

Comments on NYISO's Proposed Tariff Language for Cost Containment Metric for Transmission

Project Evaluation in Public Policy Process

Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (together, the “Companies”) respectfully submit these comments on the New York Independent System Operator, Inc.’s (“NYISO”) proposed Tariff language to implement its proposed cost containment mechanism in the Public Policy Transmission Planning Process (“PPTPP”). As noted in prior comments¹, while the Companies believe that cost containment is appropriately within the jurisdiction of the Federal Energy Regulatory Commission (“FERC”) and best left to the FERC rate settlement process, in the interest of compromise, the Companies are agreeable to considering certain cost containment provisions within the NYISO PPTPP.

The Companies acknowledge and appreciate the work NYISO has done to date in modifying its proposal in response to stakeholder comments, and offer these comments to help further refine the proposal related to (1) inclusion of real estate costs; (2) inclusion of environmental site remediation and mitigation costs; (3) qualitative consideration of cost containment proposals; and (4) treatment of transmission owner upgrades.

1. Inclusion of Real Estate Costs

The NYISO’s current proposal defines “Included Capital Costs” under a cost cap as including “real estate and land rights” and “rents,” with the exception of “real estate costs for existing rights-of-way [...] not owned by the Developer,” which may be included at the option of the Developer. The Companies object to the inconsistent treatment of different types of real property costs. The costs to acquire rights to land not owned by the Developer may not reasonably be predictable – whether or not they pertain to existing rights of way. What renders the costs unpredictable is not whether the rights pertain to existing rights of way; it’s whether the information can fairly be derived – based on the specific

¹ Transmission Owner Comments submitted June 2019, available at <https://www.nyiso.com/documents/20142/7239276/04c%20Con%20Edison%20Comments%20STI.pdf/0cd2ae77-3e11-0025-765d-6c23f8e9f113>

facts and circumstances of the land at issue – from due diligence performed at an early stage. Rather than trying to hard-wire inclusion and exclusion for subcategories of real estate cost, which will be impacted by a variety of factors, all such costs should be includable at the Developer’s option. In other words, let the Developer decide whether or not to include these costs. Providing optionality appropriately acknowledges that there are instances in which such costs can be reasonably predictable and other instances in which they cannot. Optionality can incentivize Developers to include such costs when it is reasonable to do so and receive “credit” for doing so in the qualitative evaluation.

2. Inclusion of Environmental Site Remediation and Mitigation Costs

The Companies appreciate the NYISO’s response to stakeholder comments asking that NYISO define what it means by “reasonably expected” environmental site remediation and environmental mitigation costs that would be included under a cost cap. However, the current definition draws an erroneous distinction between project sites “already owned, operated, controlled, or otherwise utilized by the Developer” and those that are not. The ability of a Developer to estimate costs of environmental site remediation and mitigation does not depend upon ownership; rather, it depends upon whether the land at issue has been investigated. NYISO’s proposed tariff language inappropriately uses ownership as an indication of site condition knowledge, when previous investigation (not ownership) is what drives this information. Further, a Developer may be aware of potential environmental remediation or mitigation issues, but may or may not have completed the needed studies to be able to appropriately estimate the cost to address them. Similarly, a Developer may have completed one or more environmental studies (which form the basis of its bid), but experience various unforeseen events or circumstances during construction that would cause that estimate to be exceeded. To avoid the potential for confusion, the language describing “unforeseeable environmental remediation and environmental mitigation costs” should therefore be modified to clarify the circumstances under which such costs are considered unforeseeable and excluded from the cost cap.

To address these issues, the Companies propose the following revisions to the language currently included in Section 31.4.5.1.8.1.1 and 31.4.5.1.8.2.1:

31.4.5.1.8.1.1 For purposes of Section 31.4.5.1.8.1, the phrase “reasonably expected environmental remediation and environmental mitigation costs” means any estimated **environmental** site investigation, **environmental** remediation, and **environmental mitigation** costs to the extent they would arise in the normal course of planning and constructing a Public Policy Transmission Project, which includes, but is not limited to, the following circumstances:

(i) For project sites ~~already owned, operated, controlled, or otherwise utilized by the Developer at the time of submission, and~~ for which an environmental site assessment has already been conducted or environmental remediation or mitigation activities are ongoing, the Developer shall provide an estimate of any additional environmental site investigation, remediation, or mitigation that is known or **may** reasonably **be estimated anticipated** at the time of submission.

(ii) For project sites ~~that are not owned, operated, controlled, or otherwise utilized by the Developer at the time of submission and~~ for which the Developer has no reason to believe would require any environmental remediation or mitigation without undertaking a site investigation, such as but not limited to any greenfield or undeveloped land, the Developer shall provide an estimate of the cost to perform a Phase I Environmental Site Assessment on a per mile basis.

(iii) For project sites ~~that are not owned, operated, controlled, or otherwise utilized by the Developer but~~ for which the Developer has reason to believe may require environmental site investigation, remediation, or mitigation, the Developer shall provide an estimate of the cost to perform such environmental site investigation, remediation, or mitigation to the extent possible based upon the information reasonably available to the Developer at the time of submission.

31.4.5.1.8.2.1 For purposes of Section 31.4.5.1.8.2, the phrase “unforeseeable environmental remediation and environmental mitigation costs” means any costs relating to environmental remediation and environmental mitigation that are not anticipated by the Developer or are otherwise indeterminable based upon information reasonably available to the Developer at the time of submission, including any environmental remediation or mitigation costs that cannot be estimated by the Developer without performing an environmental site assessment or investigation; provided, however, that the cost of

conducting such environmental site assessment or investigation shall be considered an Included Capital Cost pursuant to Section 31.4.5.1.8.1. **Costs attributable to environmental investigation, remediation and mitigation that exceed the amount estimated in the Developer’s bid based on, among other things, changes in the extent of known contamination, changes in the remedial design and construction-related contingencies, changes in regulatory requirements and regulatory approval schedules, changes in planned activities or their timing, local government permitting requirements, gaining access to property or cooperation from property owners and other third parties, unanticipated field conditions and/or force majeure events are deemed both “unforeseeable environmental remediation and environmental mitigation costs” and Excluded Capital Costs.**

3. Qualitative Consideration of Cost Containment Proposals

As noted in prior comments, the Companies continue to be concerned that the NYISO’s proposed “qualitative metric” for evaluating cost caps is not well-defined. In the most recent draft of Tariff language to implement the proposal, NYISO proposes to define the qualitative metric in proposed Section 31.4.8.2.2 as follows:

- (i) The effectiveness of the proposed Cost Cap in providing an incentive to the Developers to contain their Included Capital Costs, i.e., how aligned is the Developer’s incentive to maximize its profits by avoiding cost overruns compared to the level of risk exposure to consumers, and what degree of risk is the Developer assuming to pay for cost overruns;
- (ii) The effectiveness of the proposed Cost Cap in protecting ratepayers from Included Capital Cost overruns;
- (iii) If the Developer’s proposed hard Cost Cap or soft Cost Cap is below the ISO’s independent consultant’s cost estimate for Included Capital Costs, how close (i.e., how far below) is the Developer’s proposed Cost Cap for Included Capital Costs to the ISO’s independent cost estimate, considering the Developer’s financial and technical qualifications, and considering the likelihood that the project could be constructed at the Cost Cap amount;
- (iv) If the Developer’s proposed Cost Cap is above the ISO’s independent consultant’s cost estimate for Included Capital Costs, (a) how close (i.e., how far above) is the Developer’s proposed Cost

Cap for Included Capital Costs to the ISO's independent cost estimate; (b) whether the Cost Cap is so significantly above the ISO independent consultant's cost estimate that it is unlikely to bind the Developer and provide benefit to ratepayers; and (c) whether the Cost Cap exceeds the ISO's independent cost estimate by only a small amount, such that the Cost Cap could protect ratepayers from cost overruns.

The Companies are concerned that items (i) and (ii) in the metric definition are unclearly defined and overly broad. If NYISO's intent in subsection (i) is to qualitatively evaluate the proposal based on the form of the cost cap, then this can be more precisely stated, in order to avoid ambiguity: "The effectiveness of the proposed Cost Cap in providing an incentive to the Developers to contain their Included Capital Costs, i.e., the form of Cost Cap proposed (hard Cost Cap or soft Cost Cap) and, for a soft Cost Cap, the percentage cost sharing in the Developer's proposal."

Based on discussions at the September 6 Electric System Planning Working Group ("ESPWG") regarding subsection (ii), it appears that in evaluating the effectiveness of the proposed Cost Cap in protecting ratepayers, the NYISO intends to consider how the Developer's cost estimate compares to the independent cost estimate and the benefit that results for customers. If that is the case, then subsection (ii) is unnecessary, as comparisons between the cost cap and the independent cost estimate and a resulting assessment of customer benefits are already adequately addressed in subsections (iii) and (iv).

The Companies also support the requests made by other stakeholders at the September 6 ESPWG for NYISO to provide examples of how this metric will be evaluated. An example would help stakeholders to better understand this metric and provide more informed feedback on the proposed language.

4. Treatment of Transmission Owner Upgrades

As noted at the August 20 and September 6 ESPWG meetings, the Companies are concerned that the NYISO's proposed Tariff language does not address the treatment of projects that may contain upgrades subject to the Transmission Owner ("TO") Right of First Refusal ("ROFR") under Section 31.6.4 of the NYISO OATT. Under NYISO's proposal, both "new" and "upgrade" project elements

would be included in a Developer's cost cap. The proposal does not address treatment and evaluation of costs and cost caps if a TO exercises its ROFR over a proposed upgrade. For example, if a TO exercises its ROFR over an upgrade, a Developer's proposed cost cap may need to be adjusted accordingly to reflect the removal of those project elements from the Developer's rate base. Leaving this issue unaddressed leaves a gap in the Tariff and lack of clarity on how NYISO will evaluate proposals with upgrades.

In proposed edits submitted to the NYISO on August 14, the Companies suggested two edits to help clarify this issue, which NYISO has thus far declined to adopt:

- At the end of OATT 31.4.5.1.8.3, the addition of a sentence stating, "A Cost Cap proposed by a Developer will only be binding upon the Developer that submitted the Cost Cap."
- The addition of "upgrades to existing transmission facilities which a Transmission Owner may elect to build pursuant to Section 31.6.4" to the list of "Excluded Capital Costs" defined in Section 31.4.5.1.8.2.

The Companies continue to believe that these changes are necessary to reflect the voluntary nature of cost containment and to avoid creating a conflict between the new provisions and NYISO OATT Section 31.6.4. As it is, NYISO's proposal leaves open the following critical issues with respect to the TO ROFR:

- (1) What is the process for a TO's exercise of its ROFR in the PPTPP?
- (2) If a TO exercises its ROFR in a project with a cost cap, does the Developer:
 - a. have the right to submit a new cost estimate for its cost cap?
 - b. have an obligation to submit a new cost estimate for its cost cap?
 - c. have the right to withdraw its cost cap?
- (3) If the Developer is given the right to submit a new cost cap, can it change the essential form of the cap – *i.e.*, hard to soft, soft to hard, different form of soft, etc.?
- (4) If the TO exercises its ROFR in a project with a cost cap, how will NYISO estimate the capital costs for the project in its evaluation?

- (5) Will the NYISO accept a project proposal with a cost cap that excludes upgrades subjected to a ROFR?
- (6) If a TO exercises its ROFR and agrees to a cost cap on the upgrades, will the NYISO's process for documenting and enforcing that cap follow the same procedure as that established for a Developer's cap?

Leaving these questions unanswered in the Tariff creates uncertainty for all stakeholders regarding how NYISO will evaluate proposals with upgrades.