UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc.) Docket No. OA08-52-001

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

Pursuant to Rules 212 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214 (2008), the New York Independent System Operator, Inc. ("NYISO") respectfully requests leave to answer, and answers, certain protests that were filed in response to the June 18, 2008 compliance filing in this docket ("June 18 Filing"), which was submitted jointly by the NYISO and the New York Transmission Owners ("NYTOs"). The June 18 Filing enjoyed broad stakeholder support, and only a few relatively isolated issues have been raised by protestors. The NYISO hereby responds to a protest submitted by the New York Regional Interconnect, Inc. ("NYRI") to the approval mechanism proposed by the NYISO for economic projects under the Congestion Assessment and Resource Integration Study ("CARIS").[1] The NYISO also responds to protests from Niagara Mohawk Power Corporation, d/b/a National Grid ("National Grid") -- which otherwise supported the June 18 Filing -- and Multiple Intervenors. These protests were limited to one specific aspect of the cost recovery calculation for the Reliability Facilities Charge ("RFC")[2] contained in the June 18 Filing. As outlined below, these protests are without merit, and should be rejected.

[1] *See* New York Independent System Operator, Inc., Order No. 890 Transmission Planning Compliance Filing, Docket No. OA08-52-000, filed December 7, 2007.

[2] Unless otherwise noted, capitalized terms set forth herein have the meanings set forth in the NYISO's Open Access Transmission Tariff.

I. Request for Leave to Answer

The NYISO recognizes that the Commission generally discourages answers to protests.[3] However, the Commission has the discretion to accept answers to protests, and has done so when those answers help to clarify complex issues, provide additional information, or are otherwise helpful in the development of the record in a proceeding.[4] In this case, some of the protests mischaracterize or misunderstand certain aspects of the June 18 Filing, as well as certain Commission policies governing that filing. This answer is intended to correct such mischaracterizations and misunderstandings, and thus to assist the Commission in clarifying the record in this proceeding. For these reasons, the NYISO respectfully requests that the Commission accept this answer.

II. Answer

A. NYRI's protest to the supermajority voting mechanism associated with economic upgrades under the CARIS should be rejected.

1. NYRI's protest is out-of-time.

The NYISO filed its proposal for a planning process for economic upgrades in this docket on December 7, 2007 ("December 7 Filing"), and interventions and comments on that proposal -- including the supermajority voting mechanism that NYRI protests -- were due on January 7, 2007.[5] NYRI attempts to excuse its late filing on this issue by stating that the supermajority voting proposal "may have some affect [sic] on recovery of [a] Project's costs," and that "[t]his

[3] 18 C.F.R. § 385.213(a)(2) and (3).

[4] *See e.g., New York Independent System Operator, Inc.*, 108 FERC ¶ 61,188 at P 7 (2004) (accepting the NYISO's answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. New York Independent System Operator, Inc.*, 93 FERC ¶ 61,017 at 61,036 (2000) (accepting an answer that was "helpful in the development of the record…").

[5] *See New York Independent System Operator, Inc., et al.*, Docket Nos. OA08-52-000, *et al.*, Notice of Extension of Time, issued December 20, 2007.

possibility did not become apparent to NYRI until after the [NYRI incentive rate] Petition was filed and the NYISO filed the June 18 Compliance Filing."[6] NYRI does not give any further explanation for its failure to raise this issue in January, or explain how NYRI -- apparently alone among stakeholders participating in this proceeding -- missed the NYISO's very clear proposal in the December 7 Filing to require that economic upgrades be approved by a supermajority of beneficiaries. Indeed, several protestors filed comments on this very aspect of the NYISO's proposal in January 2008 on grounds that are very similar to the ones that NYRI now raises, and the NYISO filed a timely response to those protests.[7]

Rule 2008 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2008(b) (2008), permits an entity to seek an extension of time to perform an "act required or allowed" after the time period for performing that act has expired, but allows the grant of such an extension only "if the movant shows extraordinary circumstances sufficient to justify the failure to act in a timely manner." In this case, NYRI has provided no showing of extraordinary circumstances that would justify the filing of a protest more than six months after the deadline for doing so has passed. Accordingly, the Commission should reject NYRI's protest because it is far out-of-time.

[6] Motion to Intervene and Protest of New York Regional Interconnect, Inc., Docket No. OA08-52, filed July 9, 2008 ("NYRI Protest").

[7] *See* Motion for Leave to Answer, and Answer, of the New York Independent System Operator, Inc., Docket No. OA08-52-000, filed January 22, 2008 ("January 22 Answer").

2. The NYISO's proposal is fully consistent with Order Nos. 890 and 890-A.

a. Order No. 890 does not mandate the construction of proposed transmission projects, and Order No. 890-A expressly permits the use of a supermajority voting mechanism for economic upgrades.

In Order No. 890, the Commission adopted a measured approach to developing planning requirements for transmission upgrades. The Commission recognized that the decision to construct upgrades incorporated into a transmission provider's expansion plan can raise complex questions, and therefore "decline[d] to expand the pro forma OATT to place additional obligations on the transmission provider to construct facilities identified in its transmission plan."[8]

This measured approach is particularly evident in the Commission's rulings on planning for economic projects that reduce congestion and may improve reliability, but that are not otherwise necessary to meet applicable reliability criteria (which are the very type of projects addressed by the NYISO's CARIS proposal). In an effort to clarify the standards implemented by Order No. 890, PSEG asked the Commission on rehearing to clarify that (1) "[t]o the extent the Commission requires ratepayer funding of economic upgrades . . . market participants who are asked to pay [will] be allowed to vote on acceptance of cost allocations for the project";[9] and (2) "construction of a project be approved only if a certain percentage vote in favor of building the project and no more than a certain percentage vote against building the project."[10] In short,

[8] Order No. 890-A at P 178. *See also* Order No. 890-A at P 251 (The "identification of an upgrade (reliability or economic) in the transmission plan does not trigger an obligation to build under the Attachment K planning process.").

[9] Order No. 890-A at P 243.

[10] *Id.*

PSEG asked for clarification that a supermajority voting mechanism is appropriate for economic upgrades. On rehearing, the Commission agreed with PSEG's requested clarification, stating that "[w]ithin an RTO or ISO, stakeholder processes can be used to determine whether to pursue either economic or reliability upgrades and, thus, voting mechanisms such as those suggested by PSEG could be adopted if stakeholders desire."[11]

Thus, far from prohibiting the use of a supermajority voting mechanism for economic upgrades, Order No. 890-A expressly permits the use of such a mechanism in order to determine whether the costs of such projects should be imposed on their beneficiaries. This approach reflects the view that -- as the NYISO explained in its prior response on this issue -- the decision to move forward with an economic upgrade should not be lightly made in circumstances where the project's costs will be allocated to its beneficiaries.[12] Indeed, the construction of an economic upgrade is inherently a discretionary action, and it is important that there be appropriate checks and balances on the cost viability of such a project. Accordingly, it is just and reasonable to require that a substantial majority of the parties who will be required to pay for an economic upgrade assent to it before it goes forward.[13]

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[11] *Id.* at P 252.

[12] *See* January 22 Answer at pg. 12.

[13] NYRI's protest exhibits a certain level of confusion over how the costs of economic projects are allocated when it states that "the tariff attempts to distinguish regulated transmission projects from so-called, undefined 'market-based' projects by stating that a market-based project is not subject to the OATT Section 15 cost allocation rules" and that "[i]f the NYISO does not intend Attachment Y to apply to market-based projects, then it is not clear what allocation procedures would apply to those projects." NYRI Protest at pg. 9. The NYISO's markets are designed to send price signals to incent developers to build transmission, demand response and generation solutions to meet system needs. Such "market-based" solutions are paid for solely by the developer, and the developer receives its revenues from the NYISO's markets and/or through bilateral agreements entered into outside of the NYISO's markets. With respect to economic projects, there are only two ways for the costs of a proposed project to be allocated to market participants. The first is under the procedures proposed in Attachment Y, which requires that all beneficiaries of an economic project pay its costs, whether they are in favor of the project or not, but also mandates that the project not go forward unless a supermajority of those beneficiaries vote

b. NYRI's citations to Order Nos. 890 and 890-A are taken out of context, and, in any event, do not undermine Order No. 890-A's holding that a supermajority voting mechanism for economic upgrades is permissible.

NYRI's efforts to bolster its arguments by reference to Order Nos. 890 and 890-A are undermined by the fact that the portions of those orders identified by NYRI are taken out of context, and do not support the principles for which they are cited. Fundamentally, NYRI appears to want the costs of economic upgrades identified in an ISO planning process to be imposed on beneficiary transmission customers on a relatively broad scale, even if a substantial number of those customers otherwise object to the construction of such facilities. While the requirements of Order Nos. 890 and 890-A clearly are intended to facilitate the development of new transmission facilities, those orders do not require the scope of mandatory cost allocation for economic upgrades that NYRI seeks to have the NYISO adopt.

NYRI places significant emphasis on the holding in Order No. 890-A that transmission providers are not obligated to develop "transmission plans on a co-equal basis with customers," and that "[t]ransmission planning is the tariff obligation of the transmission provider, and the *pro forma* OATT planning process adopted in Order No. 890 is the means to see that it is carried out in a coordinated, open, and transparent manner."[14] The primary intent of this directive, which is outlined in the Commission's discussion of the level of coordination required between a transmission provider and its transmission customers, is to clarify the obligation of transmission providers located outside of Independent System Operators ("ISOs") and Regional Transmission

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in favor of allowing the project to proceed. The second -- the market-based methodology -- allows the developer to contract directly with one or more market participants for the construction of an economic upgrade. Under this option, the costs of the project are borne solely by those market participants, and the NYISO's cost allocation procedures in Attachment Y are not invoked.

[14] Order No. 890-A at P 188.

Organizations ("RTOs") -- which generally have less experience than their ISO and RTO counterparts in including transmission customers as part of the planning process -- to coordinate with their non-transmission owning customers regarding the development of a comprehensive transmission plan. The fact that a transmission provider is primarily responsible for developing a transmission plan, and is not required to permit customers to have a "formal vote" on such a plan, does not mean that ISOs/RTOs may not rely on their stakeholder processes to develop such plans, or that they may not adopt a supermajority voting mechanism for economic upgrades. As illustrated above, Order No. 890-A expressly permits ISOs and RTOs to use a supermajority vote of project beneficiaries in order to determine whether an economic upgrade should go forward.

Similarly, NYRI's citation of the Commission's ruling in Order No. 890 on the Indianapolis Power proposal is misguided, and does not support the claim that the supermajority voting mechanism proposed in the CARIS is prohibited by Order No. 890. The Commission's rejection of "Indianapolis Power's proposal to require tariff changes resulting from this rulemaking only with the support of the ISO or RTO members who may bear the costs associated with the revision"[15] has nothing to do with the type of supermajority voting mechanism to which NYRI objects. Rather, it stands only for the proposition that an ISO's or RTO's stakeholders may not block an ISO or RTO from making a compliance filing mandated by the Commission. The fact that ISOs and RTOs must implement the applicable requirements of Order No. 890, even if their members object to those requirements, does not mean, as NYRI would have the Commission believe, that transmission customers do not have a say in how transmission plans are developed, or that a transmission provider -- especially an independent, not-for-profit transmission provider like the NYISO -- may not adopt a supermajority voting mechanism for

[15] Order No. 890 at P 159.

economic upgrades. Indeed, the NYISO's economic process is designed to provide transmission customers, developers like NYRI, and other stakeholders a voice in studying transmission congestion and weighing the costs and benefits of projects to alleviate congestion on the bulk power system.

Finally, NYRI's reliance on the three-part test in Order No. 890 that the Commission uses to determine whether an allocation methodology for upgrade costs is just and reasonable is unavailing. NYRI places a significant emphasis on the second prong of that test -- "whether a cost allocation proposal provides adequate incentives to construct new transmission."[16] Nothing in that assessment overrides the Commission's holdings in Order Nos. 890 and 890-A that an ISO may rely on its stakeholder process to evaluate proposed upgrades, or that an ISO may use a supermajority voting mechanism to determine whether the costs of an economic project may be allocated to beneficiary transmission customers. Furthermore, NYRI's emphasis on the second prong overlooks the third prong of the test, which examines whether the cost allocation proposal is "generally supported by state authorities and participants across the region."[17] This part of the cost allocation test underscores the importance of having broad stakeholder support for cost allocation methodologies, and their resulting distributions of upgrade costs.[18]

[16] *Id.* at P 559.

[17] *Id.*

[18] NYRI's assertion that "the NYISO proposal does not enjoy majority stakeholder support," NYRI Protest at pg. 13, is simply wrong. Although some parties from Upstate New York did protest the supermajority voting proposal, the majority of the stakeholders participating in the tariff development process supported that proposal.

3. The NYISO's cost allocation proposal for economic upgrades is consistent with the order on PJM's cost allocation methodology, as well as the Commission's incentive rate policy and construction permitting authority.

NYRI's citation to the Commission's recent order approving, *inter alia*, the cost allocation methodology for economic upgrades submitted by PJM Interconnection, L.L.C. ("PJM") is also unavailing. PJM's Order No. 890 compliance proposal did not require supermajority approval of economic project beneficiaries in order for the costs of the project to be allocated to those beneficiaries, and the Commission rejected an argument by PSEG that it should impose a supermajority voting mechanism on PJM. This holding establishes only that a supermajority voting mechanism for economic upgrades is not required, and not -- as NYRI would have the Commission understand -- that a supermajority voting mechanism for economic projects is prohibited. Indeed, in rejecting PSEG's argument, the Commission expressly stated that "Order No. 890 does not mandate any type of voting mechanism in this context."[19] Furthermore, the order went on to state that "we found in Order No. 890-A that such a mechanism [*i.e.*, a supermajority mechanism] could be adopted if stakeholders desire,"[20] but that "the voting mechanism proposal offered by PSEG was considered by PJM members but failed to garner majority support among stakeholders."[21] Far from supporting NYRI's position, this discussion affirmatively refutes NYRI's contention that a supermajority voting mechanism for economic upgrades is prohibited by the Commission. Moreover, the NYISO's supermajority voting mechanism enjoyed the support of a broad majority of the stakeholders that expressed

[19] *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,163 at P 114 (2008).

[20] *Id.* (emphasis added).

[21] *Id.*

their input during the development of the economic planning process; only the upstate TOs, and, belatedly, NYRI oppose it.

NYRI's contention that a supermajority voting mechanism "is in direct conflict with" the Commission's incentive rate policy and its backstop transmission siting authority also is without merit. The incentive rate policy provides for the grant of incentive transmission rates to transmission projects that satisfy the criteria of FPA Section 219, while the backstop siting authority under FPA Section 216 allows the Commission to site transmission lines in designated National Interest Electric Transmission Corridors under specific circumstances. Neither the incentive rate policy nor the backstop siting authority have any bearing on how the costs of economic transmission upgrades should be allocated, or whether those costs can or should be imposed on beneficiaries over their objections. In fact, a supermajority voting mechanism is fully consistent with the Commission's incentive rate policies given that transmission projects approved through ISO/RTO processes generally are entitled to certain presumptions regarding their consistency with FPA Section 219. The Commission recognized these points, albeit implicitly, when it held in Order No. 890-A (and confirmed in the PJM order) that a supermajority voting requirement may be adopted in order to allocate costs of economic upgrades.

In addition, the Commission certainly was cognizant of both the incentive rate policies and its backstop transmission siting authority when it held in Order No. 890-A that the use of a supermajority voting mechanism is permissible. Accordingly, NYRI's argument that a supermajority voting mechanism "is in direct conflict with" the Commission's incentive rate policy and its backstop transmission siting authority should be rejected.

4. The NYISO's cost allocation proposal for economic projects is just and reasonable

As a final matter, and as the NYISO asserted in its January 22, 2008 response to the Upstate Transmission Owners' protest, the supermajority proposal is just and reasonable.[22] It was adopted after careful deliberations in the NYISO's stakeholder process, and -- contrary to the assertions of NYRI -- had the support of the majority of the participating stakeholders.[23] Furthermore, as outlined above, it is important to proceed carefully on economic upgrades to ensure that they strike the correct balance between costs and benefits, and the supermajority voting mechanism ensures that such upgrades will receive the necessary scrutiny by the parties that will have to pay for them. In this way, the mechanism assures that the market works appropriately, and that those transmission upgrades that are proposed in response to the correct market signals are implemented.

With respect to NYRI's concern that parties with conflicts of interest might be able to interfere unfairly with the approval of a beneficial project, NYRI's assertions are based on speculation, and are unsupported by any evidence. Furthermore, it is important to remember that the overall planning process is overseen and administered by the NYISO itself, which is an independent entity. The NYISO will work to ensure that the planning process is open, transparent, coordinated, and fair. The NYISO will be vigilant for signs of potential anticompetitive conduct in the approval of economic upgrades, and will take appropriate steps if it determines that the supermajority voting mechanism is being used by stakeholders to undermine projects. This NYISO oversight is supplemented by the NYISO's dispute resolution

[22] *See* January 22 Answer at pg. 12.

[23] This support is highlighted by the July 21, 2008 answer of the PSEG Companies in support of the NYISO's supermajority proposal. *See* Motion for Leave to Answer and Answer of the PSEG Companies, Docket No. OA08-52-000, filed July 21, 2008.

process, which allows stakeholders to raise, and seek redress of, any potential abuses of the supermajority voting process.[24]

In sum, the supermajority voting mechanism for economic upgrades is just and reasonable, and should be approved by the Commission.

B. The protests of National Grid and Multiple Intervenors regarding the RFC methodology should be rejected

1. The use of a volumetric charge rather than a demand charge to recover the cost of reliability upgrades is just, reasonable, and non-discriminatory

The methodology for calculating the RFC set forth in the June 18 Filing is based on existing methodologies used by the NYISO to recover infrastructure costs, and is otherwise just and reasonable. The RFC's volumetric methodology is very similar to the methodology that the NYISO uses to calculate the Transmission Service Charge ("TSC") and the NYPA Transmission Adjustment Charge ("NTAC"), which are the charges used to recover the embedded costs of the existing transmission facilities owned by the NYTOs. Like the RFC, the TSC and NTAC are recovered on a volumetric basis rather than a demand basis, and are used to recover the costs of facilities used to ensure reliable electric service in the New York Control Area. Also like the RFC, the TSC involves recovery of a specified revenue requirement allocated to loads within specified zones (the NTAC is allocated on a statewide basis).[25] Functionally, there is no difference between the two, and neither National Grid nor Multiple Intervenors have explained why the RFC methodology is objectionable, while the TSC methodology is not.

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[24] *Id.* at pgs. 12-13.

[25] The Commission has approved both the TSC and the NTAC, which have been in place since the NYISO commenced operations in 1999. *See Central Hudson Gas & Electric Corporation, et al.*, 86 FERC ¶ 61,062 at pg. 61,213 (1999) (approving the NTAC); *Central Hudson Gas & Electric Corporation, et al.*, 92 FERC ¶ 61,0628 at pg. 61,495 (2000) (approving settlement implementing TSC).

In fact, it is entirely reasonable to recover embedded system costs on a volumetric basis rather than a demand basis.[26] As National Grid and Multiple Intervenors point out, the use of a volumetric charge means that high load factor customers will pay more than lower load factor customers with the same peak load for the reliability upgrades implemented through Attachment Y. There is nothing inherently objectionable about this outcome. Furthermore, it avoids the potential for unreasonable cost shifts associated with the use of a demand charge. For example, if a high load factor customer uses power primarily during off-peak hours of the day, its share of the costs under a demand charge methodology might be unreasonably low (if it is not consuming power at all, or only consuming small amounts of power, during the monthly peak). Thus, the use of a volumetric charge is just and reasonable, and the Commission should not require the NYISO to switch at this time to a demand charge for the RFC.

2. The switch to a demand charge is not feasible at this time.

It is not technically feasible for the NYISO to implement a demand-based RFC charge and have a complete Order No. 890 planning process in place (including cost allocation and cost recovery) as the Commission has required. Implementation of such a demand-based charge would require the NYISO to reconfigure its billing software (currently constructed to permit only RFC calculations on a volumetric basis) at a significant cost with limited and uncertain benefits.

Presently, all cost allocations authorized by the NYISO OATT are volumetric in nature at varying time gradients. For example, in addition to the TSC and NTAC noted above, market residuals and margin assurance payments as well as the charges for the Station 80 capacitor banks and the Ramapo PAR facilities are allocated based on hourly load-ratio shares; day-ahead

[26] *See California Independent System Operator Corporation*, 111 FERC ¶ 61,337 at PP 72-74 (2005) (upholding the CAISO's volumetric rate design used for recovery of embedded transmission costs).

and real-time guarantee payments as well as supplemental event credits are allocated on daily load-ratio shares; and ERO costs and incremental costs paid to Generators pursuant to Local Reliability Rule IR-3 are allocated on monthly load-ratio shares. In all of these cases, the OATT directs the NYISO to use Actual Energy Withdrawals (for internal loads) or Energy Schedules (for wheel throughs and exports) as the billing units.

Consequently, the NYISO settlements engine and invoicing application have been built to perform cost allocations exclusively on a volumetric basis using actual or scheduled volumes, with provisions for this data to be updated by Meter Authorities and for the resulting settlements to be corrected through a limited true-up period. To modify the capability of these systems to allocate costs on a demand basis using data not previously captured and stored in the billing system or used in any other settlement calculation (*i.e.*, load contributions to a forecasted zonal peak) would consume significant NYISO resources and incur substantial costs. These software revisions would have to be presented to the NYISO's Budget and Priorities Working Group for acceleration, and the NYISO would have to delay work on other important projects that are currently waiting to be performed**.** And the potential use of such an investment would be severely limited, given that the use of such software would be restricted to the allocation of the RFC. Moreover, the occasion to use this software may never materialize, given the uncertainty as to whether a regulated transmission reliability backstop project would ever be invoked. As discussed above, given that a volumetric RFC is just, reasonable, and non-discriminatory, there is no basis for requiring that other important projects be displaced in order to implement a demand charge mechanism for the RFC.

Furthermore, the reference to the ICAP cost allocation methodology also is unavailing. Indeed, although both ICAP costs and the RFC are allocated to load, those allocations are

performed differently. The allocation of ICAP is based on Transmission Districts, while the RFC allocation is based on Load Zones. For this reason, the processes and systems in place to support the ICAP market are inadequate to support an RFC demand-charge. Indeed, the NYISO and its Transmission Owners would be required to build out a set of administrative rules and processes and software systems that would need to operate in parallel with the ICAP processes and procedures. This would include the development of procedures to describe the development and approval of zonal load forecasts; the calculation of load-serving entity contributions to zonal forecasted peaks (including provisions for load-serving entities to challenge their assessments), and the handling of load shifts between load-serving entities (*i.e.*, a true-up mechanism). Each Transmission Owner would be required to implement the necessary procedures to process and maintain peak demand contributions for each load-serving entity at the zonal level, and to submit that data to the NYISO on a monthly basis, including any updates for past periods. The NYISO has discussed this with the New York Transmission Owners, many of which have confirmed that such modifications to their internal systems would also be burdensome and costly.

3. The use of a volumetric charge had support in the NYISO's stakeholder process, and the NYISO has committed to bring the issue back before its stakeholders for reconsideration.

Finally, the NYISO brought the issue of how the RFC should be calculated before its stakeholders, and a majority of those stakeholders supported the use of a volumetric charge. Nonetheless, because several parties argued in favor of a demand charge, the NYISO agreed to bring the issue back to its stakeholder process for reconsideration. The NYISO will ensure that the stakeholder process will fully consider an RFC cost recovery methodology that is appropriate for the NYISO's markets in the long term. In light of the infeasibility of implementing a demand charge over the short-term, and the fact that a volumetric charge is just and reasonable, the

stakeholder process is the appropriate procedural vehicle for revisiting this issue. Accordingly, the Commission should decline to impose an RFC methodology that is based on a demand charge rather than a volumetric charge.

C. The tariff change sought by Competitive Power Ventures is unobjectionable, but will have no effect on the Commission's jurisdiction over transmission upgrades for reliability purposes.

As explained in the June 18 Filing, the NYISO's tariffs have been drafted in a manner that treats transmission reliability upgrades as subject to the Commission's jurisdiction, and non-transmission reliability upgrades as subject to the jurisdiction of the New York Public Service Commission ("NYPSC") and other state authorities, such as the Long Island Power Authority and the New York Power Authority. In the stakeholder discussions, certain generators sought to include language stating that the provisions of the tariffs indicating that cost recovery for non-transmission reliability upgrades would be subject to NYPSC jurisdiction would not affect Commission jurisdiction over wholesale power sales. As an accommodation to these concerns, the NYISO and the New York Transmission Owners agreed to add language to the tariff restating the jurisdictional line over wholesale power sales. Hence, the language in Section 13.6 of the tariff states that "nothing in this section shall affect the Commission's jurisdiction over wholesale sales." CPV now seeks to add the same language to Section 16 of Attachment Y that would make this same point. Specifically, CPV asks that the Commission require the NYISO to add to Section 16.0c a statement that "[n]othing in this section shall affect the Commission's jurisdiction over wholesale sales."

As a threshold matter, the Commission's jurisdiction is a function of its statutory authority under the FPA, and not of the language of the tariffs of public utilities. Indeed, nothing that the NYISO includes in its tariffs can affect the scope of the Commission's jurisdiction over

either transmission or non-transmission reliability upgrades.[27] That said, however, the NYISO does not object to including the language requested by CPV in Section 16 to parallel the language in Section 13.6.

III. Conclusion

Wherefore, the NYISO respectfully requests that the Commission grant its motion to file this answer to the protests in this docket, accept the answer, and accept for filing the NYISO's Order 890 tariff amendments to create a Comprehensive System Planning Process on December 7, 2007, including the tariff leaves filed on cost allocation and cost recovery on June 18, 2008.

Respectfully submitted,

/s/ Ted J. Murphy

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July 24, 2008

[27] *See Bonneville Power Administration v. Federal Energy Regulatory Commission*, 422 F.3d 908, 924 (9th Cir. 2005) ("FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or opt out of FERC's jurisdiction.").

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 24th day of July, 2008.

/s/ Ted J. Murphy

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