

156 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Competitive Transmission Developers

Docket No. EL16-84-000

v.

New York Independent System
Operator, Inc.

ORDER DENYING COMPLAINT

(Issued September 8, 2016)

1. On June 10, 2016, Boundless Energy NE, LLC (Boundless Energy), CityGreen Transmission, Inc. and Miller Bros. (collectively, Competitive Transmission Developers or CTD)¹ filed a complaint against the New York Independent System Operator, Inc. (NYISO), under sections 206 and 306 of the Federal Power Act (FPA),² alleging that NYISO violated its Open Access Transmission Tariff (OATT) in its latest project solicitation to address public policy transmission needs identified by the New York State Public Service Commission (New York Commission). For the reasons discussed below, we deny CTD's complaint.

¹ Boundless Energy is a developer of non-utility transmission and generation projects, and was the original developer of the Neptune Regional Transmission System's high-voltage direct current (HVDC) cable. CityGreen Transmission, Inc. is a nonincumbent transmission developer interested in developing HVDC and alternating current transmission facilities. Miller Bros. is a utility contracting company.

² 16 U.S.C. §§ 824e, 825e (2012).

I. Background

2. In 2012, prior to the time that NYISO's Order No. 1000³ transmission planning process became effective, the New York Commission initiated a series of proceedings to consider potential actions to address insufficient transmission capacity between upstate generation and downstate consumers on New York's alternating current (AC) bulk electric transmission system.⁴

3. On August 1, 2014, NYISO began its first public policy transmission planning process under Order No. 1000⁵ by requesting that interested parties submit proposed transmission needs driven by public policy requirements.⁶ NYISO received proposed transmission needs from eight parties, and provided them to the New York Commission.⁷

4. Subsequently, the New York Commission expanded its ongoing 2012 proceeding to incorporate the proposed transmission needs it received from NYISO.⁸ The New York Commission sought revised proposals from transmission owners and developers that would improve existing aging transmission infrastructure and increase Upstate New York/Southeast New York ("UPNY/SENY") transfer capacity.⁹ The New York Commission received 22 revised proposals from four entities or groups, including

³ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 203 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, 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).

⁴ Complaint at 10.

⁵ NYISO's Order No. 1000 transmission planning process became effective January 1, 2014. *New York Independent System Operator, Inc.*, 148 FERC ¶ 61,044, at P 37 (2013).

⁶ Complaint, Attachment D at 1.

⁷ *Id.*

⁸ Complaint at 10-11.

⁹ Complaint, Attachment E at 9.

Boundless Energy,¹⁰ and it directed the New York Commission Staff, with the assistance of NYISO, to evaluate the project proposals.¹¹ On September 22, 2015, the New York Commission Staff issued its final report endorsing two transmission project portfolios, and finding that three developers had proposed portfolios of transmission projects that were comparable to the endorsed portfolios.¹² Following this report, the New York Commission held hearings, and directed additional analysis based on its own planning parameters, data, and inquires.¹³

5. On December 17, 2015, the New York Commission issued an order (December 17 Order)¹⁴ adopting the New York Commission Staff's recommendations on public policy requirements, and identifying Segments A and B as public policy transmission needs (collectively, AC Transmission Needs),¹⁵ as follows: (1) Segment A - Edic/Marcy to New Scotland; Princetown to Rotterdam;¹⁶ and (2) Segment B – Knickerbocker to

¹⁰ Boundless Energy submitted an application for its Leeds Path West Project, which utilized HVDC technology. *Id.*; Attachment A, Tompkins Affidavit at P 5.

¹¹ Complaint at 9-10.

¹² *Id.* at 11; Attachment E at 12.

¹³ Complaint at 11.

¹⁴ Case 14-E-0454, In the Matter of New York Independent System Operator, Inc.'s Proposed Public Policy Transmission Needs for Consideration, *Order Addressing Public Policy Requirements for Transmission Planning Purposes* (December 17, 2015). For a copy of the December 17 Order, *see* Complaint, Attachment E.

¹⁵ Complaint, Attachment E at 66-68 and Appendix A.

¹⁶ Construction of a new 345 kV line from Edic or Marcy to New Scotland on existing right-of-way (primarily using Edic to Rotterdam right-of-way west of Princetown); construction of two new 345 kV lines or two new 230 kV lines from Princetown to Rotterdam on existing Edic to Rotterdam right-of-way; decommissioning of two 230 kV lines from Edic to Rotterdam; related switching or substation work at Edic or Marcy, Princetown, Rotterdam and New Scotland.

Pleasant Valley;¹⁷ Upgrades to the Rock Tavern Substation;¹⁸ and Shoemaker to Sugarloaf.¹⁹

6. The New York Commission's December 17 Order²⁰ also identified evaluation criteria and analyses for NYISO to apply in evaluating proposed solutions to the AC Transmission Needs,²¹ which included, among other things, that: (1) proposed solutions to Segment A must include all project components included in Segment A, and must provide at least a 350 MW increase to the Central East interface transfer capability; (2) proposed solutions to Segment B must include all project components included in Segment B, and must provide at least a 900 MW increase to the UPNY/SENY interface transfer capability; (3) no Public Policy Transmission Project will be selected for Segment A unless a Public Policy Transmission Project will be selected for Segment B;

¹⁷ Construction of a new double circuit 345 kV/115 kV line from Knickerbocker to Churchtown on existing Greenbush to Pleasant Valley right-of-way; construction of a new double circuit 345 kV/115 kV line or triple circuit 345 kV/115 kV/115 kV line from Churchtown to Pleasant Valley on existing Greenbush to Pleasant Valley right-of-way; decommissioning of a double circuit 115 kV line from Knickerbocker to Churchtown; decommissioning of one or two double-circuit 115 kV lines from Knickerbocker to Pleasant Valley; construction of a new tap of the New Scotland-Alps 345 kV line and new Knickerbocker switching station; related switching or substation work at Greenbush, Knickerbocker, Churchtown and Pleasant Valley substations.

¹⁸ New line traps, relays, potential transformer upgrades, switch upgrades, system control upgrades and the installation of data acquisition measuring equipment and control wire needed to handle higher line currents that will result as a consequence of the new Edic/Marcy to New Scotland, Princetown to Rotterdam and Knickerbocker to Pleasant Valley lines.

¹⁹ Construction of a new double circuit 138 kV line from Shoemaker to Sugarloaf on existing Shoemaker to Sugarloaf right-of-way; decommissioning of a double circuit 69 kV line from Shoemaker to Sugarloaf; related switching or substation work at Shoemaker, Hartley, South Goshen, Chester, and Sugarloaf.

²⁰ On March 18, 2016, Boundless Energy filed appeals of the New York Commission's December 17 Order in two New York state courts, and it is seeking a stay of the New York Commission's proceeding. *Id.*; Attachment A, Tompkins Affidavit at P 14.

²¹ *See also* Complaint, Attachment D at Attachment II.

(4) the selection process shall favor Public Policy Transmission Projects that result in upgrades to aging infrastructure; and (5) no acquisition is required of any new permanent transmission rights-of-way, except for *de minimis* acquisitions that cannot be avoided due to unique circumstances,²² and there is no crossing of the Hudson River.

7. On February 29, 2016, NYISO issued a competitive project solicitation (Solicitation), requesting interested parties to submit solutions to the AC Transmission Needs identified by the New York Commission.²³ The Solicitation included an Attachment I, a copy of the New York Commission's description of Segments A and B, and an Attachment II, a list of evaluation criteria that the New York Commission had directed NYISO to apply when evaluating transmission solutions. Solicitation responses were due April 29, 2016, and Boundless Energy did not submit a response to the Solicitation. NYISO is currently conducting an evaluation of the viability and sufficiency of the responses.

II. Complaint

8. CTD asserts that NYISO violated its OATT in its Solicitation to address the AC Transmission Needs identified by the New York Commission. Specifically, CTD contends that NYISO improperly surrenders its responsibilities to the New York Commission because NYISO: (1) fails to review all viable technical solutions, including transmission, alternative technologies, generation, and non-wires solutions;²⁴ (2) delegates its planning functions to the New York Commission;²⁵ and (3) limits its role in the Solicitation to a ministerial one in which NYISO simply selects the lowest cost project bid to develop the New York Commission's preferred projects.²⁶ Therefore, CTD requests that the Commission direct NYISO to reissue its Solicitation to ensure that the Solicitation seeks project solutions to meet identified public policy transmission needs,

²² The evaluation criteria specify that the transfer or lease of existing transmission right-of-way property or access rights from a current utility company owner to a developer is not considered an acquisition. Complaint, Attachment D at Attachment II.

²³ Complaint, Attachment D.

²⁴ *Id.* at 3, 17.

²⁵ *Id.* at 15 (citing OATT, Attachment Y, § 31.4.8) and 19.

²⁶ *Id.* at 16.

consistent with the intent and purpose of Order No. 1000 and NYISO's public policy transmission planning process contained in its OATT.

9. CTD alleges that the Solicitation surrenders key aspects of NYISO's planning responsibilities to the New York Commission. CTD explains that NYISO's public policy transmission planning process requires NYISO to perform the planning function.²⁷ CTD further explains that the OATT requires NYISO to solicit a wide range of possible transmission solutions to address public policy transmission needs, and it obligates NYISO to evaluate each of the proposals.²⁸ CTD argues that the Solicitation, as structured, however, eliminates the chance for alternative, innovative, and cost-effective solutions to transmission needs, such as an intrastate transmission solution that deviates from the New York Commission's preferred intrastate transmission solution, an Interregional Transmission Project, an HVDC transmission line, or some other transmission solution.²⁹ CTD also asserts that the Solicitation limits the solution to the specific transmission projects the New York Commission identified, and prevents NYISO from independently reviewing the project solutions, consistent with its OATT obligations.³⁰

10. CTD contends that NYISO's delegation of its transmission planning responsibilities to the New York Commission is inconsistent with Commission precedent. CTD states that, in response to NYISO's Order No. 1000 compliance filing, the Commission found that while the New York Commission "can consult, collaborate, inform, and even recommend a transmission project for selection,"³¹ any New York

²⁷ *Id.* CTD points out that Commission precedent requires the Commission-jurisdictional public utility to perform the transmission planning function. *Id.* at 18 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at PP 2-8, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

²⁸ *Id.* at 16-17 (citing OATT, Attachment Y, § 31.4.3).

²⁹ *Id.* at 17.

³⁰ *Id.* at 20 (citing OATT, Attachment Y, §§ 31.4.6.3 and 31.4.6.4.).

³¹ *Id.* at 18 (citing *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 79 (2013)).

Commission recommendation is not a final determination, and “NYISO must be the entity that selects the solution.”³² CTD also states that the Commission recently found that NYISO had inappropriately delegated its responsibilities to the New York Commission with respect to the evaluation and selection for reliability must-run alternatives.³³

11. CTD also claims that the Solicitation violates NYISO’s OATT, which according to CTD, sets forth a sponsorship model that NYISO adopted in response to Order No. 1000, requiring NYISO to identify generalized transmission needs and solicit project solutions to address those needs.³⁴ CTD asserts that NYISO’s OATT does not allow NYISO to use a competitive bidding model, under which a regional transmission organization (RTO) would pre-select the specific transmission solution and solicit bids from all qualified developers. CTD also argues that the NYISO OATT definition of Public Policy Transmission Projects supports the determination that the NYISO adopted a sponsorship model.³⁵ In addition, CTD argues that, consistent with the sponsorship model, NYISO OATT section 31.4.2.1 provides that the New York Commission will identify the transmission need, and OATT section 31.4.3 requires NYISO to solicit Public Policy Transmission Projects to address the transmission need.³⁶ CTD argues that, because the Solicitation identifies the specific transmission solution, listed as Segments A and B, with start and end points, voltage levels, right-of-ways, and circuitry that are eligible for bid, it is not consistent with the explicit terms of OATT section 31.4.3, and it transforms NYISO’s sponsorship model into a competitive bidding model.³⁷ Furthermore, CTD states that even if NYISO’s OATT allows it to toggle between a

³² *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 at P 40).

³³ *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, at P 32 (2016) and *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 40 (2015)).

³⁴ *Id.* at 22-24 (citing OATT, Attachment Y, § 31.4.3).

³⁵ *Id.* at 25 (citing OATT, Attachment Y, § 31.1.1, stating a Public Policy Transmission Project is “[a] transmission project or a portfolio of transmission projects proposed by Developer(s) to satisfy an identified Public Policy Transmission Need and for which the Developer(s) seek to be selected by the ISO for purposes of allocating and recovering the project’s costs under the ISO OATT.”).

³⁶ *Id.* at 23-24.

³⁷ *Id.* at 26.

sponsorship model and a competitive bidding model, the Commission must find that NYISO, not the New York Commission, must determine the project solutions eligible for a competitive bid.³⁸

12. CTD emphasizes that, in contrast to the New York Commission's and NYISO's very specific processes to address AC Transmission Needs, NYISO adopted a different and, in CTD's opinion, more appropriate approach for another competitive project solicitation.³⁹ In particular, CTD notes that the New York Commission issued a July 20, 2015 order identifying a general public policy transmission need "to alleviate congestion in Western New York," and NYISO issued a general solicitation requesting proposed solutions to alleviate that congestion, without identifying any specific transmission project or solution, as it did here.⁴⁰

13. CTD argues that if the Solicitation is left as issued, there is no recourse for stakeholders to argue that NYISO did not perform its planning function correctly, or that NYISO would have selected different projects than those the New York Commission selected. It also argues that there is no way to verify that the studies the New York Commission relied upon used NYISO's modeling, generator dispatch, and other assumptions.⁴¹ While CTD acknowledges that the NYISO OATT permits the New York Commission to establish evaluation criteria and types of analyses that NYISO should use in evaluating project solutions, CTD argues that the New York Commission's December 17 Order and the NYISO's Solicitation did more than establish evaluation criteria; they transformed the state's regulatory process into a competition outside of this Commission's jurisdictional process for the selection of project specific technical criteria.⁴²

14. CTD contends that a Commission order is necessary to provide guidance to market participants on the rules and procedures that govern NYISO's public policy transmission

³⁸ *Id.* at 26-27 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 99-107).

³⁹ *Id.* at 9-10.

⁴⁰ *Id.*

⁴¹ *Id.* at 27.

⁴² *Id.* at 28.

planning process.⁴³ CTD argues that if the Commission approves this Solicitation, then it is endorsing a two-pronged public policy transmission planning process, whereby the New York Commission determines which project solutions are selected to meet public policy transmission needs, and NYISO determines which developer is chosen to construct the project.⁴⁴ As a policy matter, CTD asserts that it should not be the intent of the Commission's Order No. 1000 nonincumbent transmission developer reforms to allow the state regulator to conduct one aspect of the public policy transmission planning process and the Commission-jurisdictional entity to conduct a second aspect of the process, as that would represent an improper delegation of the Commission-jurisdictional entity's planning responsibilities and deprives stakeholders of recourse to the Commission if discrepancies with the competitive process arise.⁴⁵ CTD also contends that ceding control of the transmission planning process to a state commission disadvantages competitive transmission providers because they cannot, unlike incumbents, recover planning costs through a rate mechanism; rather, they must rely on external funding to compete in project solicitations.⁴⁶ CTD notes the Commission's technical conference on issues related to competitive transmission development processes,⁴⁷ applauds that effort, and asserts that NYISO's actions here are an example of the difficulties nonincumbent transmission developers have in promoting viable, cost-effective projects.⁴⁸

15. CTD requests that, regardless of the Commission's determination in this proceeding, the Commission clarify that, when analyzing the proposed project solutions, NYISO must utilize its normal study process, including base assumptions and generator dispatch modeling, and not rely on studies the New York Commission commissioned that reflect different assumptions in modeling.⁴⁹ CTD states that CTD member, Boundless

⁴³ *Id.* at 29.

⁴⁴ *Id.*

⁴⁵ *Id.* at 30.

⁴⁶ *Id.*; Attachment A, Tompkins Affidavit at P 4.

⁴⁷ *Id.* (citing *Competitive Transmission Development Technical Conference*, Docket No. AD16-18-000 (May 16, 2016)).

⁴⁸ *Id.* at 30.

⁴⁹ *Id.* at 31.

Energy, is concerned that NYISO intends to adopt the modeling and assumptions the New York Commission relied upon in determining the New York Commission's preferred project solutions. CTD argues that NYISO's adoption of the New York Commission's modeling and assumptions would violate the OATT, which requires NYISO to independently review the proposed project solutions.⁵⁰

III. Notice of Complaint and Responsive Pleadings

16. Notice of CTD's complaint was published in the *Federal Register*, 81 Fed. Reg. 39,637 (2016), with answers, interventions, and protests due on or before June 30, 2016. Timely motions to intervene were filed by North America Transmission, LLC (North American Transmission),⁵¹ ITC New York Development LLC, TDI USA Holdings Corporation, Avangrid Networks, NRG Power Marketing LLC and GenOn Energy Management, LLC, NextEra Energy Transmission New York, Inc., New York Transmission Owners,⁵² and New York Transco, LLC (NY Transco). The New York Commission filed a notice of intervention.

17. NYISO submitted a timely answer. The New York Commission and North American Transmission submitted timely comments. Boundless Energy submitted an answer to NYISO's answer and North American Transmission's comments, and North America Transmission filed an answer to Boundless Energy's answer.

A. NYISO's Answer

18. NYISO asserts that it has acted consistent with its OATT, and the Commission should dismiss the complaint. NYISO explains that under its OATT, the New York Commission ultimately determines the public policy transmission needs for which

⁵⁰ *Id.* at 31 & n.70 (citing OATT, Attachment Y, § 31.4.1.).

⁵¹ North America Transmission, an affiliate of LSP Transmission Holdings, LLC, states that it responded to NYISO's Solicitation.

⁵² New York Transmission Owners include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Power Supply Long Island, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

NYISO will evaluate solutions,⁵³ and the New York Commission may prescribe various evaluation criteria and types of analyses that the NYISO must consider in its evaluation of proposed solutions.⁵⁴ NYISO states that it structured its Solicitation pursuant to its public policy transmission planning process, which requires NYISO to: (1) solicit solutions for the public policy transmission need the New York Commission identified; (2) use the criteria the New York Commission identified in evaluating whether proposed solutions are sufficient to meet the need; and (3) apply the types of analyses the New York Commission identified as part of NYISO's selection of the more efficient or cost-effective transmission solution.⁵⁵ NYISO argues that the New York Commission appropriately considered siting and other public policy concerns in its AC Transmission Needs proceeding, and it identified a public policy transmission need consistent with its role in NYISO's public policy transmission planning process. NYISO also argues that it would be unreasonable for the New York Commission to ignore the knowledge that it gained from the AC Transmission Needs proceeding, and to adopt a public policy transmission need that could lead NYISO to select a transmission solution with significant or insurmountable obstacles to siting.⁵⁶

19. NYISO asserts that the New York Commission has not selected a particular project or usurped the NYISO's transmission planning functions. NYISO states that, as required by its OATT, NYISO's Solicitation broadly solicited Public Policy Transmission Projects and Other Public Policy Projects to address the public policy

⁵³ NYISO Answer at 10 & n.22 (citing OATT, Attachment Y, § 31.4.2.1, which states that the New York Commission, with input from NYISO and interested parties, will “identify the transmission needs, if any, for which specific transmission solutions should be requested and evaluated...”).

⁵⁴ *Id.* at 10 & n.24 (citing OATT, Attachment Y, § 31.4.2.1, stating the New York Commission “may also provide: (i) additional criteria for the evaluation of transmission solutions and non-transmission projects...and (iii) the type of analyses that it will request from the [NYISO]”); *see also, id.* at 12 n.36 (citing OATT, Attachment Y, § 31.4.8.1.8, which states that NYISO “shall apply any criteria specified by the Public Policy Requirement or provided by the [New York Commission] and perform the analyses requested by the [New York Commission], to the extent that compliance with such criteria and analyses are feasible”).

⁵⁵ *Id.* at 12.

⁵⁶ *Id.* at 14.

transmission need that the New York Commission identified.⁵⁷ NYISO points out that it received 15 Public Policy Transmission Projects and one Other Public Policy Project (which was a portfolio of distributed generation) from six incumbent and nonincumbent developers in response to its Solicitation.⁵⁸ NYISO states that the proposed solutions include single and double circuit proposals, as well as numerous variations of system configuration, including reconfiguration of existing facilities.⁵⁹ NYISO contends that this broad and varied response to the Solicitation rebuts CTD's assertion that the New York Commission selected a particular project and interfered with NYISO's planning function.

20. NYISO further argues that the New York Commission's Segments A and B descriptions provide a general framework for the transmission projects to meet the AC Transmission Needs, but do not specify exact physical or electric designs.⁶⁰ NYISO's affidavit from Zachary Smith, Director of Transmission Planning, states that there are numerous potential physical designs, such as alternative transmission structure configurations, that would meet the AC Transmission Needs and provide varying levels of expandability.⁶¹ Mr. Smith states that there are also numerous potential electrical designs that would provide varying levels of operability and performance, such as more efficient conductors, controllable devices, and series compensation.⁶²

⁵⁷ *Id.* at 11 & n.30 (citing OATT, Attachment Y, § 31.4.3). A Public Policy Transmission Project is defined as “[a] transmission project or a portfolio of transmission projects proposed by Developer(s) to satisfy an identified Public Policy Transmission Need and for which the Developer(s) seek to be selected by the ISO for purposes of allocating and recovering the project's costs under the ISO OATT.” OATT, Attachment Y, § 31.1.1. An Other Public Policy Project is defined as “[a] non-transmission project or a portfolio of transmission and non-transmission projects proposed by a Developer to satisfy an identified Public Policy Transmission Need.” OATT, Attachment Y, § 31.1.1.

⁵⁸ NYISO Answer at 15; Attachment II, Smith Affidavit at P 15.

⁵⁹ *Id.* at 16; Attachment II, Smith Affidavit at P 15.

⁶⁰ *Id.* at 14-15.

⁶¹ *Id.* at 15; Attachment II, Smith Affidavit at P 12.

⁶² *Id.*

21. Regardless of the analysis that the New York Commission performed regarding potential transmission solutions in its AC Transmission Needs proceeding, NYISO states that, consistent with its OATT requirements, it is now conducting a separate and independent evaluation of the viability and sufficiency of the proposed solutions submitted in response to the Solicitation to determine their ability to satisfy AC Transmission Needs.⁶³ NYISO states that it will then independently evaluate the viable and sufficient transmission solutions, and select the more efficient or cost-effective Public Policy Transmission Project using all of the cost and non-cost metrics included in OATT section 31.4.8.1.⁶⁴ To perform its evaluation, NYISO states that it will not use the New York Commission's studies, but rather its own base cases, modeling, and studies that it has independently developed in accordance with OATT section 31.4 and the NYISO Public Policy Transmission Planning Process Manual.⁶⁵

22. In addition, NYISO states that CTD's actual dispute is with the New York Commission's determination of public policy transmission needs, which Boundless Energy has challenged in two pending state court proceedings in New York.⁶⁶ NYISO notes that pursuant to OATT section 31.4.2.2, a dispute "raised solely within the [New York Commission's] jurisdiction relating to any [New York Commission] decision to either accept or deny a proposed transmission need...shall be addressed through judicial review in the courts of the State of New York pursuant to Article 78 of the New York Civil Practice Law and Rules."⁶⁷ NYISO requests that the Commission reject CTD's attempt to duplicate its state court challenges to the New York Commission's order through a section 206 complaint against NYISO.

⁶³ NYISO Answer at 16; Attachment II, Smith Affidavit at P 17.

⁶⁴ *Id.*

⁶⁵ NYISO Answer at 17; Attachment II, Smith Affidavit at P 18.

⁶⁶ NYISO Answer at 8 (citing *Matter of Boundless Energy NE, LLC v. Public Service Commission of the State of New York, et al.*, New York State Supreme Court, Albany County, Index No. 1200-16 (commenced Mar. 21, 2016); and *Matter of Boundless Energy NE, LLC v. Public Service Commission of the State of New York, et al.*, New York State Supreme Court, Appellate Division, Third Department, Index No. 522738 (commenced Mar. 21, 2016)).

⁶⁷ NYISO Answer at 8.

B. Comments

23. The New York Commission argues that the Commission should dismiss the complaint. It asserts that the public policy transmission planning process provides a role for the New York Commission to identify public policy transmission needs, and it specifies that the New York Commission may provide evaluation criteria to NYISO that NYISO will apply when it is evaluating the solutions. The New York Commission states that its evaluation criteria were established after a lengthy and comprehensive process, with ample opportunity for stakeholder input, and this process resulted in the identification of specific transmission needs and environmental factors directly related to the New York Commission's required statutory findings to site transmission facilities.⁶⁸ The New York Commission argues that CTD was allowed to participate in each step of NYISO's public policy transmission planning process, and CTD should not be allowed to circumvent that process to achieve an outcome desirable for their preferred project(s) at the expense of the State's public policy needs. The New York Commission also states that, under the OATT, NYISO retains independent and ultimate authority to select an appropriate transmission project, if any, for purposes of regional cost allocation and recovery.⁶⁹

24. The New York Commission asserts that in considering the public policy transmission needs and evaluation criteria, the Commission should recognize that NYISO's public policy transmission planning process affects matters of concurrent federal and state jurisdiction. According to the New York Commission, the Commission establishes rates for wholesale transmission and the New York Commission has jurisdiction over the siting of transmission lines. The New York Commission states that, consistent with its jurisdiction, it undertook a comprehensive siting and planning process to address the public policy transmission needs. The New York Commission also states that its identification of the AC Transmission Needs as public policy transmission needs was informed by an extensive record, and its environmental and siting concerns were reflected in its evaluation criteria for NYISO.⁷⁰ The New York Commission states that if the terms of NYISO's process are reinterpreted so that NYISO may ignore the New York

⁶⁸ New York Commission Comments at 2-3.

⁶⁹ *Id.* at 4, 6.

⁷⁰ *Id.* at 7-8.

Commission's evaluation criteria, the project that NYISO chooses may be unable to obtain the New York Commission's siting approval.⁷¹

25. North American Transmission argues that the complaint is based on the flawed claim that the NYISO Solicitation was too narrowly defined to comply with the NYISO OATT. North American Transmission asserts that this claim is not supported by the Solicitation, given the various proposals that NYISO has received in response to the Solicitation, including at least one non-transmission proposal, two direct current proposals, and several other alternative proposals.⁷² North American Transmission also states that it submitted multiple alternative proposals for both segments, and other developers also submitted multiple alternatives.⁷³ It also contends that CTD's request to delay and rebid the Solicitation would prejudice North American Transmission and other bidders in the Solicitation.

26. North American Transmission states that, to date, NYISO has not rejected any project type, or refused to evaluate any project, whether it meets the New York Commission's parameters or not. North American Transmission therefore argues that CTD's assertion that NYISO has violated its OATT is premature. North American Transmission asserts that if NYISO's Solicitation evaluation report ultimately reflects that NYISO summarily rejected, without evaluation, alternative proposals, the parties submitting those proposals may have a cause of action for NYISO's violation of its OATT.⁷⁴ North American Transmission also asserts that it is unclear whether Boundless Energy, who did not participate in the Solicitation, and CityGreen Transmission, Inc. and Miller Bros. who are "not qualified transmission developers in NYISO's public policy transmission planning process," would have standing to assert an OATT violation in NYISO's evaluation of other proposals. It asserts, however, that the Commission does not need to address that standing issue at this time since no such OATT violation has occurred.⁷⁵

⁷¹ *Id.* at 8.

⁷² North American Transmission Comments at 4.

⁷³ *Id.*

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

C. Boundless Energy's and North American Transmission's Answers

27. Boundless Energy asserts that the Commission has exclusive jurisdiction to interpret and enforce NYISO's OATT requirements, and therefore the complaint is properly before the Commission. Boundless Energy also asserts that NYISO mischaracterizes the complaint as an attempt to duplicate the relief Boundless Energy seeks in its state court actions filed on appeal of the New York Commission's December 17 Order.⁷⁶ Boundless Energy explains that the complaint asks the Commission to interpret and enforce the NYISO OATT, and to not allow NYISO to abdicate key aspects of its transmission planning function role to the New York Commission.

28. Boundless Energy argues that the Solicitation goes well beyond the mere inclusion of "evaluation criteria" and includes specific project solutions to meet the public policy transmission needs. Boundless Energy states that NYISO's and the New York Commission's responses to its complaint raise the question of whether the Commission expects independent system operators (ISO) and RTOs to perform an independent, transparent and competitive transmission development process, as required by Order No. 1000 and the OATT, or whether ISOs and RTOs must be beholden to state regulators who use "evaluation criteria," or other such terms, in their effort to control the transmission planning process.

29. Boundless Energy disagrees with North American Transmission's comment that the complaint is premature, as well as its assertion that Boundless Energy should have to submit a non-conforming proposal to NYISO and have NYISO reject that proposal before it can seek relief from the Commission. Boundless Energy states that the OATT violation occurred with the Solicitation, and there is no requirement under section 206 of the FPA to wait a period of time after a public utility violates its tariff. Boundless Energy also points out that it and North American Transmission appear to share views in opposing NYISO's position that NYISO is bound to accept the project solutions the New York Commission identified by the New York Commission.

30. North American Transmission responds that Boundless Energy mischaracterizes its comments by asserting that North American Transmission's position is that Boundless Energy's only recourse in response to the Solicitation was to submit a non-conforming bid.⁷⁷ North American Transmission states that its argument is that the complaint is

⁷⁶ *Id.* at 4 (citing NYISO Answer at 9).

⁷⁷ North American Transmission Answer at 2 (citing Boundless Energy Answer at 2).

premature because NYISO has not refused to evaluate proposals, or rejected any project type under its OATT. North American Transmission maintains however that Boundless Energy should have modified its bid to meet the public policy transmission need, like North American Transmission did. Also, contrary to Boundless Energy's claims that it and Boundless Energy share views about NYISO's obligations to the New York Commission, North American Transmission states that it did not conclude that NYISO ceded any authority to the New York Commission, or that the public policy transmission need was too narrowly defined.⁷⁸ North American Transmission also takes issue with Boundless Energy's characterization that it is undisputed that the New York Commission itself "identified the portfolio of projects that would meet the [Public Policy Transmission Needs]."⁷⁹ North American Transmission states that no other party shares this view, and North American Transmission does not believe that the New York Commission identified the portfolio of projects to meet the need; the New York Commission only identified the evaluation criteria to be used in the Solicitation.

IV. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.⁸⁰

⁷⁸ *Id.* at 4 (citing Boundless Energy Answer at 10).

⁷⁹ *Id.* at 4 (citing Boundless Energy Answer at 7-8 (citing the New York Commission's May 16, 2016 Memorandum of Law in Support of the Verified Answer at 20)).

⁸⁰ North American Transmission asserts that CTD did not properly caption its complaint, because it used Competitive Transmission Developers in the caption and Competitive Transmission Developers is not a formally established entity. North American Transmission Comments at 1 n.1. We note that the Commission's regulation concerning captions, 18 C.F.R. §385.2002(e) (2015), states that the caption must include "[t]he name of the participant for whom the filing is made, or a shortened designation for the participant." Therefore, we find that it was not procedurally improper for CTD to use the shortened designation of Competitive Transmission Developers in the caption of its complaint. In addition, under the Commission's regulations, any person may file a complaint. *Id.* §385.206 (a). A "person" is broadly defined as "an individual . . . an organized group of persons, whether incorporated or not . . ." *Id.* §385.102(d).

32. 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 an answer unless otherwise ordered by the decisional authority. We will accept Boundless Energy's and North American Transmission's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

33. Based on the record in this case, we find that CTD has failed to demonstrate that NYISO violated its OATT in its Solicitation to address public policy transmission needs identified by the New York Commission or that NYISO's public policy transmission planning process is inconsistent with Order No. 1000. Accordingly, we deny CTD's complaint.

34. Order No. 1000 requires each public utility transmission provider's OATT to include procedures to consider transmission needs driven by public policy requirements in the local and regional transmission planning processes.⁸¹ It defines public policy requirements as requirements established by local, state or federal laws or regulations (i.e., enacted statutes passed by the legislature and signed by the executive and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level).⁸² Order No. 1000 permits public utility transmission providers, in consultation with stakeholders, to develop procedures that rely on a committee of load-serving entities, a committee of state regulators, or a stakeholder group to identify the transmission needs driven by public policy requirements for which transmission solutions will be evaluated.⁸³ Order No. 1000 also requires public utility transmission providers to evaluate potential solutions, including those proposed by stakeholders, to those identified transmission needs.⁸⁴

35. As required under Order No. 1000, NYISO developed a public policy transmission planning process, which included the following three steps at issue in the complaint. First, NYISO and its stakeholders identify transmission needs driven by public policy requirements (i.e., public policy transmission needs) and submit those needs to the

⁸¹ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203.

⁸² *Id.* P 2 & n.155.

⁸³ *Id.* P 209.

⁸⁴ *Id.* P 211.

New York Commission. The New York Commission then determines the public policy transmission needs for which NYISO will evaluate solutions, and may also provide NYISO with additional evaluation criteria and types of analyses for NYISO to use in NYISO's evaluation of solutions.⁸⁵ Second, NYISO issues a solicitation requesting proposed transmission and non-transmission solutions to address the public policy transmission needs that the New York Commission identified.⁸⁶ Finally, NYISO evaluates the proposed solutions, and selects the more efficient or cost-effective transmission solution, if any, in the regional transmission plan for purposes of regional cost allocation.⁸⁷

36. Consistent with the Commission's order accepting NYISO's Order No. 1000 compliance filing,⁸⁸ NYISO's OATT permitted NYISO, in consultation with stakeholders, to rely on the New York Commission, with input from NYISO and interested parties, to identify the public policy transmission needs,⁸⁹ and the New York Commission identified the public policy transmission needs here. As required under the first step of NYISO's public policy transmission planning process, NYISO, in 2014, requested interested parties to submit proposed transmission needs driven by public policy requirements. NYISO received proposed transmission needs from eight entities and provided them to the New York Commission. Subsequently, the New York Commission expanded its ongoing 2012 proceeding, which was addressing insufficient transmission capacity between upstate generation and downstate consumers on New York's AC transmission system, to identify public policy transmission needs.⁹⁰ After evaluating revised developer proposals to improve this transmission capacity, and after

⁸⁵ OATT, Attachment Y, § 31.4.2.1.

⁸⁶ *Id.* § 31.4.3.

⁸⁷ *Id.* § 31.4.8.2.

⁸⁸ *New York Independent System Operator, Inc.*, 143 FERC ¶ 61,059 at P 142.

⁸⁹ OATT, Attachment Y, § 31.4.2.1.

⁹⁰ The New York Commission states that “[b]ecause the [New York Commission] undertook a comprehensive siting/planning process before the NYISO OATT incorporated [NYISO's Order No. 1000 public policy transmission planning process], the [New York Commission's] identification of Public Policy Transmission Needs was informed by the extensive record before the [New York Commission]. New York Commission Comments at 7.

conducting hearings and additional analysis, in consultation with NYISO, the New York Commission identified Segments A and B as the public policy transmission need.⁹¹ Based on the record of this case, we find nothing to indicate that NYISO's and the New York Commission's identification of the public policy transmission need is inconsistent with the NYISO OATT definition of a Public Policy Transmission Need.⁹²

37. We also find that NYISO conducted the Solicitation in accordance with its OATT. The OATT requires NYISO to solicit proposals for Public Policy Transmission Projects and Other Public Policy Projects to satisfy a public policy transmission need.⁹³ NYISO's Solicitation stated that it "solicits Public Policy Transmission Projects and Other Public Policy Projects to address AC Transmission Public Policy Transmission Needs...."⁹⁴ In addition to the specific evaluation metrics, under OATT section 31.4.8.1,⁹⁵ that NYISO will consider when it is evaluating transmission solutions, OATT section 31.4.2.1 gives the New York Commission discretion to establish additional evaluation criteria and types of analyses that NYISO will apply when evaluating transmission solutions.⁹⁶ The

⁹¹ Complaint, Attachment D at 1.

⁹² OATT section 31.1.1 states that a Public Policy Transmission Need is "[a] need identified by the [New York Commission] that is driven by a Public Policy Requirement...." OATT, Attachment Y, § 31.1.1.

⁹³ OATT, Attachment Y, § 31.4.3. For the definition of a Public Policy Transmission Project, *see supra* note 35. An Other Public Policy Project is defined as "[a] non-transmission project or a portfolio of transmission and non-transmission projects proposed by a Developer to satisfy an identified Public Policy Transmission Need." OATT, Attachment Y, § 31.1.1.

⁹⁴ Complaint, Attachment D at 1, 2.

⁹⁵ OATT, Attachment Y, § 31.4.8.1.

⁹⁶ OATT, Attachment Y, § 31.4.2.1 (stating the New York Commission "may also provide: (i) additional criteria for the evaluation of transmission solutions and non-transmission projects...and (iii) the type of analyses that it will request from the [NYISO]"); *see also*, OATT, Attachment Y, § 31.4.8.1.8 (stating NYISO "shall apply any criteria specified by the Public Policy Requirement or provided by the [New York Commission] and perform the analyses requested by the [New York Commission], to the extent that compliance with such criteria and analyses are feasible.").

New York Commission's identification of evaluation criteria and types of analyses⁹⁷ was consistent with OATT section 31.4.2.1, and NYISO appropriately included them in the Solicitation.⁹⁸ Consistent with OATT sections 31.4.2.1 and 31.4.8.1, NYISO states that it must apply the specific evaluation metrics detailed in OATT section 31.4.8.1, as well as the additional evaluation criteria that the New York Commission specified under OATT sections 31.4.2.1, as NYISO evaluates transmission solutions in response to the Solicitation.⁹⁹

38. Additionally, we disagree with CTD that the New York Commission's identified public policy need transformed NYISO's sponsorship model into a competitive bidding model. The New York Commission did not select a specific project, and did not require NYISO to conduct only a bid-based solicitation for a specific project.¹⁰⁰ The record reflects the potential for competing solutions, and it shows that competing solutions were actually proposed in response to the Solicitation. NYISO's affidavit from Mr. Smith states that there are numerous potential physical designs, such as alternative transmission structure configurations, that would meet the transmission needs and provide varying levels of expandability.¹⁰¹ Mr. Smith also states that there are also numerous potential electrical designs that would provide varying levels of operability and performance, such as more efficient conductors, controllable devices, and series compensation.¹⁰² NYISO states that it received 15 Public Policy Transmission Projects and one Other Public Policy Project (which was a portfolio of distributed generation) from six incumbent and

⁹⁷ Complaint, Attachment D at Attachment II.

⁹⁸ Because we find that NYISO acted consistent with its OATT, we disagree with CTD's contention that NYISO inappropriately delegated its responsibilities to the New York Commission, and we find no similarity here with our recent case in which we found that NYISO inappropriately delegated its responsibilities to the New York Commission with respect to the evaluation and selection of reliability must-run alternatives. *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076 at P 32.

⁹⁹ NYISO Answer at 11-12.

¹⁰⁰ The OATT requires NYISO to conduct a solution-based solicitation, based on the sponsorship model. OATT, Attachment Y, § 31.4.3.

¹⁰¹ NYISO Answer at 15; Attachment II, Smith Affidavit at P 12.

¹⁰² *Id.*

nonincumbent developers in response to its Solicitation.¹⁰³ NYISO also states that the proposed solutions included single and double circuit proposals, as well as numerous variations of system configuration, including reconfiguration of existing facilities.¹⁰⁴ North American Transmission states that NYISO's Solicitation responses include at least one non-transmission proposal, two direct current proposals, and several other alternative proposals.¹⁰⁵ North American Transmission also states that it submitted multiple alternative proposals for both segments, and other developers also submitted multiple alternatives.¹⁰⁶ Furthermore, because the record reflects the potential for competing solutions, and it shows that competing solutions were actually proposed in response to the Solicitation, we also disagree with CTD's contention that if the Commission approves this Solicitation, then it is endorsing a two-pronged competitive process, including a competition before the New York Commission to determine which project solutions are selected to meet public policy transmission needs, and a competition issued by NYISO to determine which developer is chosen to construct the project. We find that the New York Commission did not select a specific project in its process to identify the public policy transmission need, and therefore NYISO appropriately conducted a solution-based solicitation, based on the sponsorship model, consistent with its OATT.

39. In response to CTD's concern that NYISO will not conduct an independent evaluation of transmission solutions using its own assumptions and models, we note that NYISO states that, consistent with its obligations under the OATT, it is conducting a separate and independent evaluation of the viability and sufficiency of the proposed solutions submitted in response to the Solicitation.¹⁰⁷ NYISO also states that it will then independently evaluate the viable and sufficient transmission solutions, and select the more efficient or cost-effective solution.¹⁰⁸ In addition, NYISO states that, to perform its evaluation, it will not use the New York Commission's studies, but rather its own base cases, modeling, and studies that it has independently developed in accordance with OATT section 31.4 and the NYISO Public Policy Transmission Planning Process

¹⁰³ NYISO Answer at 15; Attachment II, Smith Affidavit at P 15.

¹⁰⁴ *Id.* at 16; Attachment II, Smith Affidavit at P 15.

¹⁰⁵ North American Transmission Comments at 4.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ NYISO Answer at 16; Attachment II, Smith Affidavit at P 17.

¹⁰⁸ *Id.*

Manual.¹⁰⁹ Therefore, we find that NYISO is following the requirements of its OATT in identifying solutions in response to the Solicitation.¹¹⁰

40. Finally, the Commission emphasizes that NYISO should be careful to ensure that its public policy transmission planning process remains consistent with Order No. 1000. It appears that the structure of the Solicitation arose from unique circumstances related to the AC Transmission Needs proceeding that was initiated prior to the effectiveness of the NYISO Order No. 1000 transmission planning process. In contrast, in a prior competitive solicitation, NYISO issued a more general competitive solicitation to address transmission needs to alleviate congestion in Western New York. While we find that the complainants have not shown that NYISO violated its tariff here, we encourage NYISO to conduct its public policy transmission planning process in a manner that promotes competition, consistent with Order No. 1000.

The Commission orders:

The complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰⁹ NYISO Answer at 17; Attachment II, Smith Affidavit at P 18.

¹¹⁰ North American Transmission generally asserts, without supporting argument, that Boundless Energy, who did not participate in the Solicitation, and CityGreen Transmission, Inc. and Miller Bros. who are “not qualified transmission developers in NYISO’s public policy transmission planning process,” may not have standing to file a complaint asserting an OATT violation in NYISO’s evaluation of other proposals. In this regard, we note that neither the Commission’s statute nor its regulation require such participation or qualification as a predicate to filing a complaint. 16 U.S.C. § 825e (2012); 18 C.F.R. § 385.206 (2015).