process.

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<sup>32</sup> NY Transco, LLC, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation, Orange & Rockland Utilities, Inc., and Rochester Gas and Electric Corp.

<sup>33</sup> Niagara Mohawk March 24 Answer and Indicated TOs March 25 Answer.

**B. Substantive Matters****1. Transmission Incentive****a. NYPA's Proposal**

18. NYPA proposes to recover 50 basis points for Regional Transmission Organization (RTO) participation, resulting in an overall ROE of 9.15 percent.<sup>34</sup> NYPA states that the Commission determined in Order No. 679<sup>35</sup> that it will approve ROE adders “for public utilities that join and/or continue to be a member of an [independent system operator], RTO, or other Commission-approved Transmission Organization.”<sup>36</sup> NYPA notes that the Commission has consistently granted this incentive to non-jurisdictional utilities. NYPA states that it is a member of NYISO and has turned over operational control of its transmission facilities to the NYISO and will do the same for any future projects, including the MSSC Project.

**b. Comments and Protests**

19. City and the New York Commission assert that NYPA should not be able to receive a 50 basis point adder for its continued participation in NYISO.<sup>37</sup> City argues that the incentives provided by the adder should be directed at entities that are reluctant to join a region and at regions that are reluctant to establish market structures.<sup>38</sup> Such

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<sup>34</sup> NYPA Transmittal Letter at 23.

<sup>35</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007); *see also Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (2012 Incentives Policy Statement).

<sup>36</sup> NYPA Transmittal Letter at 24 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 326; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 86; *see also Ass'n of Businesses Advocating Tariff Equity Coal. of MISO Transmission Customers v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 200 (2014) (*ABATE*) (“The Commission stated in Order No. 679 that entities that have already joined, and that remain members of, an RTO, ISO, or other Commission-approved transmission organization, are eligible to receive this incentive.”)).

<sup>37</sup> City February 24, 2016 Comments and Protest at 15 (City Protest); New York Commission February 24, 2016 Protest at 8-9 (New York Commission Protest).

<sup>38</sup> City Protest at 14.

incentives are unnecessary here, City argues, because NYPA helped establish NYISO, has been a member of NYISO for 17 years, and receives benefits from NYISO. Lastly, City argues that an “earnings adder” is inconsistent with NYPA’s statutory mandate, which requires NYPA to provide low cost power to customers.<sup>39</sup>

**c. Answer**

20. NYPA contends that the Commission determined in Order No. 679 that it will approve the RTO Participation Adder for utilities “that join and/or continue to be a member of an [independent system operator (“ISO”)], RTO, or other Commission-approved Transmission Organization.”<sup>40</sup> NYPA states that the Commission has emphasized that “entities that have already joined, and that remain members of, an RTO, ISO, or other Commission approved transmission organization, are eligible for this incentive.”<sup>41</sup> NYPA also states that it is well-settled that non-jurisdictional entities are eligible for the RTO Participation Adder, stating that the Commission has consistently granted this incentive to non-jurisdictional utilities, such as NYPA.<sup>42</sup>

**d. Commission Determination**

21. We accept NYPA’s request for a 50 basis point ROE incentive for participation in NYISO. As noted in prior orders addressing this incentive,<sup>43</sup> the Commission’s decision to grant an incentive ROE for RTO participation is consistent with the purpose of FPA section 219<sup>44</sup> and is intended to encourage public utilities’ continued involvement in an RTO. A utility is presumed eligible for an RTO incentive “if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization and

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<sup>39</sup> *Id.* at 15.

<sup>40</sup> NYPA Answer at 12 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 326).

<sup>41</sup> *Id.* at 12 (citing *ABATE*, 149 FERC ¶ 61,049, at P 200).

<sup>42</sup> *Id.* at 12-13 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,166 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,137; *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,050; *Valley Elec. Ass’n, Inc.*, 141 FERC ¶ 61,238 (2012)).

<sup>43</sup> See, e.g., *Pacific Gas & Elec. Co.*, 141 FERC ¶ 61,168, at P 25 (2012); *Pacific Gas & Elec. Co.*, 132 FERC ¶ 61,272, at P 23 (2010).

<sup>44</sup> 16 U.S.C. § 824s (2012).

that its membership is on-going”<sup>45</sup> and need not provide additional justification as to the necessity or benefits of the incentive.<sup>46</sup>

22. We reiterate that the basis for this incentive adder is recognition of the benefits that flow from membership in an RTO, ISO, or other Commission-approved Transmission Organization and that *continuing* membership is generally voluntary.<sup>47</sup> Therefore, consistent with the policy in Order No. 679 to encourage continued involvement in NYISO,<sup>48</sup> we find that the requested 50 basis point ROE adder for RTO participation is appropriate, subject to it being applied to a base ROE that has been shown to be just and reasonable based on an updated discounted cash-flow analysis. We clarify that, in the hearing proceedings discussed below, NYPA’s zone of reasonableness will be established, as well as a determination of where within that zone its base level ROE should be set.<sup>49</sup> The application of the 50 basis point ROE adder to the base level ROE may not exceed the top of the zone of reasonableness.

## 2. Cost Allocation for the MSSC Project

### a. NYPA’s Proposal

23. As for recovering the MSSC Project costs, NYPA states that Rate Schedule 15 establishes an MSSC Facilities Charge to be recovered from NYISO’s Load Serving Entities utilizing the same participant-funded cost allocation method agreed upon in the NY Transco Settlement. NYPA states that the parties to the NY Transco Settlement agreed to a participant-funded cost allocation agreement with respect to the TOTS Projects, including the MSSC Project. NYPA states that the NY Transco applicants and LIPA agreed to support, and the other settling parties agreed that they would support or

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<sup>45</sup> NYISO is already covered under the Commission’s definition. Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 327-328 (stating that all RTOs and ISOs are already covered by the approved definition).

<sup>46</sup> See *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,004, at PP 41-44 (2015).

<sup>47</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 331 (emphasis added).

<sup>48</sup> See *Pacific Gas & Elec. Co.*, 141 FERC ¶ 61,168 at P 25 (determining that granting Pacific Gas and Electric (PG&E) an incentive ROE for participation in the CAISO is consistent with the stated purpose of FPA section 219 as amended by EPAct of 2005 and is intended to encourage PG&E’s continued involvement in the California ISO, despite arguments that such incentive is no longer necessary).

<sup>49</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 68.

not oppose a proposal by NYPA in a subsequent FPA section 205 proceeding to recover its revenue requirement associated with the MSSC Project using the same participant-funded cost allocation. Therefore, Rate Schedule 15 identifies the negotiated cost allocation percentage for each transmission district, which represents the percentage of NYPA's MSSC Project ATRR that will be recovered through the MSSC Facilities Charge from that district.<sup>50</sup>

24. NYPA states that it does not anticipate collecting revenue related to the MSSC Project until the July 1, 2017 formula rate update, following that project's expected 2016 in-service date. However, NYPA states that it will not collect the MSSC Facilities Charge under Rate Schedule 15, by its terms, unless and until the Commission issues an order approving the NY Transco Settlement, as stipulated in section 6.15.4.2 of the settlement.<sup>51</sup>

**b. Comments and Protests**

25. Multiple Intervenors supports NYPA's proposed cost allocation for the MSSC Project, asserting that the cost allocation is consistent with what was negotiated in the NY Transco Settlement.<sup>52</sup>

26. In contrast, City and the New York Commission assert that the MSSC Project-specific rate excludes important settlement provisions, such as cost cap controls, which are necessary to restrict the amount of MSSC Project costs that NYPA can pass through to ratepayers. City argues that the cost overruns associated with the MSSC Project should be capped as the project is currently 39 percent over budget and NYPA offers neither a reasonable explanation for the cost overruns nor a plan for limiting further overruns.<sup>53</sup> The New York Commission asserts that the NY Transco Settlement requires utilities to forgo any incentive adders on costs incurred above certain cost estimates that were negotiated. The New York Commission argues that in NYPA's previous rate filing, in Docket No. ER15-2102-000, NYPA stated that its Transmission Adjustment Charge formula rate would include the same performance-based incentive components as the NY

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<sup>50</sup> NYPA Transmittal Letter at 10-11.

<sup>51</sup> *Id.* n.3.

<sup>52</sup> Multiple Intervenors February 24, 2016 Protest and Comments at 13-14 (Multiple Intervenors Protest).

<sup>53</sup> City Protest at 7.

Transco Settlement; therefore, it argues, the Commission should direct NYPA to include this provision as part of its proposal to collect costs for the MSSC Project.<sup>54</sup>

**c. Answer**

27. NYPA argues that the City's and the New York Commission's argument that NYPA should include other aspects of the NY Transco Settlement, such as cost-containment measures, is contrary to the plain language of the settlement.<sup>55</sup> Moreover, NYPA argues, imposing a similar cost-containment measure, which reduces a rate incentives based on certain cost measures, would be inconsistent with the MSSC facilities charge because NYPA is not seeking an incentive ROE for the MSSC Project.<sup>56</sup>

**d. Commission Determination**

28. We accept NYPA's proposed Rate Schedule 15 and the cost allocation for the MSSC Project, as it is consistent with the NY Transco Settlement.<sup>57</sup> While we acknowledge the New York Commission's and City's contention that NYPA should implement the integral components (i.e., cost containment) of the NY Transco Settlement, we decline to require NYPA to do so. We find that the NY Transco Settlement does not require NYPA to forgo any incentive adders on costs incurred above certain cost estimates that were negotiated. The NY Transco Settlement requires NYPA to implement the cost allocation based on certain percentages; the settlement does not require NYPA to limit an incentive adder if capital project costs exceed a certain threshold.<sup>58</sup> Rather, for the provision at issue, among others, the settlement explicitly excludes NYPA's portion of the MSSC Project.<sup>59</sup> Moreover, while NYPA may have

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<sup>54</sup> New York Commission Protest at 9-10.

<sup>55</sup> NYPA Answer at 40 (stating that Article 2.3 provides that the agreement does not apply to any issue related to NYPA's revenue requirement for the cost of its portion of the MSSC Project and that Article 3.3 provides that the New York Commission and the City are required to support the cost allocation proposed by NYPA).

<sup>56</sup> *Id.* at 41.

<sup>57</sup> NY Transco Settlement, Article 3.3.

<sup>58</sup> New York Transco, LLC, Offer of Partial Settlement, Article 3.2(b), Docket No. ER15-572-004 (filed Nov. 5, 2015).

<sup>59</sup> Except where explicitly stated in other portions of the NY Transco Settlement, settlement applies to the following TOTS Projects: Ramapo to Rock Tavern Projects, Staten Island Unbottling Project, and NYSEG's portion of the MSSC Project. *Id.* at Article 2.1.

proposed a similar provision in its previous filing, in Docket No. ER15-2102-000,<sup>60</sup> the Commission rejected that filing;<sup>61</sup> additionally, NYPA did not make that proposal in the current proceeding. Therefore, that proposal is not a part of the record for this proceeding and we deny the New York Commission's and City's request.

### **3. Formula Rate & Protocols**

#### **a. Depreciation Rates, PBOP, and Other Expenses**

##### **i. NYPA's Proposal**

29. NYPA proposes to adopt stated depreciation rates for transmission and general plant using two depreciation studies of NYPA's transmission assets dated September 30, 1996 (1996 Depreciation Study) and August 13, 1982 (1982 Depreciation Study). Specifically, NYPA states that the depreciation rates for transmission plant are based on the 1996 Depreciation Study, while the depreciation rates for general plant are based on the 1982 Depreciation Study.<sup>62</sup> NYPA explains that the depreciation rates are based on average service life, mortality dispersion, and net salvage (gross salvage less cost of removal). NYPA further explains that a percent is developed for each account or subaccount based on service lives and net salvage percentages estimated for transmission and general plant currently included in NYPA's rates.

30. NYPA states that the depreciation rates used in the formula rate for transmission plant are directly supported by the 1996 Depreciation Study and, notwithstanding the vintage of the study, these rates are just and reasonable given the fact that NYPA has not added any major capital assets to its transmission system since the 1996 Depreciation Study was completed.<sup>63</sup>

31. NYPA states that the formula rate includes a stated PBOP expense, consistent with Commission policy.<sup>64</sup> NYPA states that its PBOP expense will remain fixed unless changed pursuant to a filing under sections 205 or 206 of the FPA. NYPA explains that the 2014 Annual Report shows a PBOP expense of approximately \$38.1 million, which

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<sup>60</sup> *N.Y. Indep. Sys. Operator, Inc.*, Filing, Docket No. ER15-2102-000 at 9-10 (filed July 2, 2015).

<sup>61</sup> *N.Y. Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,166, at PP 59, 65 (2015).

<sup>62</sup> NYPA Transmittal Letter at 27.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 28.

includes two primary components (1) the amortization payment of \$25 million, and (2) the normal cost of \$13.1 million. NYPA states that the amortization payment of \$25 million represents the amortizing of unfunded actuarial accrued liabilities associated with post-employment benefits earned in previous years. NYPA states that the normal cost of \$13.1 million is the estimate of post-employment benefits earned by current employees during 2014.<sup>65</sup>

**ii. Comments and Protests**

32. Protestors assert that the depreciation studies that NYPA proposes to use to calculate depreciation rates for the formula rate are outdated and lack transparency.<sup>66</sup> Multiple Intervenors and NYAPP emphasize that even the 1996 Depreciation Study, which covers general plant assets, recommends that NYPA revise the depreciation rates every five years.<sup>67</sup> Protestors argue that NYPA's reliance on the fact that it has not developed a new transmission asset is misplaced because the projected lives of NYPA's existing assets may have materially changed.<sup>68</sup>

33. For the 1982 Depreciation Study, covering general plant assets, protestors assert that NYPA updated certain accounts, but it did not explain the extent of the updates or why it did not perform a comprehensive update of all general plant categories,<sup>69</sup> which Municipal Utilities argues is necessary.<sup>70</sup> Accordingly, protestors argue that the Commission should allow additional time for discovery and analysis of the studies,<sup>71</sup> and Municipal Utilities and NYAPP argue that NYPA should use an updated study to support

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<sup>65</sup> *Id.*

<sup>66</sup> City Protest at 16-17; Municipal Utilities February 24, 2016 Comments at 6-7 (Municipal Utilities Protest); Multiple Intervenors Protest at 6; NYAPP February 19, 2016 Comments at 6, 12 (NYAPP Protest).

<sup>67</sup> Multiple Intervenors Protest at 7; NYAPP Protest at 10.

<sup>68</sup> Multiple Intervenors Protest at 8; Municipal Utilities Protest at 8.

<sup>69</sup> Multiple Intervenors Protest at 8; Municipal Utilities Protest at 8; NYAPP Protest at 13.

<sup>70</sup> Municipal Utilities Protest at 8.

<sup>71</sup> City Protest at 16-17; Municipal Utilities Protest at 6; Multiple Intervenors Protest at 9; NYAPP Protest at 14.

its depreciation rates.<sup>72</sup> NYAPP contends that the Commission should require NYPA to file a new depreciation study or, alternatively, set this matter for hearing.<sup>73</sup>

34. Protestors argue that other aspects of NYPA's filing require further clarity and may need to be revised. Specifically, NYAPP argues that NYPA has not demonstrated that the expenses related to its PBOP account is reasonable and that NYPA's formula rate may permit the double recovery of future PBOP costs.<sup>74</sup> City argues that it needs additional information to verify the input data for NYPA's salary expense and employee pension and benefit expense accounts, and to evaluate the relationship between the two accounts.<sup>75</sup>

### iii. Answer

35. NYPA argues that its depreciation rates are directly supported by the 1996 and 1982 studies, notwithstanding the updates it made to reflect "evolutionary changes" in general plant assets.<sup>76</sup> While NYPA maintains that the studies are just and reasonable, it states that it is conducting a new depreciation study for both transmission plant and general plant. NYPA asserts that, if directed by the Commission, it will make a section 205 filing to change the depreciations rates to reflect the updated study; therefore, the Commission will not need to set the disputes over the depreciation rates for hearing.<sup>77</sup>

36. NYPA disagrees with NYAPP's argument that the formula rate may permit double-recovery of future PBOP. NYPA argues that NYAPP misinterprets the formula rate and clarifies that the adjustment costs function to increase or reduce the PBOP expense, based on the PBOP values stated in an actuarial report.<sup>78</sup>

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<sup>72</sup> Municipal Utilities Protest at 7; NYAPP Protest 12-13 (stating that the depreciation rates for general plant and transmission plant should be established by an updated study).

<sup>73</sup> NYAPP Protest at 13-14.

<sup>74</sup> *Id.* at 18 (citing *Vermont Yankee Nuclear Power Corp.*, 120 FERC ¶ 61,043, at P 8 (2007)). NYAPP states that NYPA may not rely solely on actuarial assumptions because by their nature these assumptions are subjective.

<sup>75</sup> City Protest at 15.

<sup>76</sup> NYPA Answer at 37.

<sup>77</sup> *Id.* at 37.

<sup>78</sup> *Id.* at 38-39.

**b. Capital Structure****i. NYPA's Proposal**

37. NYPA proposes to use its actual capital structure, comprised of long-term debt and its net position, updated each year in NYPA's financial statements, capped at 60 percent equity.<sup>79</sup> NYPA explains that, based on 2014 calendar year data, NYPA's capital structure has a 76.4 percent equity based on its ratio of long-term debt to net position. NYPA states that its long-term capitalization target, which it intends to achieve through the issuance of long-term debt to finance capital expansion, is 65 percent equity. However, NYPA is proposing to voluntarily cap the equity component of its capital structure at 60 percent to minimize rate impacts to NYISO customers during a period of anticipated capital spending over the coming years. NYPA notes that the Commission has expressly accepted voluntary proposals by an entity to cap the equity component of its capital structure in *Transource Wisconsin, LLC*.<sup>80</sup>

**ii. Comments and Protests**

38. Protestors disagree with NYPA's proposed actual capital structure, and its proposal to apply a maximum 60 percent cap on equity.<sup>81</sup> Protestors argue that a 60 percent equity ratio is above what the Commission has commonly approved in previous orders.<sup>82</sup> Further, protestors claim that, due to discrepancies between NYPA's work papers and its Annual Report, NYPA excluded certain liabilities from its calculation, causing NYPA's actual capital structure to be misstated.<sup>83</sup> Taking these omissions into account, protestors argue, NYPA's actual equity ratio would be approximately 48 percent, well below the 60 percent cap, and its debt ratio would be 52 percent, not 23

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<sup>79</sup> NYPA explains that its net position is equivalent to a private entity's retained earnings. *Id.* at n. 34.

<sup>80</sup> *Transource Wis., LLC*, 149 FERC ¶ 61,180, at P 34 (2014).

<sup>81</sup> City Protest at 8; Municipal Utilities Protest at 5-6; Multiple Intervenors at 9. NYAPP Protest at 14.

<sup>82</sup> Municipal Utilities Protest at 6; Multiple Intervenors Protest at 10; NYAPP Protest at 16-17.

<sup>83</sup> Municipal Utilities Protest at 6 (stating that the actual capital structure wrongfully excludes \$3.265 billion in other non-current liabilities and \$1.055 billion in long-term debt); NYAPP Protest at 14 (stating that the actual capital structure wrongfully excludes \$3.265 billion in other non-current liabilities and \$1.055 billion in long-term debt).

percent.<sup>84</sup> Protestors argue that the Commission should either reject NYPA's proposed capital structure or set it for hearing.

39. Notwithstanding the issues with NYPA's capital structure, NYAPP and Niagara Mohawk assert that NYPA should use a hypothetical capital structure. Specifically, the protestors contend that in *City of Vernon*, the Commission found that a hypothetical capital structure is appropriate for a non-jurisdictional entity that does not have common stock and finances its project with internally generated funds and bond sales.<sup>85</sup> In addition, the protestors assert that the capital structure that the Commission accepted in *City of Vernon* was based on capital structure of the applicant's neighboring investor-owned utility.<sup>86</sup> Niagara Mohawk asserts that, because it is the most relevant neighboring investment-owned utility, NYPA's Transmission Adjustment Charge should adopt Niagara Mohawk's capital structure, which is 50 percent debt and 50 percent equity.<sup>87</sup>

40. On the other hand, City argues that it may not be appropriate to allow NYPA to use a proxy group consisting of investor-owned utilities, as NYPA's capital structure diverges from that of the investor-owned utilities, compromising the City's ability to compare the financial risks.<sup>88</sup> However, City argues, even if the Commission allows NYPA to use a proxy group of investor-owned utilities, NYPA's equity ratio should be consistent with the mean equity ratio for that group, which is 52 percent, not 60 percent.<sup>89</sup>

### iii. Answers

41. NYPA contends that its proposal is based on a voluntary cap on the equity component of its actual capital structure, rather than an incentive-based hypothetical capital structure, and NYPA is proposing to cap its equity ratio at a level that is lower than its actual equity ratio, rather than requesting an increase in its equity ratio. NYPA contends that the current proceeding is distinguishable on multiple grounds from the *City*

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<sup>84</sup> Municipal Utilities Protest at 6; NYAPP Protest at 14.

<sup>85</sup> Niagara Mohawk Protest at 3-4 (citing *City of Vernon*, 93 FERC ¶ 61,103, at 61,286 (2000); see also *City of Vernon*, 109 FERC ¶ 63,057, at P 115 (2004), *aff'd* 111 FERC ¶ 61,092, at P 84 (2005)). NYAPP Protest at 17 (citing *City of Vernon*, 93 FERC ¶ 61,103, at 61,286 (2000)).

<sup>86</sup> Niagara Mohawk Protest at 6; NYAPP Protest at 17.

<sup>87</sup> Niagara Mohawk Protest at 3.

<sup>88</sup> City Protest at 8-10.

<sup>89</sup> *Id.* at 8.

of *Vernon*, contrary to the protesters' claims, because the City of Vernon did not issue debt to finance its facilities and funded its projects entirely with cash and had requested to use a 100 percent equity ratio.<sup>90</sup> NYPA also emphasizes that the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's decision to allow the City of Vernon to adopt Southern California Edison's (SoCal Edison) ROE and capital structure as a proxy because of SoCal Edison's geographic proximity to the City of Vernon, and found that "mere geographical proximity hardly appears, absent further explanation, a sufficient warrant for the same return on equity or the same capital structure."<sup>91</sup> Therefore, NYPA argues that the Commission should disregard protestors' arguments that NYPA should use a hypothetical capital structure or be required to use Niagara Mohawk's capital structure because it is the closest neighboring utility to NYPA.

42. NYPA contends that protestors' arguments that NYPA's equity ratio should be reduced because it is higher than necessary to maintain NYPA's credit rating are unsupported and contrary to Commission precedent. NYPA argues that the Commission has found that it "has never dictated a utility's capital structure based on how much common equity it needs to attract capital and maintain good credit ratings."<sup>92</sup> Therefore, NYPA urges the Commission to find that it is inappropriate to dictate NYPA's capital structure based on what is necessary to maintain good credit ratings.

43. NYPA argues that the City's argument that NYPA's capital structure should be set at the average level of NYPA's proxy group is contrary to Commission precedent. When determining the appropriate capital structure, NYPA notes that the Commission considers whether "the utility issues its own debt without guarantees, has its own bond rating, and has a capital structure within the range of capital structures approved by the Commission."<sup>93</sup> Despite City's claim, NYPA states that the Commission has found that these considerations do not require that an entity's capital structure fall within the range of capital structures of the entities in the proxy group, let alone that an entity's capital structure must be set at the average of this range.

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<sup>90</sup> NYPA Answer at 19 (citing *City of Vernon*, 94 FERC ¶ 61,148, at 61,565 (2001); *City of Vernon*, 109 FERC ¶ 63,057, at 65,152 (2004)).

<sup>91</sup> *Id.* at 20 (citing *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1121 (D.C. Cir. 2002)).

<sup>92</sup> *Id.* at 22-23 (citing *ABATE*, 149 FERC ¶ 61,049, at P 193 (2014)).

<sup>93</sup> *Id.* at 24 (citing *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 49 (2007); *ABATE*, 149 FERC ¶ 61,049 at P 190).

44. Niagara Mohawk disagrees with NYPA's assertion that the facts in the *City of Vernon* decision are distinguishable from the facts in this proceeding.<sup>94</sup> Niagara Mohawk reiterates its argument that, consistent with the *City of Vernon*, NYPA should use a hypothetical capital structure of 50 percent debt and 50 percent equity because NYPA is a public utility that does not have common or preferred stock. As for NYPA's proposed actual capital structure, Niagara Mohawk disagrees with NYPA's proposal to treat retained income as equity, as the Commission has never allowed a utility to use retained earnings as a substitute for traditional common or preferred equity in its capital structure.<sup>95</sup>

45. In response, NYPA argues that retained earnings are properly included as equity capital for purposes of determining its capital structure and that Niagara Mohawk fails to provide any rational basis for distinguishing between the retained earnings of publicly-owned entities and investor-owned utilities.<sup>96</sup> Also, in regards to using its actual capital structure, NYPA contends that the Commission should follow its well-settled precedent for utilizing a transmission-owning utility's actual capital structure where that utility, like NYPA, "issues its own debt without guarantees, has its own bond rating, and has a capital structure within the range of capital structures approved by the Commission."<sup>97</sup> Further, NYPA reiterates its argument that the Commission should reject Niagara Mohawk's arguments that the *City of Vernon* controls the outcome in this case.<sup>98</sup>

c. **Base Return on Equity**

i. **NYPA's Proposal**

46. NYPA states that the Commission has found that while non-jurisdictional public power entities do not raise equity capital through the issuance of stock, they nevertheless provide internal sources of funding for investment and such funding comes at a cost. NYPA states that it performed a two-step discounted cash flow (DCF) analysis that is

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<sup>94</sup> Niagara Mohawk March 24 Answer at 4-5 (stating that it is irrelevant that the Commission's findings on geographic proximity of the City of Vernon's neighboring utility was revised on appeal).

<sup>95</sup> *Id.* at 4-5.

<sup>96</sup> NYPA March 28 Answer at 4-5.

<sup>97</sup> *Id.* (citing *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 49 (2007); *see also ABATE*, 149 FERC ¶ 61,049).

<sup>98</sup> *Id.* at 7-9.

consistent with the Commission's latest guidance in Opinion No. 531.<sup>99</sup> NYPA states that the range of reasonable returns is 6.37 percent to 10.29 percent with a median of 8.65 percent. Therefore, NYPA proposes to recover a base ROE of 8.65 percent.<sup>100</sup>

**ii. Comments and Protests**

47. The New York Commission contends that its proxy group indicated that a base ROE of no more than 8.5 percent would be just and reasonable.<sup>101</sup> The New York Commission agrees with NYPA's discounted cash flow cost of equity methodology, however, it states that the composition of NYPA's proxy group raises concerns because NYPA's proxy group includes companies that are not similarly rated to NYPA. Therefore, the New York Commission contends that this issue should be set for hearing.<sup>102</sup>

48. In addition, Multiple Intervenors and City argue that basing NYPA's ROE on "so-called comparable utilities" is without merit because there are no investor-owned utilities comparable to NYPA. Therefore, Multiple Intervenors note that while NYPA's proposed proxy group may include some of the highest-rated investor-owned utilities, they are not comparable to NYPA in terms of risk. For example, Multiple Intervenors argue that not a single utility in the proxy group has the same credit ratings as NYPA, and not a single utility is within one rating notch of NYPA. Therefore, Multiple Intervenors state that the proxy group utilities are much riskier than NYPA and the ROE results should be adjusted downward to reflect NYPA's much-higher credit ratings and much-lower risk.<sup>103</sup>

**iii. Answer**

49. NYPA contends that protestors' arguments not only ignore the Commission's decision in Opinion No. 531, but also the Commission's decisions finding that the DCF method should also be used for non-jurisdictional entities. NYPA states that the Commission determined in *City of Vernon* that the DCF model is appropriate for non-

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<sup>99</sup> NYPA Transmittal Letter at 23 (citing *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015)).

<sup>100</sup> *Id.* at 22-23.

<sup>101</sup> New York Commission Protest at 3.

<sup>102</sup> *Id.* at 7-8.

<sup>103</sup> Multiple Intervenors Protest at 11-12.

jurisdictional entities,<sup>104</sup> and recently reaffirmed that it prefers the use of this model for such entities.<sup>105</sup> NYPA contends that protestors provide no Commission precedent or other evidence in support of their claim that NYPA's ROE should be determined exclusively based on the level of NYPA's capital structure, rather than on the proper application of the Commission's two-step DCF analysis. Therefore, NYPA argues that the Commission should reject the protestors' arguments and allow NYPA to use the two-step DCF analysis to determine its ROE.

50. NYPA acknowledges that its credit rating is marginally higher than other utilities in the proxy group; however NYPA states that its requested ROE is conservative and remains appropriate for NYPA given that (1) NYPA's voluntary equity capitalization cap of 60 percent is below its historical equity ratio level and below its target equity ratio used by the rating agencies in the rating process; and (2) anomalous market conditions continue to suppress the results of the DCF analysis yet NYPA does not request an upward adjustment from the median to reflect these conditions.<sup>106</sup> Therefore, NYPA urges the Commission to find that any potential downward adjustment to NYPA's ROE that might have otherwise been appropriate to account for its slightly higher credit rating, is far outweighed by the upward adjustment that NYPA could have requested to account for the current anomalous market conditions.<sup>107</sup>

**d. Transparency**

**i. NYPA's Proposal**

51. NYPA requests a waiver of the requirements of section 35.13 of the Commission regulations to the extent necessary to permit it to populate the formula rate using cost data from NYPA's annual report, rather than a FERC Form No. 1. NYPA asserts that, because of its non-jurisdictional utility status, it is not required to file a FERC Form No. 1.<sup>108</sup> NYPA argues that the Commission has recognized that NYPA is not subject to

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<sup>104</sup> NYPA Answer at 7 (citing *City of Vernon, Cal.* Opinion No. 479, 111 FERC ¶ 61,092 at P 96, *denied*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006), *vacated and remanded on other grounds sub nom. Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007)).

<sup>105</sup> *Id.* at 7 (citing *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,281 (2015)).

<sup>106</sup> *Id.* at 8.

<sup>107</sup> *Id.* at 10 (citations omitted).

<sup>108</sup> NYPA Transmittal Letter at 18.

section 205 of the FPA and to the Commission filing requirements.<sup>109</sup> NYPA further argues that the Commission previously granted a waiver of the requirement that NYPA submit cost data using the section 35.13, noting however, that NYPA is required to develop a sufficient record in order to permit the Commission to make its required just and reasonable determination.<sup>110</sup>

52. NYPA states that instead of filing a FERC Form No. 1, it proposes to use its audited Annual Report, including NYPA's financial statements, and supplemental work papers to populate the inputs for its formula rate. NYPA represents that the financial statements are prepared in conformity with U.S. Generally Accepted Accounting Principles.<sup>111</sup> NYPA claims its audited financial statements conform to the Commission's Uniform System of Accounts (USofA), and that NYPA's financial statements reconcile to "information contained in conformance with the [Commission's] numbered accounting system."<sup>112</sup> NYPA states that the information in the audited financial statements, in tandem with supplementary data in the form of supporting work papers, will provide interested parties with sufficient information concerning NYPA's costs and accounting to demonstrate that the formula rate is just and reasonable.<sup>113</sup>

## ii. Comments and Protests

53. Protestors disagree with NYPA's proposal to use its audited financial statements, internal work papers, and ad-hoc calculations, rather than the FERC Form No. 1, to derive input data for its formula rate.<sup>114</sup> City and Municipal Utilities assert that, unlike the format of the FERC Form No. 1, NYPA's audited financial statements do not sufficiently segregate costs by function (e.g., transmission and production) and disaggregate costs in a manner that allows parties to verify that NYPA's formula rate

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<sup>109</sup> *Id.* (citing *City of Vernon, Cal.*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006), *aff'd in part and vacated in part*, *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007)).

<sup>110</sup> *Id.* at 18-19 (citing *NYISO*, 140 FERC ¶ 61,240 at 36; *see also City of Vernon*, 111 FERC ¶ 61,092 at P 44 and n.55).

<sup>111</sup> *Id.* at 19-20; S. Tetenman Test. at 14.

<sup>112</sup> NYPA Transmittal Letter at 20.

<sup>113</sup> *Id.* at 18-22.

<sup>114</sup> City Protest at 5; Municipal Utilities Protest at 9; Multiple Intervenors Protest at 4-6; NYAPP Protest at 2.

aligns operating costs with the capital accounts for only those transmission assets whose costs are appropriately recoverable through the NYPA Transmission Adjustment Charge.<sup>115</sup> Similarly, because NYPA interconnects with neighboring regions and engages in other activities, such as operating generation facilities, Multiple Intervenors asserts that FERC Form No. 1 data is also necessary to verify that the formula rate properly allocates the costs and revenues associated with NYPA's various businesses.<sup>116</sup>

54. In addition, protestors argue that some of NYPA's work papers and ad-hoc calculations have not been independently verified,<sup>117</sup> as NYPA asserts that some of its work papers are populated with data from NYPA's internal records rather than NYPA's audited financial statements. Further, protestors assert, NYPA acknowledges that some of the work papers may be insufficient and, therefore, they argue that additional time is needed for discovery.<sup>118</sup> Specifically, NYAPP asserts that it requires additional information to verify several work papers that NYPA submitted to support the formula rate.<sup>119</sup> Several protestors aver that, because of the aforementioned issues, NYPA's has not demonstrated that its input sources are transparent and based on data and costs that are readily verifiable; thus, the Commission should allow further discovery.<sup>120</sup> In addition, City requests that the Commission audit NYPA's financial data before it approves the formula rate.<sup>121</sup>

55. In addition, City contends that the protocols lack clarity on which transmission costs NYPA proposes to recover through the NYPA Transmission Adjustment Charge as opposed to the project-specific rate.<sup>122</sup> City asserts that NYPA is scheduled to implement a transmission project that is expected to last until 2025 and cost at least \$726 million; however, NYPA has not disclosed whether the project's cost will be recovered through

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<sup>115</sup> City Protest at 5-6; Municipal Utilities Protest at 9-10.

<sup>116</sup> Multiple Intervenors Protest at 5.

<sup>117</sup> *Id.* at 5 (stating that NYPA's operating and maintenance expenses appear to be derived from its accounting records, not its audited financial statements).

<sup>118</sup> City Protest at 5; NYAPP Protest at 2-3 (citing NYPA Transmittal Letter at 19).

<sup>119</sup> NYAPP Protest at 3-4.

<sup>120</sup> City Protest at 7; Multiple Intervenors Protest at 6; Municipal Utilities Protest at 9.

<sup>121</sup> City Protest at 6; Municipal Utilities Protest at 10-11.

<sup>122</sup> City Protest at 17.

the NYPA Transmission Adjustment Charge. Also, NYAPP asserts that NYPA's protocols include a provision that appears to give NYPA the authority to make limited section 205 filings to change its formula rate without a full review and analysis of the formula rate by interested parties and the Commission. NYAPP contends that this provision is contrary to Commission precedent.<sup>123</sup> Accordingly, the protestors request that the Commission set this matter for settlement and hearing procedures.<sup>124</sup>

**iii. Answer**

56. NYPA contends that in several instances the Commission has permitted a non-jurisdictional entity to derive its inputs to the formula rate using data from a source other than FERC Form No. 1.<sup>125</sup> NYPA states that the Commission has allowed non-jurisdictional entities to use company data alone or in conjunction with publicly available sources of data especially where those data are maintained using the USofA for use as an input to the formula rate. NYPA contends that its formula rate is based on its Financial Report contained in its Annual Report, which is publicly available, is independently audited every year, and provides comparable transparency to FERC Form No. 1. NYPA states that where inputs are not taken directly from the Financial Report, they are reconciled to data in the Financial Report through comprehensive workpapers that provide much greater detail and granularity than traditional IOU workpapers. In addition, NYPA states that the data used in those workpapers derive from NYPA's books and records, which are maintained using the USofA.<sup>126</sup>

57. NYPA contends that its formula rate provides sufficient opportunity for parties to review and challenge the prudence of NYPA's costs. For instance, NYPA states that the annual update process allows interested parties, on an annual basis, to review and challenge inputs to and costs recovered under the formula rate. Therefore, NYPA states that, on an annual basis, parties will have the ability to scrutinize any and all inputs to the formula rate. In addition, NYPA states that the protocols allow any interested party that disputes the prudence of a NYPA capital expenditure to submit a formal challenge to the Commission under the protocols and, if the challenge creates "serious doubt" as to the prudence of the expenditure, the burden would shift to NYPA to demonstrate prudence

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<sup>123</sup> NYAPP Protest at 5 (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552 (1994)).

<sup>124</sup> *Id.* at 6; City Protest at 17, 20.

<sup>125</sup> NYPA Answer at 28-29.

<sup>126</sup> *Id.* at 30-31.

before the Commission.<sup>127</sup> Therefore, NYPA states that the Commission should find that NYPA has created a sufficient record to justify its formula rate and that the formula rate provides interested parties with ample opportunity to review and challenge the prudence of NYPA's future costs through the annual update process.<sup>128</sup>

58. With regard to NYAPP's argument that a provision of the protocols would allow NYPA to make piecemeal changes to the formula rate without filing such revisions for Commission review under FPA section 205, NYPA states that it does not read that provision to authorize it to make such changes absent a section 205 filing. However, NYPA states that, if directed by the Commission, NYPA would add clarifying revisions to this provision via a compliance filing.<sup>129</sup>

**e. Cost of Recovery Provision**

**i. Comments and Protests**

59. Protestors assert that NYPA does not appropriately demonstrate that it complied with section 14.2.2.2.3 of Attachment H of NYISO's OATT, requiring that NYPA obtain unanimous approval from the Transmission Owners for any upgrades or expansions costing in excess of \$5 million annually.<sup>130</sup> City asserts that NYPA is required to obtain such approval as it seeks to increase its annual revenue requirement by \$14.5 million, an increase that likely includes the cost allocation of a capital project costing in excess of \$5 million.<sup>131</sup> To resolve this issue, Indicated TOs assert that NYPA should add to NYISO's OATT two new sections, including one that explicitly states that the NYPA Transmission Adjustment Charge ATRR component of NYPA's formula rate shall not include the cost of any upgrade or expansion that exceeds \$5 million annually and for which unanimous approval from the incumbent Transmission Owners has not been obtained.<sup>132</sup> In addition,

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<sup>127</sup> *Id.* at 34 (citing *Kentucky Utils. Co.*, 62 FERC ¶ 61,097, at 61,698 (1993); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 121) (2013).

<sup>128</sup> *Id.* at 34.

<sup>129</sup> *Id.* at 36.

<sup>130</sup> City Protest at 18-19; Indicated TOs February 24, 2016 Comments and Limited Protest at 6 (Indicated TOs Protest); Municipal Utilities Protest at 10.

<sup>131</sup> City Protest at 18-19 (stating that the budget for the transmission modernization program is \$726 million over the next 15 years, making the NYPA's annual capital expenditure \$50 million per year).

<sup>132</sup> Indicated TOs Protest at 7.

Municipal Utilities argues that NYPA should re-file its formula rate with an explanation of how it plans to comply with the veto provision of the cost cap requirement.<sup>133</sup>

60. In addition, LIPA argues that that the NYISO OATT's veto provision bars NYPA from automatically recovering capital expenditures associated with the transmission modernization project because that project should be considered an upgrade or expansion that is subject to section 14.2.2.2.3 of the OATT.<sup>134</sup> To clarify when the veto provision applies to a project, LIPA argues that NYPA's formula rate should specify which types of capital expenditures constitute "upgrades and expansions."<sup>135</sup> LIPA argues that absent incorporation of a definition of upgrades and expansions, NYPA's proposed formula will not produce transparent, just and reasonable results that can be replicated by customers. Therefore, LIPA requests that the Commission direct NYPA to make a compliance filing that details, with specificity, the types of facilities that would be treated as "additions, upgrades or expansions" under the NYPA Transmission Adjustment Charge formula rate, consistent with the limitations imposed by the NYPA Transmission Adjustment Charge veto.<sup>136</sup>

**ii. Answers**

61. NYPA disagrees with protests that the formula rate is inconsistent with the veto provision in section 14.2.2.2.3. NYPA disagrees with Indicated TOs' request to revise the veto provision because the revision will inappropriately change the meaning of the veto provision. In addition, NYPA argues that protestors request to add section 14.2.3, describing the scope and applicability of the limitations that the veto provision imposes on the formula rate, is unnecessary because the veto provision already includes the proposed language. However, NYPA states that it is amenable to adding section 14.2.3, provided that it either cross-references the new section to the veto provision or directly quotes the veto provision.<sup>137</sup>

62. Further, NYPA disagrees with LIPA's assertion that the formula rate lacks transparency because it does not explicitly state which projects are subject to the veto provision. However, NYPA states that if directed, it will make a compliance filing to add

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<sup>133</sup> Municipal Utilities Protest at 10-11.

<sup>134</sup> LIPA Protest at 8.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 13.

<sup>137</sup> NYPA Answer at 43.

a worksheet in its formula rate that identifies and describes capital additions made during the proceeding calendar year.<sup>138</sup>

63. NYPA clarifies that it has not proposed to recover all future costs for the transmission modernization project through the NYPA Transmission Adjustment Charge. NYPA asserts that cost recovery of such projects will be subject to the tariff, including the veto provision; therefore, interested parties will have an opportunity to challenge the costs of such projects.<sup>139</sup>

64. Indicated TOs disagree with NYPA's interpretation of the scope of the veto provision, arguing that the provision should apply to any investment by NYPA, rather than only to certain projects, such as additions. Indicated TOs contend that NYPA's narrow interpretation is inconsistent with the purpose of the NYPA Transmission Adjustment Charge, which allows NYPA to assess a usage-based charge for residual costs that NYPA was unable to collect from its direct contract customers and for costs that it has demonstrated are necessary to meet a state-wide need that has not been identified by NYISO's planning process.<sup>140</sup> Also, Indicated TOs agree that NYPA should revise its protocols to include a work paper identifying any capital additions and either cross-reference or directly quote the veto provision.<sup>141</sup>

65. In response, NYPA argues that the Commission should deny the Indicated TOs' motion to answer.<sup>142</sup> In the alternative, NYPA reiterates its argument that it disagrees with the Indicated TOs' assertion that the scope of the veto clause includes any transmission investment rather than being limited to certain capital additions.<sup>143</sup>

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<sup>138</sup> *Id.* at 46.

<sup>139</sup> *Id.* at 47.

<sup>140</sup> *Id.* at 6-7.

<sup>141</sup> *Id.* at 10.

<sup>142</sup> NYPA March 29 Answer at 5-6.

<sup>143</sup> *Id.* at 8.

**f. Determination**

**i. Substantive Issues and Hearing and Settlement Judge Procedures**

66. Our preliminary analysis indicates that NYPA's proposed revisions establishing a formula rate and protocols to Attachment H of the NYISO OATT have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The proposed revisions raise disputed issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in hearing and settlement judge procedures. Therefore, we will accept NYPA's proposed formula rate and protocols for filing, to be effective April 1, 2016, as requested, and set them for hearing and settlement judge procedures, as ordered below. We also note that, as explained in previous Commission orders addressing the NYPA Transmission Adjustment Charge,<sup>144</sup> NYPA is not subject to suspension and refunds; however, NYPA states that, in this proceeding, "it will agree to make all appropriate refunds to customers for any collection based on an ATRR that exceeds what [the Commission] ultimately accepts as just and reasonable."<sup>145</sup> We accept NYPA's commitment to make refunds to customers, with interest, through the annual True-Up mechanism built into the formula rate.

67. In addition, we agree with protestors that NYPA's proposed protocols do not address how it intends to comply with section 14.2.2.2.3 of Attachment H of the NYISO OATT. Specifically, the protocols do not address the NYISO OATT's veto provision, which bars NYPA from automatically recovering capital expenditures in excess of \$5 million annually without approval from the incumbent Transmission Owners. We expect the hearing and settlement judge procedures ordered herein to address that issue, among others.

68. While we are setting the rate for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures begin. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>146</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will

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<sup>144</sup> See, e.g., *NYISO*, 140 FERC ¶ 61,240 at PP 28-31.

<sup>145</sup> NYPA Transmittal Letter at 33.

<sup>146</sup> 18 C.F.R. § 385.603 (2015).

select a judge for this purpose.<sup>147</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

#### **4. Requested Waivers**

69. We grant NYPA's request for waiver of section 35.13 of the Commission's regulations<sup>148</sup> and decline to direct NYPA to submit a FERC Form No. 1. Prior Commission orders have granted to non-jurisdictional utilities, such as NYPA, waiver of the Commission's regulatory filing requirements because such utilities are not subject to section 205 of the FPA.<sup>149</sup> However, to enable the Commission to conduct a section 205 evaluation of NYPA's formula rate, there must be a sufficient record developed to permit the Commission to make such an evaluation. While we are granting this waiver, the waiver does not inhibit interested parties' ability to challenge the inputs and the prudence of those inputs at the hearing directed herein. In addition, interested parties may challenge the prudence of the inputs annually during the annual update process. NYPA must be able to reconcile all formula rate inputs to the relevant support.

70. Additionally, we grant NYPA's requested exemption from the filing fee. Section 381.108 of the Commission's regulations provides that municipalities are exempt from the filing fees required by Part 381 and may file a petition for exemption in lieu of the fee.<sup>150</sup> NYPA explains that it is a municipal utility organized under the laws of New York. Therefore, we find that NYPA is exempt from the filing fee required for a rate filing and grant its petition.

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<sup>147</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>148</sup> 18 C.F.R. § 35.13 (2015).

<sup>149</sup> *City of Vernon*, 111 FERC ¶ 61,092 at P 44 and n.55; *see also NYISO*, 140 FERC ¶ 61,240 at 36.

<sup>150</sup> 18 C.F.R. § 381.108 (2015).

The Commission orders:

(A) NYPA's proposed formula rate and protocols to Attachment H of the NYISO OATT are hereby accepted for filing, to be effective April 1, 2016, and set for hearing and settlement judge procedures, as discussed in the body of this order.

(B) NYPA's request for a 50 basis point ROE adder for membership in an RTO is hereby granted, as discussed in the body of this order.

(C) NYPA's proposed Rate Schedule 15 and the cost allocation for the MSSC Project is hereby accepted, as discussed in the body of this order.

(D) NYPA's petition for exemption from the filing fee is hereby granted, as discussed in the body of this order.

(E) NYPA's request for waiver of section 35.13 of the Commission's filing regulations is hereby granted, as discussed in the body of this order.

(F) NYPA is hereby directed to file an annual FERC-730 providing information regarding transmission investment costs and project construction status, including estimated completion dates.

(G) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning NYPA's revisions to the NYISO OATT. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (H) and (I) below.

(H) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(I) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement

discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(J) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.