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RE: Comments on the Proposal Regarding Cost Containment Metric for Transmission Project Evaluation in Public Policy Process

ESPWG Members and Stakeholders:

New York Transco, LLC (“NY Transco”) appreciates the opportunity to provide these comments on the NYISO’s proposed Cost Containment Metric for Transmission Project Evaluation in Public Policy Process that was presented at the August 6, 2019 meeting of the Electric System Planning Working Group. Voluntary cost containment commitments proposed by developers in response to a public policy transmission need solicitation should enhance the solicitation process and provide important customer protections. The NYISO proposed tariff changes, however, could be enhanced to address some deficiencies, provide greater clarity and consider the flexibility inherent in Federal Energy Regulatory Commission approved formula rates.

Attached hereto are the comments on NY Transco to the cost containment metric and proposed tariff language.

Respectfully submitted.

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**COMMENTS OF NEW YORK TRANSCO, LLC ON THE PROPOSED
COST CONTAINMENT METRIC FOR TRANSMISSION PROJECT
EVALUATION IN THE PUBLIC POLICY PROCESS**

1. Any Cost Containment Commitment included in the Development Agreement should be afforded Mobile-Sierra protection.

By proposing a voluntary cost containment commitment in its project solicitation, a Developer agrees to potentially forego recovery of prudently incurred costs that it would otherwise be permitted to recover through transmission rates. If selected as the most efficient and cost effective solution to the Public Policy Transmission Need, this voluntary commitment should be afforded a heightened scrutiny of review in the event any third party seeks modification of the commitment or attempts to use the Developer's willingness to agree to such a commitment as leverage for better cost containment terms. In essence, the Developer's proposal should not ultimately become a ceiling offer for cost recovery.

Proposed Language Addition: In Section 15.3 of the Development Agreement, add the following language after the list of excusing conditions:

The standard of review for any change to Section 15.3 and/or the Developer's Cost Cap for the Included Capital Costs detailed in Appendix D shall be the "public interest" application of the just and reasonable standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527 (2008), and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010). The ordinary just and reasonable standard of review (rather than the "public interest" standard), as clarified in *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527 (2008), applies to any changes to Section 15.3 and/or the Developer's Cost Cap for the Included Capital Costs detailed in Appendix D sought by the Commission acting *sua sponte*.

2. The Tariff should recognize that a Developer may have a rate on file with the FERC that ensures proper administration of any proposed cost containment commitment – Sections 6.10.6.1, 31.4.5.1.8, 31.4.8.3, Development Agreement Section 15.3

Proposed Section 6.10.6.1 provides that a Developer "shall file with the Commission as part of its required rate filing for cost recovery under Sections 6.10.4 or 6.10.5, as applicable: (i) any Cost Cap that it proposed for its Public Policy Transmission Project,

including any excusing conditions described in Section 6.10.6.2, and (ii) a rate that does not exceed the amount of the Cost Cap.” Similar filing requirement provisions are included in Sections 31.4.5.1.8 and 31.4.8.3, and in Section 15.3 of the Development Agreement.

The explicit filing requirement for any proposed cost containment commitment is inconsistent with the manner in which a formula rate operates. For example, the NY Transco formula rate included in Section 36 of the NYISO Tariff is flexible and allows for the consideration of possible cost caps for any particular project developed by NY Transco. If NY Transco were to propose cost containment commitments and that proposal is ultimately selected by the NYISO as the most efficient and cost effective solution, NY Transco would make note of the commitment and reference the Development Agreement that memorializes the commitment (and FERC Docket No. associated with the filing of the Development Agreement).

The Development Agreement is a FERC-jurisdictional agreement that will stipulate the allowable cost recovery for any particular project that is subject to voluntary Developer cost containment commitments. To the extent the selected Developer has a formula rate on file with the Commission that ensures the proper administration of the cost containment commitments, the Developer should not be required to submit a new filing pursuant to Section 205 of the Federal Power Act. Developers do not currently have the ability to file a limited, single-issue rate filing of the kind contemplated in Section 6.10.6 and any filing would open up the entire existing rate for review, including any pre-approved return on equity component of such rate. This is simply untenable.

Proposed Language Addition: In Section 6.10.6.1 of Schedule 10 of the NYISO OATT, add the following language at the beginning of the section (corresponding changes will also need to be included in other sections referenced above):

To the extent Developer does not have a rate on file with FERC that ensures Developer will not establish a rate that exceeds the amount of the Cost Cap, the Developer of an Eligible Project . . .

3. Certain categories of costs should not be included in the definition of Included Capital Costs – Section 31.4.5.1.8.1

- *Development costs incurred prior to bid selection:* So long as a Developer can support a determination that it prudently incurred costs to support early development activities associated with its bid proposal, the Developer should be permitted to seek to include those costs in rates regardless of whether the Developer’s project is selected as the most effective and cost efficient solution.

Only post-selection costs should be included in the Included Capital Costs and subject to the cost containment commitment.

Proposed Language Addition: In Section 31.4.5.1.8.1, include the following language at the end of the section:

Notwithstanding the foregoing, Included Capital Costs do not include costs incurred by a Developer prior to the selection of the most efficient and cost effective solution (“Pre-selection Costs”). A Developer may recover the Pre-selection Costs irrespective of whether its proposal is selected as the most efficient and cost effective Public Policy Transmission Project.

- *Privileges and permits:* The list of Included Capital Costs should only include those privileges and permits that a Developer can reasonably be expected to be required to obtain. In the event some local governmental entity or some other third party subsequently institutes the need to obtain a privilege or permit that had been unknown at the time the Cost Cap proposal was submitted, the Developer should be permitted to recover all of those costs without implicating the proposed Cost Cap commitment.

Proposed Language Addition: In Section 31.4.5.1.8.1, include “expected” immediately prior to “privileges and permits.”

- *Real estate and land rights costs; rents; taxes:* Section 31.4.5.1.8.1 includes an exhaustive list of cost components that comprise the Capital Costs in the Included Capital Costs definition. Included in that list are costs associated with real estate procurement and land rights; rents (lease payments); and taxes. Each of these costs, however, are extremely difficult to estimate in the very short time a Developer has to create and submit a proposed solution in response to a Public Policy Transmission Need solicitation. This would be particularly difficult if the Developer were to utilize new rights-of-way due to the potential for litigation and subsequent long delays. Similarly, the costs subject to the Cost Cap should not include the type of costs that are not within the reasonable control and estimation of both incumbent transmission owners and non-incumbent transmission owners. Incumbent transmission developers have a unique advantage over other developers in the area of land acquisition, land access rights, rents paid to lease certain aspects of an existing right-of-way and associated taxes. In many circumstances, a developer may require access and/or ownership to land that is

currently held by an incumbent transmission owner that has no obligation or incentive to work with the developer, or even provide any accurate information to the developer as that developer prepares its submission. Moreover, certain types of lease arrangements may need approval by the New York Public Service Commission, further exacerbating the difficulty in determining appropriate cost estimates for bid development.

In addition, Section 31.4.5.1.8.1 provides that a Developer may choose to include as Included Capital Costs “real estate costs for existing rights-of-way that are part of the proposed Public Policy Transmission project, but are not owned by the Developer (*e.g.*, existing utility rights-of-way).” NY Transco suggests that this provision also provides incumbent transmission owners (those holding the existing rights-of-way) with an unfair advantage in the bid development process. Incumbent transmission developers are less likely to have significant, if any, real estate costs of the type referenced in this provision and can easily garner an advantage in the selection criteria by agreeing to include the costs as an Included Capital Cost.

Proposed Language Subtraction: To address this unfair competitive advantage, Section 31.4.5.1.8.1 should be revised by removing the references to “real estate and land rights,” “rents,” and “taxes,” in the types of costs included in capital costs. In addition, NYISO should strike the sentence beginning, “At its option, a Developer may choose . . .”

- *Retirement costs:* Section 31.4.5.1.8.1 includes costs associated with “asset retirement” as an Included Capital Cost. Including this category of costs as an Included Capital Cost places non-incumbent transmission developers at a disadvantage as the developer would need to inform the existing asset owner (the potential competitor incumbent transmission owner) that its bid includes the potential retirement of its existing facilities in order to properly develop an estimate of costs of the project proposal. In essence, the Developer is faced with the Hobson’s Choice of excluding these costs from otherwise appropriate recovery, or advising the existing asset owner of the nature of its proposed project. In order to address this issue, asset retirement costs should not be included as an Included Capital Cost.

Proposed Language Subtraction: In Section 31.4.5.1.8.1, strike the reference to “asset retirement.”

- *Debt Costs*: Section 31.4.5.1.8.1 also includes debt costs as an Included Capital Cost. However, Section 31.4.5.1.8.2 lists the “allowance for funds used during construction (“AFUDC”) or other representations of the cost of financing the transmission project during the construction timeframe . . .” as an Excluded Capital Cost. A Developer has the option of either capitalizing AFUDC during the construction period for later inclusion in rate base, or seeking a FERC incentive to recover Construction Work in Progress (“CWIP”) immediately in rate base. If the Developer is awarded anything other than 100% CWIP recovery, the debt cost associated with the construction outlay should not be considered an Included Capital Cost. In essence, this debt cost should be afforded similar treatment as AFUDC financing. If the intent of the phrase “or other representations of the cost of financing the transmission project during the construction timeframe” in Section 31.4.5.1.8.2 is to account for the debt cost associated with this cost recovery scenario, NYISO should clarify this section. If not, “debt cost” should be removed from Section 31.4.5.1.8.1.

Proposed Language Subtraction: In Section 31.4.5.1.8.1, strike the reference to “debt cost.”

4. Excluded Capital Costs – Section 31.4.5.1.8.2

- *Excluded Capital Cost clarification*: The intent of Section 31.4.5.1.8.2 is to exclude certain cost components outside the control of the Developer from the Cost Cap commitment. However, this section of the OATT should clearly state that a Developer can include the Excluded Capital Costs in rate base and earn a return on its investment, including any FERC-approved incentive return on equity.

Proposed Language Addition: In Section 31.4.5.1.8.2, include the following add the end of the section:

“For the avoidance of doubt, the Excluded Capital Costs shall not be subject to any Cost Cap proposal and a Developer shall be entitled to include the Excluded Capital Costs in its rate base and earn a return on its investment, including any FERC-approved incentive ROE.

- *Real estate costs and unforeseeable privileges and permits*: As discussed above, real estate costs and unforeseeable privileges and permits should be included as an Excluded Capital Cost.

Proposed Language Addition: In Section 31.4.5.1.8.2, strike the “and” immediately preceding “(iii),” and include the following at the end of the section:

“. . . , (iv) real estate costs for new and existing rights-of-way that are part of the proposed Public Policy Transmission project, but are not owned by the Developer (*e.g.*, existing utility rights-of-way), and (v) unforeseeable privileges and permits.

- *Interconnecting and Connecting TO costs:* Excluded Capital Costs should include any cost outside the control of the Developer, including any cost levied by an Interconnecting Transmission Owner or Connecting Transmission Owner. While romanette (i) references costs associated with the NYISO interconnection process, there may be additional costs assessed by an Interconnecting Transmission Owner and Connecting Transmission Owner outside the interconnection process (*e.g.*, costs to retire existing facilities, engineering costs, costs to access land, costs similar in nature to the Segment B Additions in the AC Transmission proceeding, etc.). This would place the Developer on equal footing with the Transmission Owners.

Proposed Language Addition: In Section 31.4.5.1.8.2, add the following (new language in bold):

“. . . (i) system upgrades determined by the ISO in one of its interconnection processes **and any other cost assessed by the Connecting Transmission Owner or Interconnecting Transmission Owner;** (ii) . . .”

5. The Cost Cap Qualitative Evaluation metrics should focus solely on the quality of the Cost Cap and not provide an enhanced ranking simply by prosing a Cost Cap – Section 31.4.8.2.2

Section 31.4.8.2.2 lists the criteria upon which the NYISO will evaluate “the quality” of any Cost Cap proposal submitted by a Developer. Despite being voluntary in nature, the first factor listed includes “whether the Developer proposed a Cost Cap.” Presumably, greater ranking will be afforded a bid that simply includes a Cost Cap proposal, regardless of the nature or quality of the Cost Cap proposal itself. While NY Transco agrees with each of the other criteria (included in romanettes (ii) through (v)), as appropriate qualitative metrics for evaluating a Cost Cap proposal, NY Transco does not

agree that a bid should be granted any qualitative points by the mere fact that a Cost Cap was included in the proposal. The need to include this quality metric has not been explained and should be removed. The remaining factors are more than sufficient to appropriately assess and rank bid submissions.

Proposed Language Subtraction: In Section 31.4.8.2.2, strike romanette “(i)”, and reorder the remaining factors.

6. Confidentiality of Cost Cap Proposal – Section 31.4.15.2

Section 31.4.15.2 states that the total amount of Included Capital Costs and any cost sharing percentage contained in any Cost Cap proposed by a Developer “shall not be treated or designated as Confidential Information for purposes of Section 31.4 and Attachment F of the ISO OATT.”

While NY Transco supports publicizing this information at some point during the bid selection process, NY Transco suggests that this information should be treated as Confidential Information until such time as the NYISO issues its initial draft selection report. NY Transco is concerned that publicizing this information before the initial draft selection report is issued may result in inappropriate responses by Developers, including more competitive Cost Cap proposals submitted with FERC for approval during the pendency of NYISO review. At a minimum, this information should not be made public until after NYISO makes its Viability and Sufficiency Assessment determination pursuant to Section 31.4.6.5 of the OATT. There is no need to publicize bid components for projects that the NYISO determines are not viable or sufficient to satisfy the Public Policy Transmission Need.

Proposed Language Addition: In Section 31.4.15.2, replace the proposed language with the following:

“ . . . provided, however, that the total amount of Included Capital Costs and any cost sharing percentage contained in any Cost Cap proposed by a Developer pursuant to Sections 31.4.5.1 and 31.4.5.1.8 shall be disclosed in the draft Public Policy Transmission Planning Report.”

7. Clarifications – Section 6.10.6

There are several provisions included in proposed Section 6.10.6 that are confusing and ambiguous. As a result, NY Transco requests that NYISO provide clarification of the following items (NY Transco reserves the right to comment further on the sections noted below following NYISO clarification):

- Section 6.10.6.2.B – This section references the definition of a Force Majeure event in the Development Agreement (Section 15.5). That definition provides that a party “shall be excused from whatever performance is affected only for the duration of the Force Majeure and while the Party exercises reasonable efforts to alleviate such situation.” As such, the proposed language after the comma in Section 6.10.6.2.B is unnecessary and could lead to some confusion. Therefore, NYISO should explain the need for the language or strike the language after the comma in its entirety.
- Section 6.10.6.3 – The reference to an “alternative rate mechanism” in this section is unclear. NY Transco recognizes that the “soft Cost Cap” concept is still under consideration, so future discussions may provide some clarity. However, NYISO should clarify what is intended by this section.
- Section 6.10.6.5 – This section is also unclear. NYISO should explain what is intended by this section, including issues regarding return on equity and related incentives “that are unrelated to capital cost containment commitments,” etc.