



September 11, 2024

VIA ELECTRONIC FILING

The Honorable Debbie-Anne Reese, Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**Re: *ISO New England Inc.*
 Docket No. EL24-83-000**

Dear Acting Secretary Reese:

In its June 13, 2024 *Order to Show Cause* in the above-captioned proceeding,¹ the Federal Energy Regulatory Commission (“Commission”) found that the ISO’s Open Access Transmission Tariff² appears to be unjust, unreasonable, and unduly discriminatory or preferential because it includes provisions for the transmission owners to unilaterally elect to initially fund capital costs for Network Upgrades necessary for proposed Generating Facilities to interconnect in a manner that meets the applicable Interconnection Standards (“TO Initial Funding Option”).³ In the Order, the Commission stated that the TO Initial Funding Option “may increase the costs of interconnection service without corresponding improvements to that service” and “there may be no risks associated with owning, operating, and maintaining network upgrades for which transmission owners are

¹ See *Midwest Indep. Sys. Operator, Inc.*, 187 FERC ¶ 61,170 (2024) (“Order to Show Cause”).

² Capitalized terms used but not defined in this filing are intended to have the meaning given to such terms in the ISO New England Inc. Transmission, Markets and Services Tariff (the “Tariff”). Section II of the Tariff is the Open Access Transmission Tariff (“OATT”). Schedule 22 of the OATT contains the *pro forma* Large Generator Interconnection Procedures (“LGIP”) and Large Generator Interconnection Agreement (“LGIA”), Schedule 23 of the OATT contains the *pro forma* Small Generator Interconnection Procedures (“SGIP”) and Small Generator Interconnection Agreement (“SGIA”), and Schedule 25 of the OATT contains the *pro forma* Elective Transmission Upgrade Interconnection Procedures (“ETU IP”) and Elective Transmission Upgrade Interconnection Agreement (“ETU IA”) (collectively, the “Interconnection Procedures”).

³ Order to Show Cause at P 1.

not already otherwise compensated.”⁴ Therefore, the Commission directed the ISO to, within 90 days of the Order to Show Cause, either “show cause as to why its OATT remains just and reasonable and not unduly discriminatory or preferential and provide responses to the questions set forth in Appendix A;” or “explain what changes to its OATT it believes would remedy the identified concerns . . . and provide responses to the questions set forth in Appendix A.”⁵

Pursuant to the Commission-accepted Transmission Operating Agreement (“TOA”) as between the ISO and the Participating Transmission Owners (“PTO”) and the Tariff, the ISO is the independent entity responsible for administering the New England Interconnection Procedures. This responsibility includes the conduct of the Interconnection Studies to identify the interconnection-related upgrades that are necessary to effectuate the interconnection of an Interconnection Customer’s proposed Generating Facility consistent with the Interconnection Standards. As part of this responsibility, the ISO identifies and determines the Generator Interconnection Related Upgrades required to satisfy the Interconnection Standards. In administering the Interconnection Procedures, the ISO seeks to ensure compliance with the requirements therein.

Under the TOA, however, the PTOs hold the exclusive Federal Power Act Section 205 filing rights for the OATT rules that establish the methodology to recover costs associated with interconnection-related upgrades, and the related financial obligations of the PTO or the interconnecting party.⁶ These provisions are set forth in Article 11.3 of the LGIA, Article 5.2 of the SGIA, and Article 11.3 of the ETU IA,⁷ as well as Schedule 11 of the OATT, and are the rules identified in the Order to Show Cause. Because these cost recovery and financial obligation rules fall within the exclusive purview of, and are implemented by, the PTOs, the ISO requested that the PTOs respond to the Order to Show

⁴ *Id.* at P 1.

⁵ *See id.* See also Paragraph (B) of the Order to Show Cause.

⁶ *See* TOA at §§ 2.05 and 3.04. *See also* SO New England, 106 FERC ¶ 61,280, at P 72 (2004).

⁷ The TO Initial Funding Option language in Article 11.3 of the LGIA, 5.2 of the SGIA, and 11.3 of the ETU IA are based on the provisions in the *pro forma* LGIA that the Commission adopted in Order No. 2003. *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008) (“Order No. 2003”); *Standardization of Small Generator Interconnection Agreements & Procs.*, Order No. 2006, 111 FERC ¶ 61,220, at PP 15, 35-36, *order on reh’g*, Order No. 2006-A, 113 FERC ¶ 61,195 (2005), *order granting clarification*, Order No. 2006-B, 116 FERC ¶ 61,046 (2006) (“Order No. 2006”).

Cause.⁸ Attachment 1 to this letter contains the response as provided to the ISO by a subset of the PTOs—the New England Transmission Owners (“NETOs”). The NETOs comprise the subset of the PTOs that are counterparties to the vast majority of Interconnection Agreements, and therefore have experience implementing the Interconnection Procedures and Schedule 11 provisions at issue in this matter.⁹

Although the matters raised in the Order to Show Cause do not address provisions under the ISO’s purview, the ISO notes that it is not aware of concerns related to the TO Initial Funding Option in New England. As the Order to Show Cause recognizes, the TO Initial Funding Option is seldom used in New England,¹⁰ which suggests the concerns presented in the order might not be prevalent in all regions.

Respectfully submitted,

/s/ Monica Gonzalez

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Counsel for ISO New England

Attachment

⁸ See Order to Show Cause at n 118 (providing that the PJM TOs may submit responses to the questions in the order).

⁹ Executed or unexecuted, but filed Interconnection Agreements are available, subject to Critical Energy Infrastructure Information, on the ISO’s website at: <https://www.iso-ne.com/system-planning/interconnection-service/interconnection-agreements>.

¹⁰ See Order to Show Cause at PP 41-42.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Holyoke, Massachusetts this 11th day of September 2024.

/s/ Julie Horgan

Julie Horgan

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Attachment 1

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc.

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Docket No. EL24-83-000

**RESPONSE TO ORDER TO SHOW CAUSE OF
THE INDICATED NEW ENGLAND TRANSMISSION OWNERS**

In accordance with Section 206 of the Federal Power Act (“FPA”)¹ and Rule 213 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,² the Indicated New England Transmission Owners (“NETOs”)³ hereby submit their response to the Order to Show Cause issued on June 13, 2024 in this proceeding.⁴ Pursuant to Ordering Paragraph B of the Order to Show Cause, the NETOs also submit their response to the questions posed by the Commission in Appendix A.⁵

I. SUMMARY OF ARGUMENT

The Order to Show Cause proposes to use Section 206 of the FPA to revoke transmission owners’ right to elect to fund network upgrades associated with generator interconnection requests

¹ 16 U.S.C. 824e (2018).

² 18 C.F.R. § 385.213 (2024).

³ The NETOs, for purposes of this proceeding, are: Eversource Energy Service Company on behalf of The Connecticut Light and Power Company, NSTAR Electric Company, and Public Service Company of New Hampshire; Central Maine Power Company; The United Illuminating Company; New England Power Company d/b/a National Grid; The Narragansett Electric Company d/b/a Rhode Island Energy; Fitchburg Gas and Electric Light Company d/b/a Unitil; and Versant Power. The NETOs own and operate the majority of the transmission system under the operating authority of ISO New England Inc. (“ISO-NE”).

⁴ *Midcontinent Indep. Sys. Operator, Inc.*, 187 FERC ¶ 61,170 (2024) (“Order to Show Cause”).

⁵ Because the Order to Show Cause directs ISO-NE to show cause why its existing tariff is not unjust and unreasonable, the NETOs’ response is being submitted as an attachment to ISO-NE’s response to the Order to Show Cause. However, as further discussed below in Section III.A.b, it is the NETOs and other New England transmission owners whose economic interests are at stake and who have the filing rights over the ISO-NE OATT provisions at issue in this proceeding. The Commission should have directed the Order to Show Cause to the transmission owners rather than to ISO-NE.

(“TO Initial Funding Option”), a right granted expressly by the Commission pursuant to Order Nos. 2003 and 2006 and retained in the Commission’s subsequent generator interconnection rulemakings.⁶ The Commission would thereby force public utility transmission owners, including the NETOs, to design, license, construct, own, and operate those network upgrades on a not-for-profit basis. For myriad reasons, this proposal is *ultra vires*.

First, in order to modify the Commission’s *pro forma* Large Generator Interconnection Agreement (“*pro forma* LGIA”) and *pro forma* Small Generator Interconnection Agreement (“*pro forma* SGIA”), which are established by regulation, the Commission is required to conduct a notice-and-comment rulemaking proceeding that complies with Section 553 of the Administrative Procedures Act (“APA”).⁷ It cannot act by adjudication, as it proposes to do here. This requirement is not merely procedural. At the heart of the Commission’s generator interconnection rules (initially adopted in Order Nos. 2003 and 2006) is a requirement that public utility transmission owners design, license, construct, own, and operate network upgrades that are required to reliably interconnect new generation to their systems. The FPA, however, does not grant the Commission authority to force transmission owners to build transmission facilities in these circumstances. No transmission owner challenged the Commission’s assertion of authority to order public utilities to build interconnection facilities under Order Nos. 2003 and 2006, and there was no economic reason for the industry to do so because the rule gave transmission owners

⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008) (“Order No. 2003”); *Standardization of Small Generator Interconnection Agreements & Procs.*, Order No. 2006, 111 FERC ¶ 61,220, at PP 15, 35-36, *order on reh’g*, Order No. 2006-A, 113 FERC ¶ 61,195 (2005), *order granting clarification*, Order No. 2006-B, 116 FERC ¶ 61,046 (2006) (“Order No. 2006”).

⁷ Pub. L. 79-404, 60 Stat. 237 (1946), 5 U.S.C. §§ 551 et seq.

the option to fund and earn a return on these facilities. However, if the Commission proposes to conscript transmission owners' resources and expertise to operate on a not-for-profit basis by eliminating rights granted in Article 11.3 of the Commission's *pro forma* LGIA and Section 5.2 of the *pro forma* SGIA as proposed in the Order to Show Cause, then the Commission's authority to adopt the entire generation interconnection rule must be reconsidered.

Second, the Commission is barred from using the vehicle of a FPA Section 206 complaint directed against Regional Transmission Organizations ("RTOs") to achieve this result. The RTOs are not the parties whose rates, and therefore economic and statutory interests, will be affected by the Order to Show Cause. Revoking public utility transmission owners' right to fund and earn a return on network facilities built to accommodate generator interconnections would strip these utilities of their ability to make Section 205 filings to place on file rates for a specific type of jurisdictional service. The D.C. Circuit has already rejected the Commission's effort to transfer Section 205 ratemaking authority from transmission owners to RTOs in *Atlantic City*.⁸

Third, the Commission proposes to act pursuant to FPA Section 206 but fails to meet its statutory burden under that provision. Under Section 206, the Commission bears the dual burden of demonstrating first that its existing regulation is now unjust and unreasonable, and if it meets that burden, to establish a just and reasonable replacement rate.⁹ The proposal in the Order to Show Cause to revoke the TO Initial Funding Option satisfies neither prong of Section 206.

In order to satisfy the first prong, the Commission would have to show that transmission rates which include the recovery of a regulated return on invested capital are unjust and unreasonable; a regulated return on invested capital is the outcome if a transmission owner

⁸ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("Atlantic City").

⁹ *Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017) ("Emera Maine").

exercises its option to fund network upgrades. However, the Commission has approved hundreds of transmission rates on this basis over the past 80 years. Its only authority in approving transmission rates is to ensure that public utilities do not earn an *excessive* return, which the Supreme Court in *Hope* defined as a return that exceeds the returns earned by competitive businesses with comparable risk.¹⁰ The Commission has adopted and applied return on equity (“ROE”) methodologies to satisfy this requirement, and rates which satisfy this longstanding and universally applied rule are just and reasonable. Once the return has been so limited, the Commission’s ratemaking responsibility under the FPA has been satisfied and the Commission has no further power.

The Commission suggests that the rates at issue here may be unjust and unreasonable where the interconnection customer can finance the network upgrades at a lower cost than the public utility transmission owner. This has never been a standard applied to determine whether rates are just and reasonable under the FPA. It is irrelevant to cabining the market power of public utilities, which is the sole purpose of ratemaking under the FPA. Moreover, the Commission’s “apples to oranges” comparison of financing costs for public utilities and their interconnection customers is fundamentally flawed. As NETO expert Ellen Lapson explains in her testimony informed by decades of experience in utility finance and provided herein as Attachment A (“Lapson Testimony”), transmission owners must maintain substantial equity in their capital structures, because they have an ongoing obligation to expand and maintain their utility systems, whereas generation owners seek the lowest possible financing available to satisfy lenders for their single asset operations.¹¹

¹⁰ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (“*Hope*”) (“the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks”).

¹¹ Lapson Testimony at 7-8.

The Commission's suggestion that the TO Initial Funding Option is somehow unfair to generators is simply astonishing. The entire transmission rate structure in RTOs favors generators by requiring network load to pay for the vast majority of the transmission system. In ISO-NE, for example, load already subsidizes the profits of generators because, unlike load, generators do not pay a comparable rate for use of the transmission system.¹² And the customers that pay for most of the transmission system pay public utilities a return on invested capital. The Commission does not explain how it can be inequitable to require generators to pay the same return associated with the limited class of transmission facilities covered by the Order to Show Cause.

Next, the Commission suggests that granting public utility transmission owners the option of whether to fund network upgrades is unduly discriminatory under Section 206 because transmission owners could apply the option to favor affiliated generation. The Commission has not identified a single instance in which this form of discrimination has occurred, and it cannot apply to the NETOs, who have already largely divested their generation. Indeed, the Commission has already adopted many other prophylactic remedies to prevent the very form of discrimination it appears concerned about now. Specifically, the Commission has required public utilities with generation interests to functionally unbundle their transmission businesses and it has adopted standards of conduct that prevent discrimination and ensure "comparability" as a required standard under Section 206. The standards of conduct apply to the NETOs. In RTOs, the Commission has the additional safeguard of involvement of the independent RTO and oversight in virtually every stage of the generator interconnection process. The Commission offers not one iota of evidence that the numerous remedies it has already adopted are inadequate, and it therefore has failed to

¹² In non-RTO regions, load still pays for most of the transmission system. However, in certain non-RTO regions, generators are responsible for some transmission charges for using the transmission system to deliver their output to load.

meet its Section 206 burden. There is no need whatsoever for the Commission to adopt the draconian remedy of denying public utilities the opportunity to earn a return on their investment in network upgrades.

Fourth, the Commission also cannot satisfy the second prong of the Section 206 analysis because conscripting the expertise and resources of private businesses without offering them an opportunity to earn a just and reasonable return for providing jurisdictional service is not just and reasonable. It is, in fact, an unconstitutional taking of private property and outside the scope of the Commission's authority under the FPA. The Commission argues that there is no taking because transmission owners are compensated by the return provided with respect to their other services. However, forcing utilities to provide some transmission service with no return automatically lowers the overall return earned on the entirety of their business below the level the Commission approved as just and reasonable. In addition, under the Commission's ROE methodology, which is based primarily on the sum of forecasted growth and dividends for a proxy group, ROEs are more likely to go down if no return is allowed for some services even though the transmission owner's financial and business risk has increased. As network upgrades are expected to become a bigger portion of transmission assets over time—due to ongoing interconnection of unaffiliated generators—this problem is only expected to grow.

Moreover, the Commission's reasoning on this issue has no limits and essentially gives the Commission the authority to set jurisdictional rates at whatever level it wishes, including zero, in individual cases so long as the business enterprise of which the transmission owner is a part earns what the Commission considers to be an adequate return overall, a level of return that the Commission does not identify. The Commission thereby eliminates the objective, longstanding boundaries on its ratemaking authority in individual cases that have been approved by the courts

in favor of a subjective standard that has no identifiable limitations. By replacing longstanding objective limits on its ratemaking authority with a subjective new standard with no identifiable objective limits, the Commission would transform the just and reasonable standard into an unlawful delegation of legislative authority to the Commission.

Fifth, the Commission’s proposal to revoke the TO Initial Funding Option will have a significant impact on the NETOs’ and other transmission owners’ future business. As discussed in the Affidavit of Vandan Divatia, Vice President Transmission Policy, Interconnections & Compliance at Eversource Energy, provided herein as Attachment B (“Divatia Affidavit”), to achieve the New England states’ ambitious decarbonization and clean energy goals will require interconnection of a large amount of new renewable energy generation.¹³ The NETOs are committed to support efforts to interconnect new clean energy resources to the grid, but not on a not-for-profit basis. In addition, under the Commission’s new Order No. 2023 requirement to study interconnection requests on a clustered basis,¹⁴ the NETOs anticipate that a substantial amount of network upgrade investment will be made as a result of the generator interconnection process. In 2020, transmission owners in PJM Interconnection, L.L.C. (“PJM”) estimated the total network upgrade costs required to reliably interconnect new generating resources in PJM at approximately \$6.5 billion.¹⁵ New England should follow the same pattern as fossil fueled generation facilities are retired and replaced with clean energy sources. The fact that the NETOs have often not chosen to fund the very limited dollars invested in network upgrades tied to the

¹³ Divatia Affidavit at 3.

¹⁴ *Improvements to Generator Interconnection Procs. & Agreements*, Order No. 2023, 184 FERC ¶ 61,054 (2023), *order on reh’g & clarification*, Order No. 2023-A, 186 FERC ¶ 61,199 (2024) (“Order No. 2023”).

¹⁵ See *PPL Elec. Utils. Corp.*, PJM Tariff Revisions to Implement Transmission Owners’ Funding of Network Upgrades, Docket No. ER21-2282 at 2 (filed June 30, 2021).

interconnection process in the past does not contradict the importance of retaining their right to earn a return on jurisdictional service in the future.

Finally, the Commission needs to recognize why the issues raised in the Order to Show Cause even exist. Historically, vertically integrated public utilities built the transmission system and rarely distinguished between network upgrades and other transmission assets, the cost of which were recovered through bundled rates. But even after the unbundling of the utility industry, the Commission consistently has held that all network upgrades on a public utility's integrated transmission system benefit all customers and therefore the costs of network upgrades must be rolled in for purposes of setting rates.¹⁶ For reasons the Commission has never explained, it has chosen to disregard its own "roll-in" rule and associated reasoning for network upgrades associated with generator interconnections, which are functionally indistinguishable from other network upgrades. If the Commission believes that generators should pay for a portion of the costs of the transmission network, it should address that issue through its cost allocation rules rather than violating its own reasoning for purposes of one category of network upgrades.

II. BACKGROUND

A. The Indicated New England Transmission Owners

Each NETO is a Participating Transmission Owner ("PTO") under the Transmission Operating Agreement ("TOA") with ISO-NE.¹⁷

¹⁶ See Order to Show Cause at P 3 ("The Commission has long acknowledged that network upgrades, which are, by definition, improvements to the transmission system itself, produce benefits to the transmission system that extend beyond the interconnection customer associated with an interconnection request."); see also *id.* at P 3, n.5 (citing cases, including *National Ass'n of Regulatory Utility Com'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) ("NARUC") (upholding the Commission's determination that network upgrades benefit the entire network, noting that the D.C. Circuit had previously endorsed the approach of assigning the costs of system-wide benefits to all customers on an integrated transmission grid) (citing *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999))).

¹⁷ *ISO New England*, 106 FERC ¶ 61,280, at P 72 (2004).

a. The Connecticut Light and Power Company, NSTAR Electric Company, and Public Service Company of New Hampshire

The Connecticut Light and Power Company (“CL&P”), NSTAR Electric Company (“NSTAR”), and Public Service Company of New Hampshire (“PSNH”) each is a public utility that is a wholly owned subsidiary of Eversource Energy, a public utility holding company under the Public Utility Holding Company Act of 2005.¹⁸ CL&P, NSTAR, and PSNH (together, the “Eversource Companies”) own and operate transmission and distribution facilities, including over 61,000 circuit miles, in Connecticut, Massachusetts, and New Hampshire, respectively. The transmission facilities of the Eversource Companies are subject to the operational control of ISO-NE, and transmission services are provided under Section II of ISO-NE’s Transmission, Markets and Services Tariff (“ISO-NE OATT”).

b. Central Maine Power Company and The United Illuminating Company

Central Maine Power Company (“CMP”) and The United Illuminating Company (“UI”) are wholly owned, indirect subsidiaries of Avangrid, Inc. CMP is primarily engaged in transmitting and distributing electricity generated by others to retail customers in Maine. CMP serves more than 600,000 customers in central and southern Maine. CMP is a transmission owner in New England and provides electric transmission service pursuant to the rates, terms and conditions of the ISO-NE OATT. CMP’s transmission system comprises approximately 2,900 miles of transmission lines. This system serves an 11,000-square-mile area, more than the size of Massachusetts and Rhode Island combined. CMP conducts business in and in relation to ISO-NE’s wholesale energy, capacity, and ancillary service markets.

UI provides electric transmission and distribution services in Connecticut. In addition, UI owns a 50% interest in an entity which indirectly owns two peaking generating plants. UI is a

¹⁸ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1262, 119 Stat. 594, 972-73 (2005).

transmission owner in New England and provides electric transmission service pursuant to the rates, terms and conditions of the ISO-NE OATT. UI's transmission system comprises approximately 138 miles of transmission lines. UI conducts business in and in relation to ISO-NE's wholesale energy, capacity, and ancillary service markets.

c. National Grid

New England Power Company ("NEP") d/b/a National Grid is an ISO-NE PTO that owns, physically operates, and maintains transmission facilities on an open-access basis in New England and recovers its transmission revenue requirements through Regional Network Service (RNS) and Local Network Service (LNS) formula rates under the ISO-NE OATT. NEP owns and operates over 2,600 miles of transmission facilities in Massachusetts. Furthermore, NEP is an interconnection service provider, and thus, a party to numerous SGIA's and LGIA's that govern the interconnection of generating units to the transmission system owned by NEP. As such, NEP has an interest in Commission proceedings related to the rates, terms, and conditions of generator interconnections, including proceedings related to TO Initial Funding.

d. Rhode Island Energy

The Narragansett Electric Company d/b/a Rhode Island Energy ("RIE") is a wholly owned subsidiary of PPL Corporation. It owns and operates electric transmission and distribution, and gas distribution, assets throughout the state of Rhode Island. RIE is a transmission owner in ISO-NE and its transmission system consists of approximately 336 miles of transmission lines and associated substations.

e. Unitil

Fitchburg Gas and Electric Light Company d/b/a Unitil ("Unitil") is a wholly owned subsidiary of Unitil Corporation providing electric distribution service to approximately 30,340 customers in the greater Fitchburg area of north central Massachusetts. Unitil is a PTO whose

transmission facilities are used for the provision of Regional Transmission Service and Local Service under the ISO-NE OATT.

f. Versant Power

Versant Power, a Maine corporation, is engaged in the transmission and distribution of electric energy and related services to approximately 165,000 retail customers in portions of northern, eastern, and coastal Maine. Versant Power directly owns approximately 1,265 miles of transmission lines, approximately 6,300 miles of distribution lines, and no generating facilities. As is relevant here, open access to Versant Power's local transmission facilities in eastern and coastal Maine (the "Versant Power, Bangor Hydro District") is provided pursuant to the ISO-NE OATT.¹⁹

B. The ISO-NE OATT Transmission Owner Initial Funding Provisions

Article 11.3 of ISO-NE's *pro forma* LGIA contains language permitting transmission owners to elect to fund network upgrades for interconnecting generation facilities that is, in all material respects, identical to the provisions promulgated by the Commission through the Order No. 2003 proceeding and reflected in the Commission's *pro forma* LGIA. Specifically, the ISO-NE *pro forma* LGIA provides that network upgrades will be funded by the interconnection customer "[u]nless the Interconnecting Transmission Owner elects to fund the capital for the Network Upgrades."²⁰ The Commission confirmed the meaning of this language in Order No.

¹⁹ Open access to Versant Power's transmission facilities in northern Maine (the "MPD") is provided pursuant to the Versant Power Open Access Transmission Tariff for Maine Public District on file with the Commission. The transmission facilities in Versant Power's two districts are not directly interconnected. Indeed, the MPD transmission system is not directly interconnected with any portion of the United States transmission grid. Rather, entities interconnected with the MPD transmission system can only access the ISO-NE system or other parts of the U.S. transmission grid over transmission facilities in New Brunswick, Canada.

²⁰ ISO-NE OATT, Schedule 22, app. 6, art. 11.3.

2003: “[A]s stated in Article 11.3 of the Final Rule LGIA, the Transmission Provider may elect to fund the Network Upgrades itself”²¹ The Commission accepted the inclusion of the funding provision in the ISO-NE *pro forma* LGIA in New England Power Pool’s Order No. 2003 compliance filing.²² Both ISO-NE’s *pro forma* SGIA²³ and ISO-NE’s *pro forma* Elective Transmission Upgrade Interconnection Agreement (“ETUIA”)²⁴ also contain language permitting transmission owner initial funding for network upgrades.

In the Order to Show Cause, the Commission notes that “[t]o date, it appears that no transmission owners have elected TO Initial Funding in the ISO-NE region.”²⁵ It is true that none of the NETOs has unilaterally elected to fund network upgrades in New England. However, some of the NETOs have funded network upgrades in response to interconnection customer requests. NEP, for example, currently offers interconnecting generators the option to choose TO Initial Funding, through contributions in aid of construction, or generator initial funding. NEP notes that more than a third of those customers choose TO Initial Funding, usually because they are smaller generators unable to fund the upgrades up-front. Moreover, while the NETOs have traditionally

²¹ Order No. 2003 at P 720; *see also* Order No. 2003-A at P 563 (stating that the transmission provider may choose to pay for the network upgrades itself). In confirming this right, Order No. 2003 refers to it as being the right of the “Transmission Provider,” which reflects the typical situation in which the transmission owner is the transmission provider. In ISO-NE, these roles are separated and the LGIA provides that the election right rests with the transmission owner.

²² *New England Power Pool*, 109 FERC ¶ 61,155 (2004) (accepting in part and rejecting in part New England Power Pool’s Order No. 2003 compliance filing).

²³ ISO-NE OATT, Schedule 23, ex. 1, art. 5.2 (“Unless the Interconnecting Transmission Owner elects to pay for Network Upgrades, the actual cost of the Network Upgrades, including overheads, shall be borne by the Interconnection Customer.”).

²⁴ ISO-NE OATT, Schedule 25, app. 6, art. 11.3 (“Unless the Interconnecting Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer.”); *see also ISO New England Inc.*, 151 FERC ¶ 61,024 (2015) (accepting ISO-NE’s proposed interconnection process for ETUs).

²⁵ Order to Show Cause at P 41 (footnote omitted). Like SPP, ISO-NE’s OATT does not have provisions or a *pro forma* agreement with standardized terms and conditions to implement the recovery of network upgrade capital costs financed through TO Initial Funding.

left the decision about how to fund network upgrades to interconnection customers, the NETOs anticipate that a substantial amount of network upgrade investment will be required in the coming years as a result of the energy transition and changes to the interconnection process mandated by Order No. 2023. The NETOs thus maintain that it is essential to preserve their existing right to unilaterally elect TO Initial Funding.

C. The ISO-NE Transmission Operating Agreement

The ISO-NE OATT provisions that establish the NETOs' right to fund network upgrades, described above, are subject to the PTOs' unilateral filing rights as defined in the TOA among ISO-NE and the PTOs. The TOA governs the voluntary allocation of Section 205 filing rights among and between the PTOs and ISO-NE. The Commission has found this allocation to be "of the sort found to be permissible under the FPA in [*Atlantic City*]." ²⁶

As relevant here, Section 3.04(a) of the TOA provides that each PTO retained its FPA Section 205 rights to establish and revise (1) the revenue requirements for its transmission facilities, (2) the rates and charges for the recovery of its investments in new transmission facilities and transmission upgrades, and (3) any terms and conditions of interconnection agreements with any entities connecting with the PTO's transmission facilities. ²⁷ In addition, under Section 3.04(b) of the TOA, the PTOs, acting jointly, have the authority to submit Section 205 filings to establish and to revise the design of any rates or charges for "the methodology by which the costs of Transmission Upgrades related to generator interconnections are allocated under the ISO OATT." ²⁸ Under Section 11.04(c) of the TOA, Section 3.04 of the TOA is protected by the

²⁶ *ISO New England*, 106 FERC ¶ 61,280 at P 72.

²⁷ ISO-NE TOA, § 3.04(a). The TOA defines a Transmission Facility to include a Transmission Upgrade, such as a network upgrade, once it is placed into commercial operation by the applicable PTO. *Id.* § 2.02(a).

²⁸ *Id.* § 3.04(b)(i).

Mobile-Sierra doctrine, and under that doctrine, the Commission must presume that the terms of the TOA are just and reasonable.²⁹

III. RESPONSE TO ORDER TO SHOW CAUSE

A. The Commission Does Not Have Statutory Authority to Revoke the TO Initial Funding Option in this Order to Show Cause Proceeding.

The Commission fails to show that it has any basis to exercise authority under Section 206 of the FPA to modify the ISO-NE OATT in this proceeding. The Commission claims that three provisions of the ISO-NE OATT appear to be unjust, unreasonable, and unduly discriminatory or preferential without addressing the fact that the cited tariff language is language that public utilities are required to adopt in *pro forma* interconnection agreements mandated by Commission rules.³⁰ For example, in the Order to Show Cause the Commission cites Article 11.3 of the ISO-NE *pro forma* LGIA, but does not acknowledge that the relevant language in that article was adopted, pursuant to the Commission's Order No. 2003,³¹ and is identical to the language contained today in Article 11.3 of the Commission's *pro forma* LGIA.³² The same is true for the relevant language in Article 5.2 of the SGIA in Schedule 23 to the ISO-NE OATT and Article 5.2 of the Commission's *pro forma* SGIA.³³ Nowhere does the Commission provide support for the extraordinary suggestion that ISO-NE OATT language required by Commission regulations and rulemaking can be found to be unjust and unreasonable absent another rulemaking and without any evidence of issues in the New England region.

²⁹ *Id.* § 11.04(c).

³⁰ Order to Show Cause at P 41.

³¹ *See Supra* Section II.B.

³² The Commission's *pro forma* LGIA was promulgated pursuant to the notice and comment rulemaking requirements of 18 C.F.R. § 35.28(f) of the Commission's Rules and Regulations.

³³ The Commission's *pro forma* SGIA was promulgated pursuant to the notice and comment rulemaking requirements of 18 C.F.R. § 35.28(f) of the Commission's Rules and Regulations.

In addition, the Commission claims to find that “there may be no risks associated with owning, operating, and maintaining network upgrades for which transmission owners are not already otherwise compensated.”³⁴ This aspect of the Order to Show Cause is not only wholly unsupported, but also legally defective as such a finding would require the Commission to initiate a Section 206 proceeding directed to the transmission owners that are the subject of the Commission’s inquiries, *i.e.*, to the PTOs rather than to ISO-NE. Even if the Commission were to initiate such a proceeding, the Commission has no statutory basis to deprive public utilities like the NETOs of their statutory rights to earn returns on their investments.

a. The Commission’s Attempt to Revoke the TO Initial Funding Option Through an Order to Show Cause Proceeding Violates the APA.

Even if the Commission did have evidentiary support that the TO Initial Funding Options in the ISO-NE OATT are unjust and unreasonable, the Order to Show Cause is an invalid procedural approach to revise these provisions. In its order, the Commission cites as problematic the following language in Article 11.3 of the ISO-NE *pro forma* LGIA: “Unless the Interconnecting Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer.”³⁵ As discussed above in Section II.B, substantively identical language, however, is found in Article 11.3 of the Commission’s current *pro forma* LGIA: “Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.” This provision was first adopted as the result of a 2002 Notice of Proposed Rulemaking (“NOPR”) to

³⁴ Order to Show Cause at P 1.

³⁵ *Id.* at P 41 n.105. The Commission also cites identical language in Schedule 25 to the ISO-NE OATT. *Id.*

develop a record to support its promulgation of Order No. 2003.³⁶ A NOPR proceeding is how the Commission, and most agencies, initiate a rulemaking pursuant to Section 553 of the APA.³⁷ Article 11.3 of the Commission’s *pro forma* LGIA stating that network upgrades will be funded by the interconnection customer “[u]nless . . . [the] Transmission Owner elects to fund the capital for the Network Upgrades” is the product of this Order No. 2003 rulemaking.³⁸ As such, the law is clear that Article 11.3 of the Commission’s *pro forma* LGIA can only be changed in a rulemaking proceeding. “[O]nce an agency makes a rule—that is, once it makes a statement prescribing law with future effect—the APA requires the agency to provide notice and an opportunity for comment before repealing [or amending] it.”³⁹

The Commission conceded in the Order to Show Cause that it accepted the TO Initial Funding Option in the ISO-NE *pro forma* LGIA pursuant to the New England Power Pool’s Order No. 2003 compliance filing.⁴⁰ In Order No. 2003, the Commission adopted TO Initial Funding language that is substantially the same as the language it accepted for inclusion in the ISO-NE *pro forma* LGIA.⁴¹ Not only did the Commission include that language in its *pro forma* LGIA, the Commission also confirmed in the body of Order No. 2003 that “as stated in Article 11.3 of the

³⁶ *Standardization of Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking*, 99 FERC ¶ 61,086 (2002).

³⁷ *See supra* n. 7.

³⁸ *Standard Large Generator Interconnection Procedures*, App. 6 § 11.3 (emphasis added) (*pro forma* LGIA) (as implemented in Order No. 2003-A); *see also*, 18 C.F.R. § 35.28(f).

³⁹ *Liquid Energy Pipeline Ass’n v. FERC*, 109 F.4th 543, 547 (D.C. Cir. 2024) (quoting *Humane Soc’y v. USDA*, 41 F.4th 564, 569 (D.C. Cir. 2022)) (brackets in original).

⁴⁰ Order to Show Cause at P 41 n.105.

⁴¹ *Compare* Article 11.3 of *pro forma* LGIA as established in Appendix C to Order No. 2003 (stating in relevant part that “[u]nless the Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer”) *with* Article 11.3 of ISO-NE *pro forma* LGIA (stating in relevant part that “[u]nless the Interconnecting Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by the Interconnection Customer”).

Final Rule [*i.e.*, Order No. 2003] LGIA, the Transmission Provider may elect to fund the Network Upgrades itself, with no advance payment by the Interconnection Customer, and thus no need for subsequent credits.”⁴² The inclusion of this provision in the ISO-NE *pro forma* LGIA also satisfies the requirements of the Commission regulations established in Order No. 2003.⁴³

Similar to Order No. 2003, the Commission promulgated as a result of Order No. 2006 a TO Initial Funding provision in Article 5.2 of its *pro forma* SGIA.⁴⁴ Both the Commission’s *pro forma* SGIA and ISO-NE’s *pro forma* SGIA that the Commission accepted in connection with ISO-NE’s compliance with Order No. 2006, include the TO Initial Funding Option.⁴⁵ In Order No. 2006, the Commission expressly found that “[t]he Interconnection Customer is responsible for the upfront funding of Network Upgrades *unless* the Transmission Provider *elects to* provide the upfront funding itself.”⁴⁶ Including the TO Initial Funding Option in the Commission’s *pro forma* SGIA demonstrates that this provision survived two deep rounds of rulemakings. It also presents a deliberate intent by the Commission to enable small resources to have network upgrades financed in advance by a willing interconnecting transmission owner to help eliminate the upfront burden of funding large capital costs during the early stages of small resource project development.

⁴² Order No. 2003 at P 720.

⁴³ See 18 C.F.R. § 35.28(f)(1) (“Every public utility that is required to have on file a non-discriminatory open access transmission tariff under this section must amend such tariff by adding the standard interconnection procedures and agreement and the standard small generator interconnection procedures and agreement *required by Commission rulemaking proceedings* promulgating and amending such interconnection procedures and agreements, or such other interconnection procedures and agreements *as may be required by Commission rulemaking proceedings* promulgating and amending the standard interconnection procedures and agreement and the standard small generator interconnection procedures and agreement.”) (emphases added).

⁴⁴ Order No. 2006 at PP 15, 35-36.

⁴⁵ Article 5.2 of the Commission’s *pro forma* SGIA (“Unless Transmission Provider elects to pay for Network Upgrades . . .”); Article 5.2 of Ex. 1 to Schedule 23 of the ISO-NE OATT, *pro forma* SGIA, (“Unless the Interconnecting Transmission Owner elects to pay for Network Upgrades . . .”).

⁴⁶ Order No. 2006 at P 446 (emphases added).

The Commission has reformed its *pro forma* large generator interconnection procedures and LGIA numerous times since the issuance of Order No. 2003, most recently in Order No. 2023 issued last year.⁴⁷ Article 11.3 of the Commission’s *pro forma* LGIA adopted in Order No. 2023 retains the right of a “Transmission Provider or Transmission Owner” to “elect[] to fund the capital for the Network Upgrades.” As such, the Commission affirmed the justness and reasonableness of this interconnection provision only last year.

The Commission’s authority to amend its *pro forma* LGIA and SGIA and the self-funding language it has mandated by regulation and rulemaking can only be exercised through a new rulemaking proceeding established pursuant to Section 553 of the APA that includes notice, an opportunity for comment, a finding that the current language of Article 11.3 is no longer just and reasonable, and a Commission decision at the conclusion of the rulemaking on amended language that is appropriate and just and reasonable.⁴⁸ The Commission, however, has followed none of these procedures required by the APA, *e.g.*, establishing a rulemaking proceeding to amend its regulations to revise its *pro forma* LGIA.⁴⁹ Instead, the Commission is attempting to conduct an end-run around the APA by requiring an evaluation of the continued justness and reasonableness of the ISO-NE OATT provisions identified in the Order to Show Cause.

Moreover, a quick review of a representative sample of LGIAs and SGIAs accepted by the Commission highlights the inherent arbitrariness of the Order to Show Cause as directed to the ISO-NE OATT. Numerous transmission owning public utilities contain language in their LGIAs and SGIAs substantively identical to the TO Initial Funding Options of the ISO-NE OATT cited

⁴⁷ Order No. 2023 at P 3.

⁴⁸ *See Am. Fed’n of Gov’t Emps. v. Fed. Lab. Rels. Auth.*, 777 F.2d 751, 758 (D.C. Cir. 1985); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1036 (9th Cir. 2007).

⁴⁹ *See supra* n.7.

in the Order to Show Cause.⁵⁰ The Commission provides no rational explanation why these provisions were not addressed in the Commission’s order and why ISO-NE, along with three other RTOs, was singled out. This is further evidence of why this issue should only be addressed in an APA rulemaking.

b. The Commission Has Directed This Proceeding to the Wrong Public Utilities in Violation of the FPA, *Hope*, and *Atlantic City*.

The Order to Show Cause directs ISO-NE to show cause why its existing tariff is not unjust and unreasonable.⁵¹ However, it is the PTOs whose economic interests are at stake and who have the filing rights over the ISO-NE OATT provisions providing for the TO Initial Funding Options. Any attempt by the Commission to delegate those rights to ISO-NE violates the D.C. Circuit’s holding in *Atlantic City*. Rule 203(a)(5) of the Commission’s Rules of Practice and Procedure require that an Order to Show Cause specify “[t]he name and address of each person against whom

⁵⁰ See, e.g., OATT of Southern Companies (consisting of Alabama Power Company, Georgia Power Company, and Mississippi Power Company), Attachment J (LGIA), Article 11.3 (“Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.”); Southern Companies OATT, Attachment J-2 (SGIA), Article 5.2 (“Unless the Transmission Provider elects to pay for Network Upgrades, the actual cost of the Network Upgrades, including overheads, shall be borne initially by the Interconnection Customer.”); OATT of Florida Power & Light Company (“FP&L”), Attachment M, Appendix 7 (LGIA), Article 11.3 (“Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.”); FP&L OATT, Attachment N (SGIA), Article 5.2 (“Unless the Transmission Provider elects to pay for Network Upgrades, the actual cost of the Network Upgrades, including overheads, shall be borne initially by the Interconnection Customer.”); OATT of PacifiCorp, Attachment N, Appendix 6 (LGIA), Article 11.3 (“Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.”); PacifiCorp OATT, Attachment O, Appendix 9 (SGIA), Article 5.2 (“Unless the Transmission Provider elects to pay for Network Upgrades, the actual cost of the Network Upgrades, including overheads, shall be borne initially by the Interconnection Customer.”); OATT of Arizona Public Service Company (“APS”), Attachment O, Appendix 6 (LGIA), Article 11.3 (“Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.”); APS OATT, Attachment P (SGIA), Article 5.2 (“Unless the Transmission Provider elects to pay for Network Upgrades, the actual cost of the Network Upgrades, including overheads, shall be borne initially by the Interconnection Customer.”).

⁵¹ See Order to Show Cause at PP 44-45, 69-70, and Ordering Paragraphs (B)-(C).

the complaint is directed.”⁵² Commission Rule 209 permits the Commission to “initiate a proceeding against a person by issuing an order to show cause[,]” which shall “contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting.”⁵³ The Commission should have directed the Order to Show Cause to the NETOs and other New England PTOs rather than to ISO-NE, the Responding RTO/ISO for the region named in the Order to Show Cause.

i. Under *Hope* and the FPA, a Regulated Utility Is Entitled to a Reasonable Return on the Capital Costs of the Business Providing Jurisdictional Service.

The Order to Show Cause concerns the justness and reasonableness of tariff provisions that permit transmission owners to continue to elect TO Initial Funding and earn a return on the network upgrades they will construct, own, and operate. The focus of the Order to Show Cause on the rates of transmission owning public utilities rather than RTOs/ISOs is clear from the first paragraph of the order where the Commission finds that RTO/ISO tariffs “appear to be unjust, unreasonable, and unduly discriminatory or preferential because there may be no risks associated with owning, operating, and maintaining network upgrades for which transmission owners are not already otherwise compensated.”⁵⁴ This is further demonstrated by the questions posed in Appendix A to the Order to Show Cause, such as Question 15:

Please explain whether the risks associated with owning, operating, and maintaining network upgrades are already incorporated into, i.e., “baked into,” the transmission owner’s Commission-approved ROEs, such that transmission owners are already compensated for these alleged risks through applying the Commission-

⁵² 18 C.F.R. § 385.203(a)(5). Rule 201 of the Commission’s Rules of Practice and Procedure states that “[t]his subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition.” 18 C.F.R. § 385.201.

⁵³ 18 C.F.R. § 385.209.

⁵⁴ Order to Show Cause at P 1.

approved ROE to the net plant value of transmission assets that do not include Generator Upfront Funded network upgrades. Please explain why or why not.⁵⁵

This question and many other questions posed in the Order to Show Cause are focused on the rates charged and returns earned by transmission owners. In fact, every single question posed in the order is directed to the circumstances of transmission owners. This shows that the Order to Show Cause is directed to transmission owners and not at the named RTOs/ISOs.

Transmission-owning public utilities are the parties whose economic interests are affected here. It is well-established under court and Commission precedent that a regulated public utility is entitled to a reasonable rate of return on the capital costs of the business of providing jurisdictional service.⁵⁶ The Supreme Court's decision in *Hope* explicitly prohibits setting rates that fail to offer a reasonable return on capital. As the Court explained:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁵⁷

⁵⁵ See also, e.g., Question 21 in Appendix A to the Order to Show Cause, which contains three subparts related to “[c]ertain transmission owners point[ing] to the increasing number of network upgrades needed on their transmission systems to support the argument that TO Initial Funding is necessary to ensure that transmission owners attract new capital that supports the financial integrity of their companies.”

⁵⁶ See also *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 690 (1923) (“Bluefield”) (finding that rates that do not produce “a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory”); *In re Permian Basin Area Rate Cases*, 390 U.S. 742, 747 (1968) (“Permian Basin”) (among a reviewing court’s primary roles in evaluating the legality of the Commission’s orders is determining if the rate order “fairly compensate[s] investors for the risks they have assumed”); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (“The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”); *AEP Power Mktg. Inc.*, 108 FERC ¶ 61,026, at P 152 (2004) (“[The Commission’s] ratemaking policy is designed to provide for recovery of prudently incurred costs plus a reasonable return on investment.”); Order No. 888-A, *infra* n.129 at 30,418 (“[T]he Commission satisfies its statutory obligation under the FPA by allowing utilities an opportunity to recover their prudently incurred costs plus a reasonable rate of return.”).

⁵⁷ *Hope*, 320 U.S. at 603.

Thus, in balancing the interests of investors and consumers, the Commission must set rates that allow the utility to recover not only its operating expenses but sufficient return on all the capital costs of the utility's business to pay its debt and dividends.⁵⁸ The return to investors must be consistent with the return to other businesses with comparable risks.⁵⁹ In New England, it is the PTOs who are the regulated entities that earn a rate of return on capital invested in the transmission network. ISO-NE, in contrast, is the not-for-profit RTO that administers the wholesale electricity markets and operates transmission facilities owned by the New England PTOs.⁶⁰ ISO-NE does *not* earn a return on capital and thus has *no* economic interest in whether the TO Initial Funding Option continues or not.

ii. The Order to Show Cause Violates the Court's holding in *Atlantic City* Because the Commission Cannot Compel Public Utilities to Cede Rights Expressly Given to Them by Statute.

If the Commission were to revoke the NETOs' TO Initial Funding Option, it would effectively deprive the NETOs of their rights under FPA Section 205. Section 205 "gives a utility the right to file rates and terms for services rendered with its assets."⁶¹ The Commission lacks authority to compel public utilities to cede the rights expressly given to them by the FPA (or any other statute).⁶² Were the Commission to direct ISO-NE to remove the NETOs' TO Initial Funding

⁵⁸ *Id.* Nothing in *Hope* suggests the standard applies only to some of the costs of the business.

⁵⁹ *Id.*

⁶⁰ See, e.g., *ISO New England Inc.*, 178 FERC ¶ 61,086, at P 2 (2022); *Participating Transmission Owners Admin. Comm.*, 151 FERC ¶ 61,154, at P 7 (2015).

⁶¹ *Atlantic City*, 295 F.3d at 9 (citing 16 U.S.C. § 824d).

⁶² *Id.* at 9-10 ("FERC cannot point to any statute giving it authority . . . to require the utility petitioners to cede rights expressly given to them in section 205 of the Federal Power Act. . . . Similarly, nothing in [FPA] section 206 sanctions denying petitioners their right to unilaterally file rate and term changes . . . Nothing in this provision gives FERC the power to deny a utility the right to file changes in the first instance."); *id.* at 10 ("FERC thereby [impermissibly] eliminated the very thing that the [FPA] was designed to protect—the ability of the utility owner to set the rates it will charge prospective customers, and change them at will, subject to review by the Commission.") (internal quotation marks omitted).

Option under the ISO-NE OATT, the Commission would eliminate the ability of the NETOs to file pursuant to Section 205 to recover a return of and on the capital costs of network upgrades that the NETOs elect to fund. In *Atlantic City*, the D.C. Circuit found that “FERC lacks the authority to require the utility owners to give up their statutory rights under section 205.”⁶³ The court also determined that nothing in Section 206 “gives FERC the power to deny a utility the right to file changes in the first instance.”⁶⁴ Revoking the NETOs’ TO Initial Funding Option would strip them of their ability to make Section 205 filings to place on file rates for a specific type of transmission service. Network upgrades are non-radial transmission facilities that integrate with the rest of the New England transmission system. They are indistinguishable in function from other network transmission facilities for which the NETOs may file rates pursuant to Section 205 to recover a return of and on an investment in any such transmission assets. Like the Commission order overturned in *Atlantic City*, the Order to Show Cause “purports to deny the [NETOs] any ability to initiate rate design changes with respect to services provided with their own assets.”⁶⁵ By eliminating the TO Initial Funding Option, the Commission would deny the NETOs the ability to make rate design changes for “their own assets.” Sustaining the Commission’s preliminary findings in the Order to Show Cause would be an unlawful abuse of the Commission’s regulatory authority. No provision in the FPA renders such abuse permissible.

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 10.

⁶⁵ *Id.*

iii. In New England, the NETOs Have Not Voluntarily Ceded the Right to Establish a Reasonable Rate to Recover the Costs of Transmission Facilities they Build to Provide Interconnection Service.

Atlantic City does allow public utilities to voluntarily cede certain of their rights under FPA Section 205. In New England, the NETOs have *not* voluntarily ceded their right to establish a reasonable rate of return to recover the costs of network upgrades they elect to construct to provide interconnection service. To the contrary, as discussed in Section II.C, that right is expressly preserved for the NETOs in Section 3.04 of the TOA among ISO-NE and the PTOs.⁶⁶ Additionally, Section 3.07(a)(iii) of the TOA reserves to the NETOs the right to earn a return on facilities constructed by a PTO to connect to the facilities of a customer:

Any expansion or modification by a PTO of its Transmission Facilities, any facilities constructed by a PTO to connect the facilities of a current or proposed Transmission Customer to such Transmission Facilities, and/or any new transmission facilities constructed by a PTO pursuant to the ISO Planning Process shall be subject to such PTO's right to recover, pursuant to appropriate financial arrangements and tariffs or contracts, all costs prudently incurred or prudently committed to be incurred, plus a return on invested equity and other capital, associated with constructing and owning or financing such facilities, expansions or modifications to its Transmission Facilities, in accordance with Schedule 3.09(a) hereof.⁶⁷

Moreover, under Section 11.04(c) of the TOA, the relevant terms and conditions of the TOA are protected by the *Mobile-Sierra* doctrine, and under that doctrine, the Commission must

⁶⁶ See, e.g., ISO-NE TOA, §§ 3.04(a) and 3.04(a)(i) (“Each PTO . . . shall have the authority to submit filings under Section 205 of the [FPA] . . . to establish and to revise . . . the revenue requirements of all Transmission Facilities of such PTO used for the provision of Transmission Service (including Transmission Facilities leased to the PTO or to which the PTO has contractual entitlements)”).

⁶⁷ ISO-NE TOA, § 3.07(a)(iii). The TOA defines a “Transmission Customer” as “[a]ny entity taking Transmission Service under the ISO OATT” and defines “Transmission Service” broadly as “[t]he non-discriminatory, open access, wholesale transmission services provided to customers by the ISO in accordance with the ISO OATT.” ISO-NE TOA, Schedule 1.01.

presume that the terms of the TOA are just and reasonable.⁶⁸ Indeed, in order to overcome the *Mobile-Sierra* presumption, the Commission must demonstrate that the NETO's rights to earn a rate of return on upgrades it builds to provide service under the ISO-NE OATT seriously harms the public interest.⁶⁹ That is a burden the Commission cannot overcome.

**iv. ISO-NE Has No Authority to Change Rate Recovery of the
NETOs and Does Not Have the Knowledge or Expertise to Answer
Most of the Questions Posed in the Order to Show Cause.**

ISO-NE, which is the named respondent in this docket, has no authority, without PTO consent, to amend rate recovery provisions of the PTOs that are contained in the ISO-NE OATT. As described above, the NETOs and other PTOs have the exclusive authority to amend transmission rates and rate design pursuant to Section 3.04 of the TOA. Section 3.04(b)(i) provides the NETOs' FPA "section 205 filing authority for revenue requirements and their recovery through rates charged for all transmission facilities including (but not limited to) costs of transmission upgrades related to generator interconnections."⁷⁰ The Commission accepted the PTOs' allocation of FPA Section 205 filing rights finding that "the determination and allocation of revenue requirements and their recovery through rates charged are properly the right of the [New England] transmission owners."⁷¹

In addition, although ISO-NE has extensive knowledge of a range of issues, including market design and transmission planning, ISO-NE is an independent non-profit regional

⁶⁸ *NRG Power Marketing, LLC v. Maine Pub. Util. Comm'n*, 558 U.S. 165, 167 (2010) (Under the Court's *Mobile-Sierra* doctrine, FERC must presume that a rate set by a freely negotiated jurisdictional contract meets the just and reasonable standard).

⁶⁹ *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008) ("The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.").

⁷⁰ *ISO New England, Inc. et al.*, 109 FERC ¶ 61,147, at P 52 (2004) (granting rehearing as it relates to the allocation of Section 205 filing rights under the TOA).

⁷¹ *Id.*

transmission organization that does not serve as an interconnecting transmission owner. ISO-NE serves as a billing agent and recovers the NETOs' revenue requirements, on behalf of the NETOs, who collectively own nearly all of the transmission facilities in the New England control area. ISO-NE lacks the knowledge and expertise to answer most of the questions posed in the Order to Show Cause because ISO-NE does not own, design, finance, construct, or permit the transmission facilities that are under its functional control. ISO-NE has no particular knowledge on the subjects of the majority of questions posed in the Order to Show Cause, including the ability of interconnection customers to obtain financing for network upgrades (Questions 4, 5, and 6); whether the risks associated with owning, operating, and maintaining network upgrades are already incorporated into, *i.e.*, "baked into," the transmission owners' Commission-approved ROEs (Question 15); the transmission owners' credit ratings (Question 16); any estimate of the percentage of the costs of interconnection-related network upgrades in relation to the transmission owner's projected aggregate rate base for the transmission system (Question 17); risks a transmission owner has associated with owning, operating, and maintaining network upgrades (Question 18); value in monetary terms of the increase in risk that a transmission owner could be exposed to when adding network upgrades to its system (Question 19); the appropriate level of compensation for such risks (Question 20); how upward adjustments in allowed ROE does or does not enable a transmission owner to continue to attract capital in a manner consistent with *Hope* and *Bluefield* (Question 21); and the appropriateness of replacement rates or management fees to satisfy the financial requirements of investor-owned public utilities (Questions 22 and 23). Thus, ISO-NE is not the appropriate respondent and cannot be expected to have most of the information relevant to answering the questions presented in Appendix A to the Commission's Order to Show Cause.

c. The Commission’s Proposal to Revoke the TO Initial Funding Option Is Also Unlawful Because the FPA Does Not Grant the Commission Authority to Order Utilities to Build Transmission Facilities.

As a federal agency, FERC is a “‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.’”⁷² Therefore, “if there is no statute conferring authority, FERC has none.”⁷³ “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”⁷⁴ Moreover, the Commission cannot do indirectly what it is prohibited from doing directly.⁷⁵ The Order to Show Cause identifies no provision in the FPA that gives the Commission authority to force public utility transmission owners to construct, own, and operate transmission facilities financed by customers. Nor can the Commission point to any such FPA provision—there is none.⁷⁶ The Commission has not identified any statutory provision granting it such authority in recent orders on this subject. As a result, the Commission cannot use the Order to Show Cause to require public utility transmission owners to shoulder such responsibilities.

Requiring elimination of a transmission owner’s right to initially fund network upgrades needed to facilitate an interconnection and elimination of the right to earn a return on its capital investment in such network upgrades has a significant risk of harm to the economic structure of the transmission industry, eliminating the investor-owned sector’s ability to earn a profit in connection with a substantial portion of its business. As recognized by the D.C. Circuit in *Ameren*,

⁷² *Atlantic City*, 295 F.3d at 8 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis in *Atlantic City*)).

⁷³ *Id.*

⁷⁴ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

⁷⁵ *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996).

⁷⁶ The Commission has limited backstop siting authority under FPA Section 216, but that is a different circumstance than what the Order to Show Cause addresses.

“the non-profit innovation [caused by generator-funded upgrades on the transmission system] might remain bearable so long as the generator-funded upgrades growing inside the grid remain tiny relative to their host. But if more and more of a transmission owner’s business is to be owned and operated on a non-profit basis, these additions would likely deter investors and diminish the ability of the transmission grid to attract capital for future maintenance and expansion.”⁷⁷ And as the Commission itself recognized in Order No. 1920, “[i]n recent years, spending on interconnection-related network upgrades has increased dramatically.”⁷⁸ The very circumstances the D.C. Circuit contemplated in *Ameren* have come to pass.

Nothing in the FPA or its legislative history suggests that Congress intended to authorize the Commission to alter the longstanding property rights that are at the heart of investor-owned utilities’ ability to operate as profitable businesses. Congress has specifically directed the Commission to ensure that public utilities do not charge unjust and unreasonable rates—it has not delegated to the Commission authority to curtail public utility rights to earn a return on facilities they use to provide jurisdictional service. Electrons flow freely on the entire transmission system. It is unjust and unreasonable to permit public utilities to earn a reasonable rate of return on one circuit and to absorb responsibility to operate the circuit across the street on a non-profit basis. Simply put, Congress has not granted the Commission authority to require public utilities to operate vast portions of their transmission system on a non-profit basis.

⁷⁷ *Ameren Serv. Co. v. FERC*, 880 F.3d 571, 582 (2018) (“*Ameren*”).

⁷⁸ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Order No. 1920, 187 FERC ¶ 61,068, at P 1108 (2024) (“Order No. 1920”).

d. The Commission Fails to Meet Its Burden to Show a Change in Regulatory Policy.

i. All of the Reasons the Commission Now Asserts for Revoking the TO Initial Funding Option Existed at the Time the Commission Adopted Its Generator Interconnection Policy in Order No. 2003.

Even if the Commission had the authority to use this Order to Show Cause proceeding to change its regulatory policy for funding of network upgrades, the Commission fails to show any change in circumstances that would justify such a change. All of the reasons the Commission now asserts for revoking the TO Initial Funding Option existed at the time the Commission adopted its generator interconnection policy in Order No. 2003. At the heart of the large generator interconnection rule adopted in Order No. 2003 is a requirement that public utility transmission owners design, license, construct, own, and operate network upgrades required to reliably interconnect new generation to their systems. Both the Commission's *pro forma* LGIA and the ISO-NE *pro forma* LGIA include this requirement. No public utility transmission owner challenged the Commission's imposition of this requirement in Order No. 2003 because one of the primary goals illustrated in the final rule is to encourage transmission infrastructure investment,⁷⁹ and to that end, building and owning transmission facilities on a for-profit basis at a reasonable return is the very business of transmission owners.

The change to the *pro forma* LGIA the Commission proposes to undertake indirectly in the Order to Show Cause, however, would affect the basic rights and obligations of transmission owners under Order No. 2003 and the Commission's successor interconnection rules. It would conscript the resources and expertise of investor-owned public utilities to operate on a not-for-

⁷⁹ See Order No. 2003 at P 12 ("Interconnection is a critical component of open access transmission service, and standard interconnection procedures and a standard agreement applicable to Large Generators will serve several important functions: they will . . . (3) *encourage needed investment* in generator and transmission infrastructure.") (emphasis added).

profit basis. If the *pro forma* LGIA were changed in this manner, then the Commission’s authority to adopt the entire generator interconnection rule would need to be reconsidered in a rulemaking process. Under the requirements of the first step applicable to this FPA Section 206 proceeding, the Commission bears the burden of justifying its change in regulatory policy. The Commission cannot meet this burden. The only reasons the Commission provides in the Order to Show Cause for eliminating the TO Initial Funding Option are: (1) a concern that the TO Initial Funding Option may result in increased costs of interconnection service without corresponding improvements to that service;⁸⁰ (2) TO Initial Funding may be implemented in an unduly discriminatory or preferential manner among interconnection customers;⁸¹ and (3) transmission owners may not face risks associated with owning, operating, and maintaining network upgrades for which transmission owners are not already compensated.⁸²

The Supreme Court has determined that “[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁸³ An agency must “articulate a satisfactory explanation for its action.”⁸⁴ The Commission may not “disregard ‘facts and circumstances that’ justified its prior choice.”⁸⁵ All of the reasons, facts and circumstances, now asserted by the Commission for eliminating the TO Initial Funding Option existed at the time it promulgated Order No. 2003.⁸⁶ These facts and circumstances have certainly not changed since

⁸⁰ See Order to Show Cause at PP 46-50.

⁸¹ *Id.* at PP 51-58.

⁸² *Id.* at PP 59-66.

⁸³ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

⁸⁴ *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁵ *MISO Transmission Owners v. FERC*, 45 F.4th 248, 264 (2022) (“FERC did not explain how its changes brought the analysis into line with general financial logic.”) (internal quotations omitted).

⁸⁶ See Order No. 2003 at PP 11-12 (“A standard set of procedures as part of the OATT for all jurisdictional transmission facilities will minimize opportunities for undue discrimination and expedite the development

the Commission reaffirmed the initial funding provisions of the *pro forma* LGIA in Order No. 2023. The Order to Show Cause does not provide any evidence showing that circumstances have changed. This is most obviously true for New England. The Commission references ISO-NE only once in its discussion of asserted reasons for eliminating the TO Initial Funding Option—when the Commission notes that ISO-NE, like the other Respondent RTOs/ISOs, has both vertically integrated transmission owners and transmission owners that are affiliated with a company that owns generation.⁸⁷ Therefore, the Commission cannot demonstrate changed circumstances warranting a change in regulatory policy, especially not in New England.⁸⁸

ii. The Commission Has Cited No Evidence that the TO Initial Funding Option Has Caused Any Issues in the ISO-NE Interconnection Process.

The Commission has not cited to any evidence demonstrating that the TO Initial Funding Option in New England has prevented timely interconnection of new generation or resulted in actual instances of undue discrimination. Nor could it. As the Commission recognizes in the Order to Show Cause, “no transmission owners have elected TO Initial Funding in the ISO-NE

of new generation, while protecting reliability and ensuring that rates are just and reasonable. Interconnection is a critical component of open access transmission service, and standard interconnection procedures and a standard agreement applicable to Large Generators will serve several important functions: they will (1) limit opportunities for Transmission Providers to favor their own generation, (2) facilitate market entry for generation competitors by reducing interconnection cost and time, and (3) encourage needed investment in generator and transmission infrastructure.”).

⁸⁷ Order to Show Cause at P 52.

⁸⁸ See *Indianapolis Power & Light Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,107, at P 35 (2017), *reh’g denied in relevant part*, 162 FERC ¶ 61,266, at P 34 (2019) (“Indianapolis Power has not demonstrated that this fundamental proposition [set forth in Order No. 888] has changed for either traditional synchronous or newer non-synchronous resources. Moreover, Indianapolis Power has not explained any other changed circumstances that would necessitate unbundling of the two services within Schedule 3 [of the *pro forma* OATT contained in Order No. 888]. Therefore, we reject Indianapolis Power’s request and decline to make any changes to our current policy with respect to Schedule 3.”); *Leonard v. R.I. Pub. Util. Comm’n*, 167 FERC ¶ 61,072, at P 39 (2019) (“Complainant has not provided adequate evidence here that circumstances have changed such that the Commission should revisit [its previous] finding.”).

region.”⁸⁹ In any event, there is no evidence to suggest that the NETOs are not meeting their regulatory obligation to expeditiously interconnect new projects.

The Commission’s Order to Show Cause suggests that granting public utility transmission owners the option of whether to fund network upgrades is unduly discriminatory under Section 206 because transmission owners could apply the option to favor affiliated generation. The Commission has not identified a single instance in which this form of discrimination has occurred, and it cannot apply to the NETOs, who have already largely divested their generation. Moreover, each electric generating facility owned by an affiliate of a NETO and interconnected to that NETO’s transmission system is fully contracted under a long-term power purchase agreement and is a price taker in the New England Markets or operates under programs subject to state regulation. Such agreements are regulated by the Commission and the New England States; thus, there is no habitat for unlawful or anticompetitive behavior.

Moreover, the Commission already imposes numerous requirements on public utilities that protect interconnection customers and shield them from unlawful discrimination.⁹⁰ For instance, the Commission requires public utilities with generation interests to functionally unbundle their transmission businesses and obtain market-based rate authority if the generation affiliate intends to sell in the wholesale markets, adopted standards of conduct that prevent this form of discrimination, and it has adopted “comparability” as a required standard under FPA Section 206.⁹¹ In RTOs/ISOs, the Commission has the additional safeguard of the independent entity’s

⁸⁹ Order to Show Cause at P 41 (footnote omitted).

⁹⁰ See *infra* Section III.B.e and Section IV, Response to Question 8.

⁹¹ The Commission has held that “an open access tariff that is not unduly discriminatory or anticompetitive should offer third parties access on the same or comparable basis, and under the same or comparable terms and conditions, as the transmission provider’s uses of its system.” *AEP*, 67 FERC ¶ 61,317 at 61,490 (1994).

involvement in the generator interconnection process. Transmission providers are encouraged to report observances of unlawful discrimination to the Commission. Given the existence of these safeguards, the Commission, in its Order to Show Cause, fails to demonstrate that it has a legitimate basis to revoke the TO Initial Funding Option in New England.

iii. The Commission Has No Grounds for Favoring Generators, Who Operate in a Competitive Market and Use the Transmission System to Derive Their Profits.

Any attempt to revoke the TO Initial Funding Option in New England would also conflict with the Commission's explicit statutory responsibilities pursuant to FPA Sections 205 and 206. Those FPA provisions require the Commission to ensure that the rates for jurisdictional services are not unduly discriminatory. Mandating the elimination of the TO Initial Funding Option creates an unequivocal generator entitlement to more favorable pricing for a given interconnection customer's use of the New England Transmission System as compared to the price paid by other transmission users. Granting generators the exclusive right to fund network upgrades would provide an economic preference for one favored class of transmission customers, in conflict with the antidiscrimination provisions of the FPA. Other customers taking Commission-jurisdictional transmission service under the ISO-NE OATT are required to pay rates which include a return on transmission owner investment in the network upgrades needed to provide them service.

In addition to the flaws outlined above, the reasoning set forth by the Commission in the Order to Show Cause is infirm to the extent it implies that the Commission can set rates that require some customers to subsidize others, which the NETOs maintain is unduly discriminatory and therefore prohibited by the FPA. Under the Commission's reasoning, it can deny a utility a return on some services because the ROE for other services will adjust upward to account for the under-recovery. This outrageous assertion presumes that it is statutorily acceptable for the Commission to force the ROE for some services to increase above the return the Commission has previously

approved as just and reasonable in order to permit a favored class of customers to pay a rate that includes no return at all, which would constitute a quintessential cross-subsidy. The Commission's Order to Show Cause does not explain why it is acceptable that the ROE for some FPA-jurisdictional services must go up in order to allow other customers to avoid having to pay the utility any return on investment, nor which services and customers ought to be entitled to the more or less favorable treatment. These reasons alone are sufficient to terminate this proceeding.

B. The Commission Cannot Show that the TO Initial Funding Option It Previously Adopted Is Unjust and Unreasonable as It Is Required to Do Before It Can Order a Change Under Section 206.

The Order to Show Cause proposes to use the Commission's authority under Section 206 of the FPA to revoke the TO Initial Funding Option. However, before the Commission can change a tariff provision under Section 206, the Commission must show that the existing tariff provision is unjust and unreasonable; and it bears the evidentiary burden to make this showing. The Commission cannot meet that burden in these circumstances.

The sole effect of the TO Initial Funding Option is that it permits transmission owning public utilities to earn a regulated return on their investment in network upgrades should they choose to make the investment. Under the existing ISO-NE OATT provisions, transmission owners are subject to the normal requirements of Section 205 and the Commission's implementing regulations and orders to demonstrate that their rates are not excessive. So long as the Commission exercises its normal authority in reviewing rates under Section 205 to limit utilities to recovering only their actual costs, including approving the level of ROE that transmission owners are permitted to earn on their investment, the Commission has no basis for finding that the rate produced by the TO Initial Funding Option is not just and reasonable.

Rates that allow a public utility to recover its costs of providing jurisdictional service plus a just and reasonable return on investment have been found to be just and reasonable in hundreds

of Commission rate proceedings. The TO Initial Funding Option at issue does not deviate from this practice. The ratemaking standard the Commission has employed for nearly a century is derived directly from the standard adopted by the Supreme Court in *Hope*.

The Commission has offered no justification for finding that in this one instance allowing utilities to earn a regulated return on the facilities they design, license, construct, own, and operate is unjust and unreasonable. The objective of FPA Sections 205 and 206, and the sole purpose for rate reviews under those sections, is to prevent public utilities subject to cost-based ratemaking, those whom the Commission deems to have market power, from charging exorbitant rates. *Hope* defines such exorbitant rates as rates that produce a return that exceeds the return available to competitive businesses with comparable risks.⁹² So long as the FPA's statutory purpose has been satisfied, the Commission has no statutory authority or justification for further lowering rates charged to generators by eliminating the transmission owners' opportunity to earn a return on investment, and any attempt to further lower rates charged is therefore *ultra vires* under the FPA.

The Commission suggests that public utilities do not bear the same risks for this category of transmission investment because they obtain by contract credit guarantees from interconnecting generators. The Commission, however, has approved hundreds of rates involving wholesale sales to individual customers without reference to the credit provisions in those contracts. Similarly, the Commission has amended its *pro forma* OATT to include creditworthiness procedures that allow transmission providers to require transmission customers to provide a letter of credit as security during the term of its service agreement.⁹³ The Commission has *never* found that the ROE in such agreements should be eliminated or even reduced because the contracts include

⁹² *Hope*, 320 U.S. at 603.

⁹³ See *pro forma* OATT, Att. L – Creditworthiness Procedures.

commonplace credit provisions. These types of credit provisions merely put public utilities into a comparable position, from a risk perspective, that they are in with respect to the rest of their transmission rate base. The public utility model operates (and has always operated) on the assumption that public utilities will be able to recover their costs because the rates are paid by their entire customer base, who collectively shoulder cost responsibility for the utility facilities used to provide them service. The failure of individual customers to pay the rates has a minuscule impact on the utility's cost recovery.

The ROE the Commission allows, which is based on a public utility proxy group, incorporates the risk level associated with serving the entire utility customer base.⁹⁴ In the case of interconnecting generators, however, the risk associated with cost recovery would be much higher without credit assurances, because generators are typically single asset companies and recovery of the utility's entire investment depends on the capability of that single company to pay.

The Commission also does not have any justification for eliminating the opportunity for public utilities to earn a return on facilities owned and operated to provide jurisdictional service because the amount of the transmission investment associated with this category of costs has been relatively small in the past. Allowing utilities to recover a just and reasonable return on these investments is essential in an evolving grid where interconnection-related network upgrades are becoming an increasingly larger percentage of overall transmission construction and upgrade projects. Especially with the Commission's mandate in Order No. 2023 of cluster studies and associated cluster network upgrades, the future of interconnection-related network upgrades will

⁹⁴ The NETOs acknowledge that while the Commission's ROE methodology is in flux, it is expected to continue to rely heavily on financial models that rely on a proxy group of representative risk utilities.

be major transmission projects that could significantly change the topology of the grid and will require extensive investment, expertise, construction, and management.⁹⁵

The Commission also suggests that it can deny public utilities an opportunity to earn a return on the facilities they design, license, construct, own, and operate where the customer may be able to finance the investment at a lower cost. The Commission has never applied this standard to setting rates, and it is not a relevant factor under *Hope* or any of its progeny. The Commission is proposing to upend nearly a century of ratemaking under the FPA, which has been based on the utility's costs and not those of the customer. As Mr. Divatia explains, the Commission's novel theory of what constitutes a just and reasonable rate also threatens the viability of the public utility model at the very time the New England region will require massive investment in new transmission facilities in order to reliably serve emerging demand growth and to facilitate the interconnection of clean energy resources.⁹⁶

The Commission's cost comparison is also an inappropriate "apples to oranges" comparison. Public utilities' financing costs, and especially the equity return embedded in the capital structure, reflect the essential character of their business, which requires they be responsible for ongoing utility obligations to the public. In contrast, interconnecting generators finance their investments at the lowest possible costs demanded by investors for their single asset operations, which permits them to finance with much higher levels of debt.⁹⁷

⁹⁵ See also Divatia Affidavit at 4.

⁹⁶ *Id.* at 3-4.

⁹⁷ See Lapson Testimony at 7-8.

a. The Commission’s Position in the Order to Show Cause Fails to Satisfy the FPA Section 206 Obligation to Find the Existing Rate Unjust and Unreasonable Similar to the Order Vacated by the D.C. Circuit in *Emera Maine*.

The Order to Show Cause indicates that the Commission is poised to repeat the errors identified by the D.C. Circuit in *Emera Maine*. In that proceeding, the D.C. Circuit vacated the Commission’s order below because the Commission conflated the two prongs of FPA Section 206. In *Emera Maine*, the D.C. Circuit reiterated the statutory requirement that FERC recognize Section 206 as distinct from Section 205 because Section 206 imposes an obligation on the Commission to determine whether an existing rate (including rates, terms and conditions) is just and reasonable as a “condition precedent” to any exercise of its Section 206 authority.⁹⁸ The *Emera Maine* court made clear that “[w]ithout a showing that the existing rate is unlawful, FERC has no authority to impose a new rate[,]”⁹⁹ and concluded that FERC’s reasoning below “effectively eliminated section 206’s statutory directive that existing rates be found unlawful before FERC has the authority to change those rates.”¹⁰⁰ In no uncertain terms, the court noted that FERC misunderstood the burden of proof under Section 206,¹⁰¹ and that Section 206 “provides a form of statutory protection to a utility.”¹⁰²

The Order to Show Cause foreshadows a future FPA Section 206 action by the Commission that would primarily rely on a faulty assumption that New England transmission owners may use unilateral TO Initial Funding to benefit affiliated interconnection customers.¹⁰³ Without any

⁹⁸ *Emera Maine*, 854 F.3d at 25.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 26.

¹⁰¹ *Id.* at 24 (stating “FERC misunderstood and misapplied its dual burden under section 206”).

¹⁰² *Id.* (internal quotations omitted).

¹⁰³ Order to Show Cause at P 52.

substantial support for such a proposition, the Commission assumes that unilaterally electing TO Initial Funding “may increase the costs of interconnection service without corresponding improvements to that service, may unjustifiably increase costs such that it results in barriers to interconnection, and may result in undue discrimination among interconnection customers.”¹⁰⁴ Such concerns are misplaced in the context of New England, where the transmission owners have largely divested their generation in the region and functionally operate as “wires” companies.¹⁰⁵ Consistent with *Emera Maine*, the first step of FPA Section 206 cannot be satisfied without a convincing explanation and formal finding, including fully developed evidence clearly establishing that the current rates are unjust and unreasonable.¹⁰⁶ Such evidence is plainly absent in the Order to Show Cause; the Commission can and should avoid repeating the mistakes identified in *Emera Maine*.

The Commission’s generic references to information filed in other proceedings is insufficient to demonstrate that the ISO-NE OATT is unjust and unreasonable. For instance, the Commission mentions that the Solar Energy Industry Association (“SEIA”) cited to a National Renewable Energy Laboratory study (“NREL Study”) in its initial brief submitted in the PJM Paper Hearing proceeding, which provided weighted average cost of capital estimates of approximately 5 percent for utility-scale solar, to argue that “utility-scale solar generators would have to forego a lower cost of capital under TO Initial Funding.”¹⁰⁷ The NREL Study does not

¹⁰⁴ *Id.* at P 44.

¹⁰⁵ *See, e.g.*, ISO-NE, 2021 Regional Electricity Outlook, at 11 (“[F]ive of the six New England states passed legislation requiring utilities to divest their generation assets.”).

¹⁰⁶ *See Emera Maine*, 854 F.3d at 24-25.

¹⁰⁷ Order to Show Cause at P 48 (citing SEIA Initial Brief, Docket No. ER21-2282-002, at 24 (filed Jan. 13, 2022) (citing “Current and Future Costs of Renewable Energy Project Finance Across Technologies,” NREL and Lawrence Berkley National Lab (July 2020), <https://www.nrel.gov/docs/fy20osti/76881.pdf>)).

cite to any specific case studies arising out of New England. Additionally, reference to weighted average cost of capital data in the NREL Study is misleading because SEIA's reliance on that data is exclusively relevant to utility-scale solar generating facilities that qualify for investment tax credits only. Not all solar project developers qualify for investment tax credits. And in any event, investment tax credits are currently scheduled to sunset in 2035 and could sunset earlier. Finally, in no way, does the NREL Study flesh out how relevant this data would be to interconnection customers in New England.

The Order to Show Cause also references the Declaration of Jennifer Ayers-Brasher ("Ayers-Brasher Declaration") submitted in the PJM Paper Hearing on behalf of RWE Renewables America for the proposition "that costs double or increase exponentially under TO Initial Funding[.]"¹⁰⁸ The Order to Show Cause also references the Declarations of Kate O'Hair ("O'Hair Declaration") and Matt Pawlowski ("Pawlowski Declaration") which claim that total payments of unidentified generation projects over a 20-year period may double when TO Initial Funding is employed.¹⁰⁹ However, none of these declarations is probative evidence because they do not provide project-specific data or examples. Instead, each of the declarations referenced in the Order to Show Cause makes general conclusory statements without providing any supportive evidence.¹¹⁰ These hollow assertions fall far short of the "adequate proffer of evidence including

¹⁰⁸ Order to Show Cause at P 48 (citing Joint Protestors Initial Brief, Docket No. ER21-2282-002, at 20 (filed Jan. 13, 2022) (citing Joint Protestors Protest, Docket No. ER21-2282-000 (filed July 28, 2021), attach. C at ¶ 9).

¹⁰⁹ Joint Protestors Protest, Docket No. ER21-2282-000 (filed July 28, 2021), attach. D at ¶ 4; NextEra Protest, Docket Nos. EL21-66 and ER21-1647 (filed May 7, 2021), Pawlowski Declaration at 7).

¹¹⁰ See e.g., Ayers-Brasher Declaration, at ¶ 9 ("self-funding of network upgrades significantly increases project costs despite providing no additional benefits to the transmission system.").

pertinent information and analysis” required under FPA Section 206 to support the claims of the Order to Show Cause.¹¹¹

The Order to Show Cause also cites to the stale, precluded testimony of Apex affiant Sandeep Nimmagadda (“Nimmagadda Affidavit”) that Joint Protestors copied into their brief in the PJM Paper Hearing.¹¹² The Nimmagadda Affidavit uses a 100 percent debt financed rate of 6 percent to compare Apex’s potential cost of financing network upgrades for four wind facilities in MISO to the cost of capital of each project’s interconnecting transmission owner to conclude that it could cost Apex up to \$19 million more if TO Initial Funding is used.¹¹³ There are several flaws with the Commission’s reliance on the Nimmagadda Affidavit. *First*, Apex uses a finance rate that is comprised of 100 percent debt compared to the blended and balanced capital structures of interconnecting transmission owners that use equity and debt. *Second*, the Commission denied Apex’s late intervention, request for rehearing, and submission of the Nimmagadda Affidavit on the record in the Ottertail Power Proceeding, because Apex failed to demonstrate good cause for its late intervention and lacked standing to request rehearing.¹¹⁴ Thus, the Commission never accepted the Nimmagadda Affidavit into evidence. It is improper for the Commission to rely on a document here that includes analyses not representative of transmission owner capital structures, has not been vetted in any way, and, indeed, has been rejected by the Commission in a prior proceeding. The Commission’s conclusion in the Order to Show Cause that the TO Initial Funding

¹¹¹ *Ill. Muni. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996).

¹¹² See Joint Protestors Initial Brief, Docket No. ER21-2282-002, at 21 (filed Jan. 13, 2022) (citing Apex Clean Energy Motion to Intervene Out-of-Time and Rehearing Request, Docket No. EL15-68 et al., at attach. I (filed Oct. 1, 2018)).

¹¹³ Nimmagadda Affidavit at ¶ 8.

¹¹⁴ *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,233, at PP 26-27 (2019).

Options contained in the ISO-NE OATT may be unjust and reasonable is wholly lacking in evidentiary support.

Finally, the Order to Show Cause is inconsistent with precedent confirming there is no single just and reasonable rate, and courts and the Commission have recognized that there is a wide range of just and reasonable rates.¹¹⁵ The fact that the Commission might prefer another particular rate is not sufficient for it to act under Section 206.¹¹⁶ The Commission cannot act under Section 206 without first completing the “step one” of finding that the rates the public utility proposes to charge are unjust and unreasonable.

b. Generators Receive Significant Benefits When a Utility Uses its Expertise and Resources to Plan, License, Construct, Permit, and Operate Network Upgrades on Their Behalf, Underscoring that the TO Initial Funding Option Is Not Unfair to Generators.

The Commission’s assertion that requiring generators to pay utilities a return on the cost of certain network upgrades can be unfair to generation owners completely disregards the benefits generators receive when a utility uses its expertise and resources to plan, license, construct, and operate the network upgrades on their behalf. Even when generators exercise the option to build, much of the expenditure of resources and use of expertise discussed in this section still applies, including 100 percent once the facilities enter service and ownership transfers to utilities.

Mr. Divatia observes that, currently, Eversource simultaneously manages 168 individual interconnection requests, spanning across all the different stages of the interconnection process.¹¹⁷ As part of these efforts, Eversource, like all the NETOs, actively works with ISO-NE and the interconnection customer to develop network upgrades that allow for the efficient and reliable

¹¹⁵ See, e.g., *id.* at 21.

¹¹⁶ *Id.* at 26.

¹¹⁷ Divatia Affidavit at 4.

interconnection of the project to Eversource's transmission system. Even before network upgrades become operational, significant utility resources are required to ensure that network upgrades conform with the utility's engineering requirements and applicable reliability standards. Generators begin relying on utility resources almost immediately during the planning, licensing, and construction phase of such facilities. Utility involvement continues throughout the engineering concept and detailed engineering process. In addition to the utility personnel specifically assigned to the project, utility operations personnel provide support during any outages, which would also require coordination with other utility departments (*e.g.*, with the utility's energy control center and utility employees responsible for switching and tagging). Once operational, the utility is responsible for the ongoing operations and maintenance of the facilities. While generators contribute to the costs of the studies, meetings, and other efforts requisite to network upgrades, such studies, meetings, and other efforts draw significantly on a utility's experience, time, resources, expertise, and good will within the community. One cannot argue in good faith that generators seeking network upgrades go without substantive investments of efforts and resources by the utility.

Indeed, transmission owners' significant investments in network upgrades stand only to increase with the Commission's issuance of Order No. 2023. Increasing the frequency of completed generator interconnections was a central aim of Order No. 2023.¹¹⁸ The natural result of the cluster study process implemented to achieve that aim will inevitably be more network upgrades over a condensed period. While the cluster study process and other Order No. 2023 reforms may be effective in "clearing" the backlog of customers awaiting interconnection, it will also mean transmission owners must manage an increasingly complex and demanding flow of

¹¹⁸ *See, e.g.*, Order No. 2023 at P 4.

interconnection-related network upgrades. Put simply, as more projects are processed through the interconnection queue, more network upgrades will need to be completed simultaneously, and it is transmission owners who will carry the lion's share of that effort—to the benefit of generators.

Further, in Order No. 2023, the Commission requires transmission providers to evaluate various alternative transmission technologies in cluster studies and restudies, and to include such evaluations in cluster study reports.¹¹⁹ While this emphasis on alternative technologies may be intended to enhance the cost and time savings associated with traditional network upgrades, such new processes place an onus on transmission providers to take even more steps to effect generator interconnections and relevant network upgrades. This is not a collateral attack on the Commission's holdings in Order No. 2023, but rather yet another example of the substantive resources that transmission providers must devote in fulfilling their duties related to network upgrades.¹²⁰ It is generators who receive the primary benefit of these mandates; not transmission owners.

c. Generators Already Benefit from the Existing Transmission Rate Design that Requires Network Load Customers to Pay.

The Commission's suggestion that the TO Initial Funding Option is somehow unfair to generators is without any basis in fact. The entire transmission rate structure in RTOs/ISOs *favors* generators by requiring network load customers to pay for the vast majority of the transmission system. At a high level, network transmission costs are collected from load-serving entities and paid to transmission owners as compensation for the cost of building, owning, and maintaining the grid.¹²¹ Thus, network load already subsidizes the profits of generators. And the load customers

¹¹⁹ *Id.* at PP 1578-1581.

¹²⁰ *Id.* at P 1580 (“[W]e require transmission providers to evaluate the enumerated alternative transmission technologies in all instances, without the need for a request from an interconnection customer.”).

¹²¹ *See, e.g.*, ISO-NE OATT, § II.21.1 (describing rates and charges for regional network service).

that pay for most of the transmission system pay public utilities a return on invested capital. In this way, the Commission has already put its finger on the scale to benefit generators in the context of network service rates. It is incomprehensible why the Commission would even entertain the notion that a regime already subsidizing generators is somehow unfair to those generators.

The Commission does not explain how it can be inequitable to require generators to pay the same return associated with the limited class of transmission facilities covered by the Order to Show Cause. As discussed above, the Commission has an obligation to provide well-reasoned explanations in support of its policy changes, and it has not done so here. A policy design that prohibits TO Initial Funding would actually be unduly discriminatory, and at best unfair, and the Commission should give that idea equal treatment.

d. The Discrimination Argument in the Order to Show Cause is Invalid and Entirely Theoretical.

The NETOs are scrupulous in complying with their ISO-NE OATT obligation to provide non-discriminatory open access. The NETOs have fostered a culture of compliance focused on all Commission requirements intended to address hypothetical discrimination risks. In addition, as part of their institutional utility goals, the NETOs are committed to providing high quality and non-discriminatory service to their customers. As such, it is not surprising that there is no evidence that the NETOs have engaged in the types of discriminatory behavior referenced in the Order to Show Cause.

In any event, the undue discrimination argument in the Order to Show Cause is unsupported and entirely theoretical. In 2015, in *Otter Tail*—later vacated by the D.C. Circuit in *Ameren*—the Commission similarly proposed rescinding self-funding based on the theoretical concern that it

presented “opportunities for undue discrimination”¹²² without any evidence of actual undue discrimination. The Commission subsequently eliminated self-funding in that proceeding and that ruling—also vacated by *Ameren*—similarly mentioned no evidence of undue discrimination. On remand, the Commission acknowledged that it “did not adequately support its determination of discrimination.”¹²³ The same is true for the Order to Show Cause. The Order to Show Cause does not identify a single instance in the ISO-NE region or otherwise where a public utility has discriminated against a generator by choosing different funding options for affiliated and unaffiliated generators. It is particularly inappropriate for the Commission to issue this type of Order to Show Cause in New England, where the transmission owners have largely divested the generation assets that the Commission thinks may create opportunity for discrimination. Also, as the Order to Show Cause expressly recognizes, “it appears that no transmission owners have elected TO Initial Funding in the ISO-NE region.”¹²⁴ The Order to Show Cause instead focuses on the theoretical concern that the relevant RTO/ISO OATTs include provisions that may result in undue discrimination, without acknowledging the realities that make such discrimination impossible.

The ISO-NE interconnection processes are supervised and conducted by ISO-NE, an independent entity, in coordination with the New England transmission owners. The ISO-NE interconnection process was developed and filed with the Commission to comply with FERC requirements. It provides generation owners with the ability to detect any possible undue

¹²² *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,220, at P 53 (2015) (“*Otter Tail*”).

¹²³ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at PP 28-29 (2018) (citing *Ameren*, 880 F.3d at 578).

¹²⁴ Order to Show Cause at P 41 (footnote omitted).

discrimination and raise those concerns with ISO-NE and the Commission.¹²⁵ It requires ISO-NE to administer the interconnection of new generation resources, coordinate the planning process for the interconnection of new generation, and analyze the reliability impact of the proposed generation, including conducting the feasibility study, system impact study, and interconnection facilities study.¹²⁶ ISO-NE is also a party to the LGIA and SGIA, three-party agreements that are executed among the interconnection customer, the transmission owner and ISO-NE.¹²⁷ While it is certainly reasonable that the Commission may want to prevent discrimination, the Commission offers no evidence that ISO-NE's oversight has failed to prevent undue discrimination in the context of generator interconnections or network upgrades generally. As such, the Order to Show Cause seeks to impose restrictions to remedy an issue that the Commission knows does not and cannot exist.

e. Highly Effective Section 206 Prophylactic Remedies for Transmission Services, including Interconnection Services, That Protect Against the Potential for Discrimination Are Already in Place.

Existing measures protect against the potential for undue discrimination, such that undue restrictions on TO Initial Funding are not necessary in New England. The Commission has already required transmission owners to implement Section 206 prophylactic remedies for the provision

¹²⁵ See *infra* Section IV, Responses to Questions 2, 9, and 10. As a practical matter, generators are always free to raise concerns regarding undue discrimination or undue preference with ISO-NE in real-time by passing any such concerns along to their ISO-NE representative or by calling ISO-NE's legal department. Such an informal information exchange with ISO-NE could alleviate any potential concerns regarding application of tariff requirements, including and not limited to interconnection requirements. Generators also always have the option of seeking support from FERC in the context of a Section 206 complaint against ISO-NE or a transmission owner or through the FERC Office of Enforcement. The NETOs are not aware of any Section 206 complaint proceeding against ISO-NE or a NETO or any Office of Enforcement action regarding discrimination in the context of the TO Initial Funding Option.

¹²⁶ See, e.g., ISO-NE OATT, Schedule 22 (Large Generator Interconnection Procedures) and Schedule 23 (Small Generator Interconnection Procedures)

¹²⁷ ISO-NE OATT, § II.47.1 (requiring ISO-NE to be a party to an interconnection agreement alongside the interconnection customer and interconnecting transmission owner).

of transmission services, such as the open access and same-time information requirements contained in Order No. 888 and its progeny.¹²⁸ Specifically, the Commission has required functional unbundling and comparability,¹²⁹ and has implemented the Standards of Conduct.¹³⁰

The Commission adopted Order No. 888 to prevent the potential for discrimination by transmission providers against non-affiliates with respect to the provision of transmission services by requiring all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file OATTs based on the Commission's *pro forma* tariff that contain minimum terms and conditions of non-discriminatory service.¹³¹ Order No. 888 also required public utilities to state separate rates for its wholesale generation, transmission and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others.¹³² Other prophylactic remedies to ensure a level playing field for competition by generators not affiliated with transmission owners include:

¹²⁸ See also *infra* Section IV, Response to Question 8.

¹²⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("Order No. 888").

¹³⁰ *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, 75 FERC ¶ 61,078 (1996) ("Order No. 889") (subsequently revised by *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008), *order on reh'g and clarification*, Order No. 717-A, 74 Fed. Reg. 54463 (Oct. 22, 2009), FERC Stats. & Regs. ¶ 31,297 (2009), *order on reh'g and clarification*, Order No. 717-B, 74 Fed. Reg. 60153 (Nov. 20, 2009), 129 FERC ¶ 61,123 (2009), *order on reh'g and clarification*, Order No. 717-C, 75 Fed. Reg. 20909 (Apr. 22, 2010), 131 FERC ¶ 61,045 (2010), *order on reh'g and clarification*, Order No. 717-D, 135 FERC ¶ 61,017 (2011) ("Order No. 717").

¹³¹ Order No. 888 at P 4.

¹³² *Id.* at P 57.

- The Commission required public utilities with generation interests to functionally unbundle their transmission businesses and it has adopted Standards of Conduct that prevent and ensure “comparability” as a required standard under Section 206. FERC’s Standards of Conduct, most recently revised in Order No. 717, are intended to ensure separation between transmission providers’ transmission business from affiliated generation to protect against potential for undue discrimination or undue preference.¹³³ FERC’s Office of Enforcement has actively engaged in regular audits to confirm transmission provider compliance with FERC Standards of Conduct requirements.
- Order No. 2003 required all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file with FERC standard procedures and a standard agreement for providing interconnection services to large generators.¹³⁴ Relevant to the provision of interconnection services within the ISO-NE control area in particular, the Commission conceded in Order No. 2003 that “when the Transmission Provider is an independent entity, the Commission is much less concerned that all generation owners will not be treated comparably because independence ensures that the Transmission Provider has no incentive to treat Interconnection Customers differently.”¹³⁵
- Similar to Order No. 2003, Order No. 2006 required standard interconnection services and procedures for small generators.¹³⁶
- The Commission adopted Order No. 890 to further strengthen the *pro forma* OATT to ensure that transmission services are provided on a basis that is just, reasonable, and not unduly discriminatory or preferential.¹³⁷ Specifically, Order No. 890 explains that the changes to the *pro forma* OATT are intended to provide greater specificity to further reduce opportunities for undue discrimination and facilitate the Commission’s enforcement, as well as increase transparency in the rules applicable to planning and use of the transmission system.
- Order No. 845 amends the Commission’s *pro forma* LGIA and Large Generator Interconnection Procedures (“LGIP”) to improve certainty, promote more informed interconnection and enhance the interconnection process and to ensure that the

¹³³ See, e.g., Order No. 717 at P 23.

¹³⁴ See, e.g., Order No. 2003 at P 1 (“This Final Rule requires all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting generators larger than 20 MW.”).

¹³⁵ *Id.* at P 701.

¹³⁶ See, e.g., Order No. 2006 at P 36.

¹³⁷ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh’g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (“Order No. 890”).

generator interconnection process is just and reasonable and not unduly discriminatory or preferential.¹³⁸

- As discussed above, the Commission in Order No. 2023 implemented a cluster study process that is premised on the theory that “interconnection requests studied in the same cluster have equal queue priority to avoid undue discrimination[.]”¹³⁹ adding yet another layer of insulation against the potential for undue discrimination.

The Commission has no evidence that the remedies it already adopted to prevent this form of potential discrimination are inadequate to prevent unjust and unreasonable rates. In addition to the above-referenced rulemaking orders and relevant implementing precedent, the Commission’s significant enforcement penalty authority is designed to prevent a public utility from engaging in undue discrimination for the benefit of its affiliates and to the detriment of non-affiliates. There is thus no need for the Commission to adopt the draconian remedy of denying public utilities the opportunity to earn a return on their investment in implementing network upgrades.

C. A Rule that Requires Transmission Owners to Design, License, Construct, Own, and Operate Transmission Facilities Without Earning a Return on Those Facilities Would Not Be Just and Reasonable and Would Exceed the Commission’s Statutory Authority.

In the Order to Show Cause, the Commission concludes “that transmission owners may not face risks associated with owning, operating, and maintaining interconnection-related network upgrades for which transmission owners are not already otherwise compensated.”¹⁴⁰ The Commission’s proposal in the Order to Show Cause defies 80 years of Commission and court precedent, including the D.C. Circuit’s recent decision in *Ameren*, because it leaves public utility

¹³⁸ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (2018), *order on reh’g and clarification*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *errata notice*, 167 FERC ¶ 61,123 (2019) (“Order No. 845”).

¹³⁹ Order No. 2023 at P 858.

¹⁴⁰ Order to Show Cause at P 66.

transmission owners with uncompensated costs and increased financial risks in violation of the Fifth Amendment.

a. The Commission Does Not Have Statutory Authority to Conscript the Resources and Expertise of Private Businesses, Converting Part of Their Business to Non-Profit Entities.

In his affidavit, Mr. Divatia describes the extensive resources and expertise transmission owners invest to design, license, construct, own, and operate their transmission facilities, including the network upgrades necessary to interconnect generation to the grid.¹⁴¹ A return on capital compensates the utility for the costs and risks associated with these efforts. In the Order to Show Cause, the Commission proposes to set this return at zero. By doing so, the rate violates not only the statutory constraints of the FPA but also constitutional requirements under the takings clause of the Fifth Amendment. The Fifth Amendment takings clause bars the federal government from taking private property for public use without just compensation.¹⁴² In the context of the Commission's ratemaking authority under the FPA, this means that the Commission cannot adopt "confiscatory" rates. In *Hope*, the Supreme Court held that rates must be set to provide a return commensurate with the return received by other enterprises with comparable risk, and also must be sufficient to ensure the financial integrity of the enterprise.¹⁴³ The Supreme Court's decision in *Hope*, thus, "defines the point at which a rate becomes unconstitutionally confiscatory . . . ,"¹⁴⁴ and the resulting rate is unconstitutionally confiscatory because it conscripts the facilities of transmission owners into service without just and reasonable compensation. Indeed, the Supreme

¹⁴¹ Divatia Affidavit at 4-5.

¹⁴² U.S. Const. amend. X ("nor shall private property be taken for public use, without just compensation").

¹⁴³ *Hope*, 320 U.S. at 603.

¹⁴⁴ *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) ("Jersey Central").

Court has held that a primary driver in evaluating the legality of Commission decisions is to determine if a rate order “fairly compensate[s] investors for the risks they have assumed.”¹⁴⁵

The Commission’s reasoning is also contrary to *Bluefield* because the Commission would categorically deny the transmission owner an opportunity to earn a return on “the value of the *property used* at the time it is being used to render the service.”¹⁴⁶ Under *Bluefield*, a utility must be allowed to earn a return on the assets “used” to provide its services—regardless of who made the capital investment. The Supreme Court described this principle as particularly “well settled” and cited cases dating back to the 1800s for the rule that “[w]hat the company is entitled to ask is a fair return upon the value of *that which it employs* for the public convenience.”¹⁴⁷

Moreover, the Commission’s proposal violates the limits on its ratemaking authority under the FPA established by the Supreme Court in *Permian Basin*. The Commission must set all rates for the services at issue within a “zone of reasonableness.”¹⁴⁸ The Commission’s interpretation of the zone of reasonableness has been uniformly consistent. In all prior cost-based rate proceedings, it has set rates that allow the seller of jurisdictional service to recover its prudently incurred operating costs plus a rate of return on invested capital within the zone of just and reasonable returns applicable to that service and proceeding.¹⁴⁹ However, establishing a rate of

¹⁴⁵ *Permian Basin*, 390 U.S. at 792.

¹⁴⁶ *Bluefield*, 262 U.S. at 690 (emphasis added).

¹⁴⁷ *Id.* (emphasis added) (citing, *e.g.*, *Smyth v. Ames*, 169 U. S. 466, 547 (1898)).

¹⁴⁸ *Permian Basin*, 390 U.S. at 767, 770.

¹⁴⁹ *See, e.g.*, *AEP Power Mktg, Inc.*, 108 FERC ¶ 61,026 at P 152 (“[The Commission’s] ratemaking policy is designed to provide for recovery of prudently incurred costs plus a reasonable return on investment.”); Order No. 888-A at 12,414 (“[T]he Commission satisfies its statutory obligation under the FPA by allowing utilities an opportunity to recover their prudently incurred costs plus a reasonable rate of return.”).

return at zero for certain facilities because the transmission owner is earning a return on other facilities or other parts of its business is not consistent with this requirement.¹⁵⁰

Nothing in the FPA or its legislative history suggests that Congress intended to give the Commission power to change the longstanding financial arrangements that are at the heart of investor-owned utilities' ability to operate as profitable businesses. The Commission was tasked only with ensuring that public utilities do not charge exorbitant rates, a task that the Commission has accomplished for 80 years by applying its cost-based ratemaking standards. As demonstrated by Ms. Lapson, even if the amount of network upgrades funded by interconnection customers were not large, the impact of the Commission's position proposed in the Order to Show Cause would lower the overall equity return received by the NETOs below the allowed return approved by the Commission as just and reasonable.¹⁵¹ The Commission does not have authority to force public utilities to sell jurisdictional services at a rate below what is just and reasonable.

Moreover, none of the methods the Commission employs (or has considered employing) to set ROE for regulated services will adjust upward to account for excluded assets such as network upgrades as the Commission alleges.¹⁵² Ms. Lapson explains that this premise of the Commission's position is incorrect.¹⁵³ The Commission sets ROEs based on a few financial metrics used in the analyses of a *proxy group* of companies, not the overall financial metrics of

¹⁵⁰ The fact that utilities earn a return on other investments also is irrelevant under *Hope*. In *Hope*, the Supreme Court acknowledged that the public utility at issue engaged in both Commission jurisdictional wholesale sales and non-jurisdictional retail sales. *Hope*, 320 U.S. at 615. The Court directed the Commission to provide a fair return on the assets and service before it without considering other parts of the utility's business. Neither the Commission nor the courts have ever interpreted *Hope* differently in the last 80 years.

¹⁵¹ Lapson Testimony at 10-12.

¹⁵² Order to Show Cause at P 66.

¹⁵³ Lapson Testimony at 13-14.

individual utilities.¹⁵⁴ In many cases, the utility before the Commission is not even part of the proxy group, either because only its parent company issues public equity or because the utility is owned by a foreign parent. Ms. Lapson shows that the impacts of the Commission's rate decisions involving individual utilities will not show up in later calculations of ROE under the methods applied to the proxy group companies. As a result, transmission owners will be left to carry the cost and risk associated with owning and operating network upgrades without compensation.

b. Preventing Transmission Owners from Earning a Return on a Growing Share of Their Systems Leaves Them with Uncompensated Costs and Increased Financial Risk, the Very Concerns Raised by the D.C. Circuit in *Ameren*.

Ms. Lapson explains why a compensation scheme in which transmission owners are prohibited from electing to fund and finance network upgrades exposes the transmission owner to uncompensated costs and risks, which increases the utility's overall financial risk.¹⁵⁵ Ms. Lapson explains that network upgrades are like any other facilities on the transmission system and are operated and maintained by the same NETO personnel who operate and maintain the rest of the NETO's transmission system and carry similar risks and obligations.¹⁵⁶ Specifically, Ms. Lapson explains that there are ongoing operational and safety risks associated with network upgrades, such as risks associated with (1) emergency response, (2) service outages and coordination, (3) environmental liabilities, and (4) extreme weather.¹⁵⁷ Mr. Divatia confirms that Eversource, like

¹⁵⁴ *Id.* Indeed, the Commission rejected the Expected Earnings methodology in Opinion No. 569-A. Expected Earnings is the only ROE methodology of the four widely used methodologies (*i.e.*, Discounted Cash Flow, Capital Asset Pricing Model, Risk Premium, and Expected Earnings) that examines the individual company instead of conducting a comparative analysis using a proxy group of companies. See *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020) ("Opinion No. 569-A"). As noted *supra* n.94, the Commission's ROE methodology remains uncertain.

¹⁵⁵ Lapson Testimony at 17-19.

¹⁵⁶ *Id.* at 17.

¹⁵⁷ *Id.* at 18.

the other NETOs, faces increasing risks associated with owning and operating network upgrades, including: (1) operational and safety risks, (2) reliability and cybersecurity compliance risks; (3) environmental risks; (4) weather and climate risks; and (5) outage coordination risk.¹⁵⁸ Setting the ROE for network upgrades at zero by eliminating the NETOs' option to fund those upgrades fails to compensate the NETOs for these costs and risks.

Ms. Lapson also explains that the base ROE that the Commission authorizes for the NETOs does not provide compensation for the operational risks associated with owning and operating network upgrades funded by interconnection customers.¹⁵⁹ Ms. Lapson explains that the application of the base ROE to a transmission owner's rate base produces a "quantum of compensation" that goes to the transmission owner for owning and operating the transmission facilities included in that rate base.¹⁶⁰ By suggesting that a transmission owner's existing ROE can compensate for the risk of owning and operating network upgrades that are not included in rate base, the Commission seems to suggest that the compensation quantum can be "stretched" to also compensate for the additional uncompensated risks associated with such network upgrades. However, as Ms. Lapson explains, if the compensation quantum is stretched to cover network upgrades that go into rate base at zero dollars, the compensation that the transmission owner earns on its other facilities included in the rate base is reduced.¹⁶¹ As a result, the transmission owner is deprived of full compensation for the equity investment it makes in its other rate-based transmission assets. Ms. Lapson further states that when the amount of network upgrades is small,

¹⁵⁸ Divatia Affidavit at 6-9.

¹⁵⁹ Lapson Testimony at 8-12.

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 12.

the “stretching” of the quantum of compensation may not have a noticeable impact.¹⁶² However, as the compensation quantum is stretched further with the ever-increasing amount of network upgrades being added to a transmission owner’s transmission system, there comes a breaking point where the stretching should be considered to be a form of taking of the transmission owner’s property and results in significant uncompensated financial risks to the public utility’s business.¹⁶³

The uncompensated costs and increased risks associated with owning and operating network upgrades on a non-profit basis are the very issues that the D.C. Circuit in *Ameren* found the Commission failed to address in the MISO proceeding. The first problem the D.C. Circuit raised then was whether “transmission owners will be forced to assume certain costs that are never compensated.”¹⁶⁴ The court was concerned transmission owners may “bear liability for insurance deductibles and all sorts of litigation, including environmental and reliability claims (such as blackout risks).”¹⁶⁵ In sum, “shareholders are forced to accept incremental exposure to loss with no corresponding benefit.”¹⁶⁶

The second problem the court raised in *Ameren* was that the Commission might be requiring transmission owners “to act, at least in part, as a nonprofit business ... attack[ing] their very business model and thereby creat[ing] a risk that new capital investment will be deterred.”¹⁶⁷ “Supreme Court precedent reveals that a regulated industry is entitled to a return that is sufficient to ensure that new capital can be attracted.”¹⁶⁸ The Commission’s “backward-looking perspective

¹⁶² *Id.* at 10-11.

¹⁶³ *Id.*

¹⁶⁴ *Ameren*, 880 F.3d at 580.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 581.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Hope*, 320 U.S. at 603).

[had] elide[d] *Hope*’s forward-looking capital attraction standard,” under which it appeared to the court “undisputable that when portions of a business are unprofitable, it detracts from the attractiveness to investors of the business as a whole.”¹⁶⁹ In addition, “[e]ven if FERC could somehow provide protection for each of the many risks involved, potential investors would need to expend costly time and resources to examine and understand [the network upgrades], in order to verify that they are, in fact, riskless,” and this “added complexity can be expected to impose its own form of deterrence upon investors.”¹⁷⁰ The court noted that these concerns are all the more acute as “more and more of a transmission owner’s business is to be owned and operated on a non-profit basis” given the ballooning nature of network upgrades.¹⁷¹ The Commission had “cross[ed] a rather significant conceptual line” in *Ameren* given the alarming consequences of conscripting transmission owners while network upgrades rapidly rise.¹⁷² In the Order to Show Cause, the Commission once again fails to adequately address these issues.

c. The Enterprise-Wide Ratemaking Theory Proposed by the Commission Departs from Decades of Uniform Precedent, Is Unconstitutionally Vague, and Has No Limiting Principle.

In the Order to Show Cause, the Commission concludes that “transmission owners may not face risks associated with owning, operating, and maintaining interconnection-related network upgrades for which transmission owners are not already otherwise compensated . . . [because] the Commission has stated that it ‘calculates a utility’s return on equity based on the risk profile of the enterprise as a whole.’”¹⁷³ This enterprise-wide ratemaking theory previously relied on by the

¹⁶⁹ *Id.* at 581-82.

¹⁷⁰ *Id.* at 582.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Order to Show Cause at P 66 (quoting *Cent. Hudson Gas & Elec. Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,149, at PP 59 n.127, 60 (2021) (“NYTO Complaint Order”)).

Commission to deny the NYISO transmission owners' Section 206 complaint departs from decades of uniform precedent and practice and would allow the Commission to order any public utility to operate any part of its system on a non-profit basis unless the utility can demonstrate that to do so would create financial risk for its entire enterprise. The implications of this reasoning are staggering and contrary to the basic principles of cost-of-service ratemaking. The Commission requires the low end of the zone of reasonable returns to be above the cost of debt; it cannot be zero.¹⁷⁴ And while the Commission “has the flexibility to determine how the rate order should be modified—whether through enlarging the rate base, increasing the rate of return, or a combination of both,”¹⁷⁵ it cannot refuse to do *any* of those things and assume without evidence that the utility's existing rate already covers interconnection-related network upgrades. The full cost of providing transmission service includes an authorized return on the full rate base, including network upgrades to interconnect new generation to the grid. The Commission's theory would let it set rates at any level (even zero), so long as the utility is providing some services at rates with a return sufficient to maintain its financial integrity. This notion is contrary to decades of FPA precedent established by the Supreme Court.

The Supreme Court's decision in *Hope* explicitly prohibits setting rates that fail to offer a reasonable return on capital. *Hope* also commands that the Commission set rates that preserve the financial integrity of the utility and permit it to attract capital.¹⁷⁶ The Commission's enterprise-wide theory seizes on that obligation to find that a return must merely not jeopardize a utility's financial integrity. This misreads *Hope*. The statements in *Hope* regarding financial

¹⁷⁴ See, e.g., *Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165, at P 60 (2015) (subsequent history omitted); see also Opinion No. 569-A at P 161.

¹⁷⁵ *Jersey Central*, 810 F.2d at 1188.

¹⁷⁶ *Id.*

integrity were prefaced with “moreover”—not “alternatively.”¹⁷⁷ Thus, *Hope* identifies an additional requirement, not a replacement for the independent obligation to afford utilities a return on their capital in addition to the recovery of operating expenses. Under the Commission’s enterprise-wide theory, a utility would need to be in a dire financial state before the Commission would be required to allow a return on a particular project or section of the business. This theory strays far outside the province of the Commission’s ratemaking authority under the FPA.

Moreover, the Commission’s enterprise-wide theory is a drastic departure from its longstanding policy of allowing the ROE component to be applied to the full amount of the utility’s rate base. The Commission’s unwavering practice has been to establish the “zone of reasonableness” using its methodology for determining an allowed ROE applicable to the particular sale or service, which establishes a zone of reasonable returns.¹⁷⁸ This approach to the zone of reasonableness has been consistent up until the NYTO Complaint Order. In all prior cost-based rate proceedings, it has set rates that allow the seller of jurisdictional service to recover its prudently incurred operating costs plus a rate of return within the zone of just and reasonable returns applicable to that service and proceeding.¹⁷⁹ Moreover, the rates that the Commission establishes must be just and reasonable today in individual rate cases, not planned to be reset or adjusted at some future date to meet the just and reasonable standard as part of an ROE proceeding

¹⁷⁷ *Hope*, 320 U.S. at 603 (“That return, *moreover*, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital”) (emphasis added).

¹⁷⁸ Opinion No. 569-A at P 46 (stating that an ROE must be within the zone of reasonableness to be presumed to be just and reasonable); *Emera Maine*, 854 F.3d at 23.

¹⁷⁹ See, e.g., *AEP Power Mktg, Inc.*, 108 FERC ¶ 61,026 at P 152 (“[The Commission’s] ratemaking policy is designed to provide for recovery of prudently incurred costs plus a reasonable return on investment.”); Order No. 888-A at 12,414 (“[T]he Commission satisfies its statutory obligation under the FPA by allowing utilities an opportunity to recover their prudently incurred costs plus a reasonable rate of return.”).

only after the public utility has experienced significant financial distress as a result of the Commission's actions.

The Commission's enterprise-wide rationale is also unconstitutionally vague and has no objective limiting principle. It effectively transforms the Commission into a legislative body that can choose to set rates at nearly any level it wishes in individual cases in order to advance its policy preferences. The enterprise-wide theory produces a ratemaking standard that is unable to be applied rationally in individual Section 205 or 206 proceedings *at the time* the Commission is obligated to set just and reasonable rates under the FPA. Sections 205 and 206 of the FPA require the Commission to determine whether rates are just and reasonable based on the record evidence before it.¹⁸⁰ The Commission cannot deny the opportunity for a return for a particular set of facilities or portion of the utility's business because the utility cannot demonstrate financial harm without the return. Yet, the financial consequences of the individual rate decisions on the utility "enterprise" cannot be determined until investors can adjust their risk assessment of the utility in question to account for the fact that some portion of its services or business, now and in the future, might have to be provided on a non-profit basis. This is unquantifiable, and perhaps unknowable, at the time ROEs are set in any individual rate proceedings. The Commission has no objective way of knowing, and has established no applicable standard for determining, how or when the utility's enterprise financial integrity has been sufficiently eroded in these circumstances to justify a return on network upgrades.

The Commission, in the Order to Show Cause or elsewhere, has offered no limiting principle with respect to this enterprise-wide ratemaking standard. This is contrary to established ratemaking principles. In *Farmers Union*, the D.C. Circuit explicitly rejected the Commission's

¹⁸⁰ See *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,159, at PP 60, 98 (2018).

attempt to set rates without following defined rules that ensure the rates will fall within a calculable zone of reasonableness that balances the interests of investors and customers. The *Farmers Union* court stated:

While we agree that the statutory phrase [just and reasonable] sets down a flexible standard, an agency may not supersede well established judicial interpretations that structures administrative discretion under the statute. An agency may not “pour any meaning” it desires into the statute. To accept FERC’s view of its own latitude would be tantamount to holding that no standards accompany the delegation of ratemaking authority to FERC, and we think such delegation would be impermissible.¹⁸¹

The Commission’s enterprise-wide theory effectively places the burden of proof on the utility to demonstrate that the financial risk of network upgrades has affected its ability to raise capital. However, the utility has no cognizable standard to apply and no statutory mechanism to recover for prior under-collections even if it can later make whatever the required showing turns out to be. This level of vagueness and subjectivity is unconstitutional.¹⁸²

Moreover, the enterprise-wide theory should be rejected as creating an unlawful delegation of legislative power. “The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”¹⁸³ Although Congress may “confer substantial discretion on executive agencies to implement and enforce the laws,”¹⁸⁴ a statutory delegation must “lay[] down . . . an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.”¹⁸⁵ Moreover, under the major questions doctrine,

¹⁸¹ *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir. 1984).

¹⁸² See *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013) (rejecting an administrative rule because “the logical extension of the bases offered to support it lacks a limiting principle”); *Emera Maine*, 854 F.3d at 20 (stating that FERC’s responsibility is to “reduce the abstract concept of reasonableness to concrete expression”) (citing *Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

¹⁸³ *Gundy v. United States*, 588 U.S. 128, 132 (2019).

¹⁸⁴ *Id.* at 135 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989))

¹⁸⁵ *Id.* (citing *Mistretta*, 488 U.S. at 372).

courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹⁸⁶ As detailed in the Divatia Affidavit, the Commission’s decision in this proceeding will have vast economic implications for the future of the NETOs’ businesses in light of the significant investment required to interconnect clean energy resources to the grid.¹⁸⁷ The Commission itself has observed that “the expansion of the high-voltage transmission system is increasingly occurring outside of the regional transmission planning process through other mechanisms such as the generator interconnection process.”¹⁸⁸ Nothing suggests that Congress delegated to the Commission the authority to subject public utilities to a new ratemaking standard that deprives them of an opportunity to earn a return on a growing portion of their businesses.

D. The Commission Cannot Adopt a Remedy Which Arbitrarily Treats One Category of Network Upgrades Differently from All Other Network Upgrades.

As noted above, the Commission has not demonstrated that the potential for discrimination exists. Even if it could find adequate evidence of the potential for discrimination, the Commission’s proposed remedy would treat one category of network upgrades differently from all other network updates. This amounts to undue discrimination in its own right. Like generators, load customers require network upgrades to receive reliable transmission service. The Commission has never provided a rationale for differentiating between network upgrades resulting from generator interconnections and network upgrades for another purpose (*e.g.*, to accommodate a transmission service request or to otherwise enhance capacity or functionality). Whatever

¹⁸⁶ *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (internal quotations omitted); *see also W. Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 716 (2022).

¹⁸⁷ Divatia Affidavit at 3-4.

¹⁸⁸ Order No. 1920 at P 54.

pricing rule the Commission determines should apply to all network upgrades, that rule must be consistent, non-discriminatory, and adhere to the “beneficiary pays” principle.

The Commission has held for many years and on many occasions that network upgrades on an integrated transmission system operate collectively to benefit all of that transmission system’s users and, therefore, the costs of network upgrades should be rolled into rates.¹⁸⁹ This remains true even if the proximate cause of building a particular network upgrade is to resolve a localized reliability problem.¹⁹⁰ RTO and ISO systems are highly integrated such that a network upgrade, as opposed to customer-side interconnection facilities or other direct assignment facilities, almost invariably provides benefits to the larger system. As the Commission has observed, “[d]ue to the integrated nature of the transmission network, network facilities benefit all network users,” even if “the facilities were installed to meet a particular customer’s request for service.”¹⁹¹ To this end, “[t]here is no need to identify further actual benefits in order to include the costs of network transmission facilities in transmission rates.”¹⁹²

¹⁸⁹ See, e.g., *NARUC*, 475 F.3d at 1285 (upholding FERC’s determination that network upgrades benefit the entire network, noting that the D.C. Circuit had previously endorsed the approach of assigning the costs of system-wide benefits to all customers on an integrated transmission grid); Order No. 2003 at PP 21, 65 (“Most improvements to the Transmission System, including Network Upgrades, benefit all transmission customers” and “Facilities beyond the Point of Interconnection are part of the Transmission Provider’s Transmission System and benefit all users.”); Order No. 2003-A at PP 585 (“the Commission has long held that the Transmission System is a cohesive, integrated network that operates as a single piece of equipment, and that network facilities are not ‘sole use’ facilities but facilities that benefit all Transmission Customers”).

¹⁹⁰ Order No. 2003 at P 11 (“A standard set of procedures as part of the OATT for *all jurisdictional transmission facilities* will minimize opportunities for undue discrimination and expedite the development of new generation, while protecting reliability and ensuring that rates are just and reasonable.”) (emphasis added).

¹⁹¹ *Northeast Texas*, 108 FERC ¶ 61,084, at P 47 (2004), *reh’g denied*, Opinion No. 474-A, 111 FERC ¶ 61,189 (2005).

¹⁹² *City of Anaheim, Cal.*, 113 FERC ¶ 61,091, at P 58 (2005), *reh’g denied*, 114 FERC ¶ 61,311 (2006)

The Commission has never provided a rationale for disregarding its rolled-in pricing policies solely in the context of network upgrades resulting from generator interconnections. Facilities resulting from generator interconnection network upgrades are functionally indistinguishable from other network upgrades that are rolled into transmission prices. In Order No. 2003, the Commission expressed a desire for parity between types of network upgrades: “The Transmission Provider has traditionally rolled into its transmission rates the cost of Network Upgrades required for its own interconnections, and the Commission’s crediting policy ensures that Network Upgrades constructed for others are treated the same way.”¹⁹³ And in Order No. 2006, the Commission adopted the Order No. 2003 pricing policy,¹⁹⁴ making clear that application of the policy depends on whether the facilities at issue constitute network upgrades or interconnection facilities.¹⁹⁵ The Commission made no suggestion that network upgrades made pursuant to a generation interconnection request warrant distinct treatment from network upgrades made for any other reason.

The Commission’s approach must be consistent for all types of network upgrades and reflect well-settled Commission policy that costs to be allocated to those who cause them to be incurred *and* those that otherwise benefit from them.¹⁹⁶ This principle is necessary to address free rider problems associated with new transmission investment, and, without it, the Commission could not ensure that the rates, terms, and conditions of jurisdictional service are just and

¹⁹³ See Order No. 2003 at P 694.

¹⁹⁴ Order No. 2006 at P 425.

¹⁹⁵ *Id.* at P 407.

¹⁹⁶ *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009) (“All approved rates must reflect to some degree the costs actually caused by the customer who must pay them . . . To the extent that a utility benefits from the costs of new facilities, it may be said to have caused a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed.”).

reasonable and not unduly discriminatory.¹⁹⁷ Thus, the Commission should conclude that network upgrades be treated consistent with each other because network upgrades conclusively benefit customers across a system.

IV. RESPONSE TO APPENDIX A QUESTIONS

- 1. Please explain whether the Responding RTO's/ISO's OATT provisions for transmission owners to unilaterally elect TO Initial Funding increase costs of interconnection service without corresponding improvements to that service.*

Response to Question 1:

No, it is not true that the TO Initial Funding Option in ISO-NE will necessarily increase cost of interconnection service without corresponding improvements to that service. As Ms. Lapson explains in her testimony in response to Question 5, this question as presented makes several unwarranted presumptions.

First, it is not always true that TO Initial Funding invariably increases costs for interconnection customers.¹⁹⁸ The cost of capital varies among interconnection customers, and one cannot assume that the costs for interconnection service will be higher if the transmission owner elects to fund the network upgrades.

Second, the question inappropriately assumes that the cost of capital of interconnection customers is appropriately compared with that of a transmission-owning utility with reliability obligations and the obligation to serve. As Ms. Lapson explains, “even if the transmission owner’s cost of capital appears to be higher, the question is based on an inappropriate analogy of the cost of funding for a limited purpose entity (interconnection customer) with no obligation to provide

¹⁹⁷ *Transmission Planning and Cost Allocation*, Order No. 1000, 136 FERC ¶ 61,051, at P 535 (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) (“Order No. 1000”).

¹⁹⁸ Lapson Testimony at 7.

ongoing service to the public in comparison to the cost of capital to a utility with a universal public service obligation and an ongoing obligation to maintain and operate the network upgrade as well as the entire network.”¹⁹⁹

Third, the current cost of service borne by an interconnection customer does not perfectly price the services that the interconnection customer receives because an interconnection customer may shift costs and burdens to other transmission customers.²⁰⁰ While an interconnection customer may lower its own costs by funding the network upgrades on a stand-alone basis, it also transfers the risks associated with owning and operating the network upgrades to the transmission owner. Eventually that will raise the costs that must be borne by all other customers of the transmission owner. This results in an unfair shift of costs from the interconnection customer to other transmission customers. Thus, claims by generators that they can finance network upgrades at a lower cost do not recognize the full cost of service and therefore is not an appropriate comparison.

Finally, even if the interconnection customers can obtain financing at lower or similar rates, the Commission and the D.C. Circuit in *Ameren* addressed and rejected the claim that increased costs can be relied on as a basis to deny the ability of the transmission owners to provide funding for network upgrades.²⁰¹

2. *Please detail any protections the Responding RTO's/ISO's OATT provides against the potential for the transmission owner in the Responding RTO/ISO to unjustly seek to increase the need for and/or size of network upgrades financed through unilateral TO Initial Funding in order to increase the transmission owner's rate base.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 8.

²⁰¹ See *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,248, at P 27 (2020) (holding that even if increased costs to interconnection customers are true, this does not outweigh the transmission owner's right to provide funding and to earn a return, as recognized by the D.C. Circuit in *Ameren*).

Response to Question 2:

As detailed below, in the ISO-NE region, the interconnection process is administered by ISO-NE, an independent third party. This process includes the scoping of interconnection-related network upgrades and is the same regardless of whether a network upgrade is funded by the interconnection customer or by the transmission owner. Thus, transmission owners do not have the ability “to unjustly seek to increase the need for and/or size of network upgrades financed through unilateral TO Initial Funding in order to increase the transmission owner’s rate base” as alleged in Question 2.

ISO-NE leads the interconnection process from the initial submission of the interconnection request through the signing of the interconnection agreement (LGIA or SGIA). ISO-NE assigns an initial queue position to the interconnection request.²⁰² ISO-NE organizes the scoping meeting²⁰³ and coordinates with other affected systems.²⁰⁴ Next, ISO-NE coordinates with the transmission owner to conduct the required studies, including to identify the scope of network upgrades required to complete the interconnection request. For example, the interconnection system impact study report includes “a list of facilities that are required as a result of the Interconnection Request and a non-binding good faith estimate of cost responsibility.”²⁰⁵ The facilities study identifies, among other items, “the nature and estimated cost of any Interconnecting Transmission Owner’s Interconnection Facilities and Network Upgrades necessary to accomplish the interconnection.”²⁰⁶ Each of the studies is followed by the issuance

²⁰² ISO-NE OATT, Schedule 22, § 4.1.

²⁰³ *Id.* § 3.4.4.

²⁰⁴ *Id.* § 3.6.

²⁰⁵ *Id.* § 7.3.

²⁰⁶ *Id.* § 8.2.

of a report to the customer and a meeting to review.²⁰⁷ Meaning, the interconnection customer early, often, and under the oversight of ISO-NE receives notice of the expected scope of interconnection-related network upgrades.

To the extent that an interconnection customer has concerns about the network upgrades identified during the study process, the customer is able to request dispute resolution procedures before a neutral decision-maker appointed by ISO-NE.²⁰⁸ The interconnection customer may also request that ISO-NE file the interconnection agreement with the Commission unexecuted and bring those concerns to the Commission.²⁰⁹

The Commission accepted those provisions and found that the transparency protects against the incentive for discrimination.²¹⁰ And those provisions are fully applicable to all interconnection requests submitted to and studied by ISO-NE regardless of whether the transmission owner elects to fund the network upgrades. Notably, the Commission relies on those protections in other areas of the country where transmission owners include the costs of network upgrades in rate base, and many of these areas do not have the added protection of an independent RTO administering the interconnection process.²¹¹

Finally, Question 2 discounts the risk of reputational harm to the transmission owner. Increasing the size and scope of a network upgrade for financial gain creates a reliability risk to the transmission owner if that change results in a violation or an event. It also invites tremendous risk to the transmission owner's reputation with the Commission, the RTO/ISO, interconnecting

²⁰⁷ *Id.* §§ 6.3.1, 7.5, 8.3.

²⁰⁸ *Id.* § 13.5.

²⁰⁹ *Id.* § 11.3.2.

²¹⁰ *New England Power Pool*, 109 FERC ¶ 61,155 (accepting in part and rejecting in part New England Power Pool's Order No. 2003 compliance filing); *see also* Order No. 2003.

²¹¹ *See supra* n.50.

customers, the investment community and other RTO/ISO stakeholders. This desire to maintain reliability and protect against reputational harm would appropriately be no different for a transmission owner when it develops projects associated with addressing local and regional reliability and when it works with interconnecting customers to develop properly-sized network upgrades.

3. *Please identify and describe all security provisions applicable to the interconnection customer in the Responding RTO's/ISO's OATT concerning costs for network upgrades financed by unilateral TO Initial Funding.*
 - a. *Please explain if the Responding RTO's/ISO's OATT or if individual agreements that contain the rates, terms, and conditions of unilateral TO Initial Funding require the interconnection customer, regardless of affiliation, to post security on the estimated network upgrade costs or actual network upgrade costs once construction is complete. As part of your explanation, please describe the form of security, the basis upon which the security is applied (e.g., estimated network upgrade costs), when security is required to be posted, and the period over which such security is required to be maintained, as well as how the security amount is adjusted during the period the transmission owner recovers its cost of capital. Please also explain whether security is posted on the cost of the network upgrade during the construction of the network upgrade and/or post construction, which is after the network upgrade goes into service.*

Response to Question 3a:

Yes, consistent with the Commission's *pro forma* LGIA, Article 11.5 of the ISO-NE *pro forma* LGIA requires that:

At least thirty (30) Calendar Days prior to the commencement of the procurement, installation, or construction of a discrete portion of an Interconnecting Transmission Owner's Interconnection Facilities, Network Upgrades, or Distribution Upgrades, Interconnection Customer shall provide Interconnecting Transmission Owner a guarantee, a surety bond, letter of credit or other form of security that is reasonably acceptable to Interconnecting Transmission Owner in accordance with Section 7 of Schedule 11 of the Tariff. In addition:

11.5.1 The guarantee must be made by an entity that meets the creditworthiness requirements of Interconnecting Transmission Owner, and contain terms and conditions that guarantee payment of any amount that may be due from Interconnection Customer, up to an agreed-to maximum amount.

11.5.2 The letter of credit must be issued by a financial institution reasonably acceptable to Interconnecting Transmission Owner and must specify a reasonable expiration date.

11.5.3 The surety bond must be issued by an insurer reasonably acceptable to Interconnecting Transmission Owner and must specify a reasonable expiration date.²¹²

Section 7 of Schedule 11 of the ISO-NE OATT provides that the generator interconnection customer is responsible for paying the transmission owner effecting an interconnection-related network upgrade “an amount equal to its share of the estimated cost of the construction at one time or in monthly or other periodic installments.”²¹³ The section also provides that “[i]n addition to, or in lieu of said payment,” the transmission owner may require the interconnection customer “to provide, as security for its obligation to pay any unfunded balance of the construction costs, a letter of credit or other reasonable form of security acceptable to the PTO or its designee that will be responsible for the construction equivalent to the cost of the upgrade including taxes and consistent with relevant commercial practices, as established by the Uniform Commercial Code.”²¹⁴ The estimated cost already paid by the interconnection customer and the actual cost of the construction of the network upgrade must be reconciled (with interest) “[a]s soon as reasonably practical, but in any event within 180 days after completion of the construction or modifications, or as otherwise mutually agreed.”²¹⁵ Any letter of credit or other security instrument provided by the interconnection customer must be released “no later than sixty (60) days after the later of the

²¹² ISO-NE’s OATT, Schedule 22, app. 6, art. 11.3; *see also* ISO-NE’s OATT, Schedule 23, ex. 1, art. 6.3 (requiring security for payment from small generator interconnection customers twenty (20) business days prior to the commencement of the design, procurement, installation, or construction of an interconnection-related network upgrade).

²¹³ ISO-NE’s OATT, Schedule 11, § 7.

²¹⁴ *Id.*

²¹⁵ *Id.*

reflection of such costs in the regional rates and the commercial operation of the Generating Facility addition or modification.”²¹⁶

In addition to the security required under Article 11.5 of the ISO-NE *pro forma* LGIA, if an interconnection customer elects to enter into an engineering and procurement agreement to advance implementation of its interconnection while an LGIA is being negotiated, the interconnection customer is required to “pay the cost of all activities authorized by the Interconnection Customer, including a deposit of 100 percent of the estimated engineering and study costs, and to make advance payments or provide other satisfactory security for such costs”²¹⁷

An interconnection customer may also be required to post additional security of \$250,000 to the interconnecting transmission owner within fifteen (15) business days after receipt of the final LGIA if the interconnection customer does not provide reasonable evidence of site control.²¹⁸

- b. Please explain whether the Responding RTO's/ISO's OATT provides for transmission owners to apply the same ROE to network upgrades financed through unilateral TO Initial Funding that they are authorized by the Commission to earn on other transmission facilities. Please explain whether the Responding RTO's/ISO's OATT requires the same level of security on transmission facilities that are not interconnection-related network upgrades, and if the security level is different, what the security requirements are.*

Response to Question 3b:

The provisions described above in response to Question 3a apply to all interconnection-related network upgrades as well as elective transmission upgrades regardless of affiliation and who funds the projects. If a transmission owner elects to fund a network upgrade, the ROE applied to the network upgrade is the same as the return earned by the transmission owner on all other capital investments in transmission in ISO-NE, *i.e.*, the NETOs' Commission-approved ROE.

²¹⁶ *Id.*

²¹⁷ ISO-NE's OATT, Schedule 22, § 9.

²¹⁸ ISO-NE's OATT, Schedule 22, § 11.3.1.1.

- c. *Please explain whether the security requirement for unilateral TO Initial Funding lowers the risk that the transmission owner will not recover its initial investment in the network upgrades. As part of your response, please explain, if there are different security requirements for transmission facilities that are not interconnection-related network upgrades and the same ROE is applied to network upgrades financed through unilateral TO Initial Funding to other transmission facilities with different security requirements, why it is just and reasonable to apply the same ROE to network upgrade costs that have a security requirement post construction.*
- d. *Given that security provisions are intended to protect against potential non-payment by interconnection customers, please explain whether network upgrades financed through unilateral TO Initial Funding could be considered to have less risk, the same level of risk, or more risk than other transmission facilities that do not have similar security requirements.*
- e. *Please explain whether the amount and duration of these security requirements could result in increased costs to interconnection customers for network upgrades financed through unilateral TO Initial Funding relative to what transmission customers would pay for recovery of investment in transmission facilities through the transmission rate. Please explain why or why not. Also, please explain, if the security requirements do result in increased costs, how is recovery of those costs just and reasonable and not unduly discriminatory or preferential.*

Response to Questions 3c, 3d, and 3e:

The ISO-NE OATT provisions described above in response to Question 3a are modeled after the Commission’s *pro forma* provisions and critical to protect the NETOs and their network customers. Moreover, in approving the MISO Facility Study Agreement (“FSA”), the Commission specifically found the provision of security “is reasonable to protect transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under the FSA and the portion of the undepreciated costs would be borne by either the transmission owner or transmission service customers, or assigned to another interconnection customer.”²¹⁹

Notably, in approving the MISO FSA, the Commission did not find that the inclusion of a security requirement lowered the risks of the MISO Transmission Owners. Rather, the

²¹⁹ *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075, at P 32 (2020).

Commission explained that the ROE for the network upgrades and the security requirements addressed different risks. Specifically, the Commission found that:

[T]he security requirement under the *pro forma* FSA and the return on and of capital provided under Transmission Owner Initial Funding *each address a different risk faced by the transmission owner*. The rate of return available to transmission owners when they provide initial funding for network upgrades compensates them for business risk, such as lawsuits, reliability compliance obligations, and environmental and construction risks; in addition, it prevents transmission owners from operating a significant portion of their business on a non-profit basis and ensures that future capital can be attracted. In contrast, the requirement to post security under the *pro forma* FSA protects transmission owners from the risk that the transmission owner has constructed a network upgrade and an interconnection customer does not make its scheduled payments. As MISO Transmission Owners note, the security under the *pro forma* FSA is only for the capital invested in network upgrades and not for a return on that capital.²²⁰

The inclusion of a security requirement does not change the risk of the network upgrades compared to other transmission facilities. As Ms. Lapson explains, “the security requirements in generator interconnection agreements do not make the network upgrade facilities funded via TO Initial Funding less risky for the transmission owner than other rate base investments. In fact, the security provisions are designed to establish a level of cost recovery risk that is comparable to that which exists for the traditional utility rate base from the perspective of the transmission owner, while reducing an economic risk to other transmission customers.”²²¹ The security protects against generator defaults and is critical to protect network customers, the transmission owner and other interconnection customers from paying for the costs of the network upgrade if the interconnection customer defaults.²²²

The cost impacts of the security requirement will vary depending on the arrangement of the individual generator as discussed above. However, any concerns of increased costs do not

²²⁰ *Id.* at P 33.

²²¹ Lapson Testimony at 7.

²²² See *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075 at P 33.

outweigh the important protections that the security provides. Entities raised similar concerns of increased costs associated with the security requirements in the MISO FSA but the Commission was not persuaded.²²³ The Commission found the inclusion of the security requirement just and reasonable, and provides no reason to change that now.

4. *Please explain whether interconnection customers are able to obtain financing for network upgrades at lower or similar rates as compared to the effective financing rates applied to interconnection customers by the transmission owners that unilaterally elect TO Initial Funding.*²²⁴
5. *If interconnection customers can obtain financing at lower or similar rates as compared to transmission owners, please explain whether unilateral TO Initial Funding could result in an unjust and unreasonable increase in costs to interconnection customers interconnecting to the transmission owner's transmission system relative to the costs of interconnection customers who upfront fund network upgrades.*

Response to Questions 4 and 5:

Whether an interconnection customer is able to obtain financing for network upgrades at lower or similar rates as a transmission owner varies case-by-case because, as noted above in response to Question 1, the cost of capital varies among interconnection customers. Thus, any suggestion of increased capital cost will depend upon the specific generator and its particular market financing arrangement. Moreover, as explained above in response to Question 1, it is not appropriate to compare costs of generators and transmission owners. In her testimony, Ms. Lapson notes that “the question is based on an inappropriate analogy of the cost of funding for a limited purpose entity (interconnection customer) with no obligation to provide ongoing service to the public in comparison to the cost of capital to a utility with a universal public service obligation

²²³ *Id.*

²²⁴ To the extent any information submitted should be treated as privileged, please submit such information consistent with 18 C.F.R. § 388.112 (2023).

and an ongoing obligation to maintain and operate the network upgrade as well as the entire network.”²²⁵

Ms. Lapson describes the difference in capital structure requirements between interconnection customers and transmission owners, and that to the extent that interconnection customers are able to obtain lower cost financing, this is because they do not bear the burden to own and operate the facilities that transmission owners bear.²²⁶ And while the interconnection customer may lower its cost of capital it does so by transferring the risks of “reliable and safe” operations and service obligations to the transmission owner.²²⁷ This raises the “costs that must be borne by all other customers of the transmission owner. This results in an unfair shift of costs from the interconnection customer to other transmission customer.”²²⁸ Moreover, there is no precedent to support a just and reasonable determination on a particular rate based on whether a customer can finance the project more cheaply.

6. *Please explain whether the financing that interconnection customers obtain to upfront fund network upgrades includes a requirement to post security. If so, please indicate whether the security requirement impacts the interest rate applied to the loan. If so, please indicate if the security requirements are similar to those imposed by transmission owners who unilaterally elect TO Initial Funding.*

Response to Question 6:

The NETOs do not have access to information about the financing arrangements entered into by their interconnection customers. However, it is reasonable to assume that generators have some financing costs as capital is not free. As also described above in response to Questions 1, 4,

²²⁵ Lapson Affidavit at 7.

²²⁶ *Id.* at 8.

²²⁷ *Id.*

²²⁸ *Id.*

and 5 and in Ms. Lapson's testimony, the financing arrangements of such customers vary among customers. Regardless, as explained in response to Question 1, the comparison is meaningless.

7. *In the Responding RTO/ISO, please explain whether transmission owners have an economic incentive to engage in undue discrimination or preferential treatment by unilaterally electing TO Initial Funding for non-affiliated interconnection customers and by allowing Generator Upfront Funding for affiliated interconnection customers. Please explain the economic theory and logic behind your response.*

Response to Question 7:

As predominantly wires-only companies, the NETOs are in the business of providing transmission service in New England in a manner that is open, transparent, and not unduly discriminatory. Each of the NETOs has largely divested its generation in New England. This circumstance eliminates any incentive or ability of the NETOs to exercise vertical market power, undue discrimination, or preferential treatment.

In addition, the NETOs have transferred regional planning and operational control of their transmission assets to ISO-NE, an independent, not-for-profit entity designed to eliminate the potential for undue discrimination. Among other things, ISO-NE has and shall continue to (1) have extensive involvement in the interconnection of new generation and transmission facilities to the region's transmission grid; (2) coordinate the regional planning process for adding bulk transmission upgrades that, among other things, facilitate the interconnection of new generation and transmission; (3) analyze the reliability impact of proposed generation projects, including conducting the system impact study, and interconnection facilities study; and (4) model the planning and development of network upgrades and account for the same in its regional system plan providing a transparent reference of the enhancements and necessary improvements to the New England transmission system, the status of such projects, and their anticipated in-service dates. As a result, the NETOs have no economic incentive to engage in undue discrimination or

preferential treatment by unilaterally electing TO Initial Funding for non-affiliated interconnection customers and by allowing generator upfront funding for affiliated interconnection customers.

Unilateral election of TO Initial Funding for non-affiliated interconnection customers prevents undue discrimination or preferential treatment by treating interconnection of load and generation equally. The ability to elect TO Initial Funding helps prevent one class of customers, generators, to avoid paying the return on investment that is necessary to develop, license, own, and operate a transmission network while other customers pay a return on the network upgrades needed to provide them service. This avoidance of paying a return results in an economic market failure known as an externality where one class of participants (other transmission network customers) subsidizes the return on transmission assets for other participants (generators).

Another economic market failure known as moral hazard also exists since the cross-subsidy externality involves cross-subsidizing the return on investment, which is a compensation for risk. Without the ability to elect TO Initial Funding and commensurate ability to earn a return on network upgrades, those individuals (generators) have an incentive to change their behavior (the moral hazard) when other individuals (other customers) take on the risk by being solely responsible for paying for the transmission owner's return on investment.

8. *Please indicate whether concerns about the risk of undue discrimination or preferential treatment by transmission owners in their unilateral election of TO Initial Funding are largely alleviated by, partially alleviated by, or not alleviated by the Commission's open access transmission regulatory regime. Under that regime, transmission owners use publicly available pro forma interconnection-related agreements to build network upgrades for interconnection customers, transmission providers report the executed interconnection-related agreements in the Electric Quarterly Reports, and the transmission owner who unilaterally elects TO Initial Funding charges a rate regulated by the Commission to recover a return of and on the network upgrade capital costs. Please explain your response.*

Response to Question 8:

The entirety of the Commission's regulatory regime implementing the FPA and its regulations, including a number of rules and regulations binding the NETOs as well as relevant precedent, not to mention the Commission's broad enforcement penalty authority, is designed to prevent a public utility from engaging in undue discrimination for the benefit of its affiliates and to the detriment of non-affiliates. As also discussed above in Section III.B.e, the Commission has issued several rules providing numerous clear requirements and protocols to help prevent undue discrimination, including:

- Order No. 888,²²⁹ which was promulgated to prevent a transmission provider from discriminating against non-affiliates in connection with the provision of transmission service by requiring all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. Order No. 888 also required public utilities to functionally unbundle their generation and transmission service. Order No. 888 also promoted the voluntary formation of independent system operators to address the potential for undue discrimination in the provisions of transmission services.
- Order Nos. 2003²³⁰ and 2006,²³¹ which require all public utilities that own, control, or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting generating facilities.
- Order No. 890,²³² which was promulgated to build on Order No. 888 and further ensure that transmission services are provided to customers on a basis that is just and reasonable, and not unduly discriminatory or preferential. Order No. 890 strengthened the Commission's *pro forma* OATT by reducing opportunities for undue discrimination, facilitating the Commission's enforcement, and increasing transparency in the rules applicable to planning and use of the transmission system.

²²⁹ See Order No. 888, *supra* n.129.

²³⁰ See Order No. 2003, *supra* n.6.

²³¹ See Order No. 2006, *supra* n.6.

²³² See Order No. 890, *supra* n.137.

- Order No. 717,²³³ which established updated standards of conduct for public utilities to implement among their employees to best separate their transmission functions from their marketing functions. Order No. 717 thus helps prevent potential instances of discrimination of other market participants or undue preference toward one's own affiliates.
- Order No. 845,²³⁴ which amended the *pro forma* LGIP and LGIA to improve certainty, promote better information to help inform interconnection requirements and outcomes, enhance the interconnection process, and ensure that generator interconnection procedures remain just and reasonable and not unduly discriminatory or preferential.
- Order No. 2023,²³⁵ which was promulgated to help reduce interconnection queue backlogs for generation projects seeking to connect to the transmission system, improve certainty in interconnection processes, and ensure open access to the transmission system for new technologies.

Additionally, as a statutory backstop, interconnection customers have recourse under FPA Section 206 to seek a Commission finding that a transmission owner engaged in undue discrimination or preferential treatment. As such, there are extensive legal safeguards in place under the Commission's current open access regime that not only largely alleviate, but in fact prevent the potential for transmission owner discrimination against non-affiliated generation or preferential treatment of affiliates. There is no evidence that these safeguards have failed to prevent undue discrimination by the NETOs against interconnection customers.

9. *Please explain whether the interconnection customers' ability to challenge network upgrade costs, including the rate of return of and on network upgrade costs, in an FPA section 206 complaint before the Commission, provides sufficient protection to interconnection customers against the risk of undue discrimination or preferential treatment by transmission owners in their unilateral election of TO Initial Funding. Please explain your response.*
10. *Please explain whether the interconnection customers' ability to challenge network upgrade costs, including the rate of return of and on network upgrade costs, by requesting that the transmission provider file its interconnection agreement (or other interconnection-related agreement, as applicable) unexecuted provides sufficient protection to interconnection*

²³³ See Order No. 717, *supra* n.130.

²³⁴ See Order No. 845, *supra* n.138.

²³⁵ See Order No. 2023, *supra* n.14.

customers against the risk of undue discrimination or preferential treatment by transmission owners in their unilateral election of TO Initial Funding. Please explain your response.

Response to Questions 9 and 10:

Interconnection customers have the ability to challenge the rates, terms and conditions applicable to TO Initial Funding via a FPA Section 206 complaint or by requiring a NETO to justify an unexecuted interconnection agreement or related agreement by filing it at the Commission under FPA Section 205, a filing that an interconnection customer can protest. Other relief may be obtained by filing a Petition for Declaratory Order so that the Commission may resolve any legal uncertainty in connection with a TO Initial Funding arrangement.²³⁶ These are the same types of relief available to interconnection customers to resolve a wide range of other subject-matter disputes. Congress has determined that the procedures available under Sections 205 and 206 of the FPA amply protect customers against the risk of undue discrimination or preferential treatment. Relief by statute and the Commission's Regulations,²³⁷ together, include the express relief authorized by Congress.²³⁸ Protections to interconnection customers as authorized by Congress and administered by the Commission to ensure that rates, terms and conditions are just and reasonable, not unduly discriminatory or preferential, are exactly the legal protections Congress had in mind and are more than adequate to protect parties to a Commission jurisdictional agreement and funding arrangement.²³⁹

²³⁶ 18 C.F.R. § 385.207(a)(2).

²³⁷ See 18 C.F.R. § 385.206-207.

²³⁸ See Regulatory Fairness Act, Pub. L. No. 100-473 (1988).

²³⁹ *Municipal Light Boards of Reading and Wakefield, Mass v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (finding that the FPA's "primary aim is the protection of consumers from excessive rates and charges).

Not only are the interconnection customer's FPA Section 206 rights protected by statute, they are also reserved as a contractual right pursuant to Article 30.11²⁴⁰ and Article 12.12²⁴¹ of the ISO-NE and Commission *pro forma* LGIA and SGIA, respectively. The Commission has a history of adjudicating TO Initial Funding disputes initiated under Section 206²⁴² and in cases initiated via the filing of an unexecuted TO Initial Funding related agreement.²⁴³ In Order No. 845, the Commission endorsed the FPA Section 206 process as a means to resolving issues raised by interconnection customers particular to network upgrades.²⁴⁴

Additionally, there is no unique or unusual harm or undue burden imposed on an interconnection customer whose statutory option for relief is, in part, predicated on its success in a FPA Section 206 cause of action to effectuate a change to a rate, term or condition that is attendant to a TO Initial Funding mechanism. For starters, under a TO Initial Funding mechanism arrangement, the interconnecting transmission owner would provide the outlay of capital to construct the network upgrades required by the interconnection customer's generating facility project. Second, any money charged to and paid by the interconnection customer under a TO Initial Funding agreement would be subject to Commission-approved charges. An interconnection customer has the right to challenge such charges subject to refund pending the outcome of the

²⁴⁰ ISO-NE OATT, Schedule 22, app. 6, art. 30.11 ("Interconnection Customer shall have the right to make a unilateral filing with the Commission to modify this LGIA pursuant to section 206 or any other applicable provision of the Federal Power Act and the Commission's rules and regulations thereunder").

²⁴¹ ISO-NE OATT, Schedule 23, app. 6, art. 12.12 ("the Interconnection Customer shall have the right to make a unilateral filing with the Commission to modify this Agreement under any applicable provision of the Federal Power Act and the Commission's rules and regulations").

²⁴² See, e.g., *Otter Tail*, 151 FERC ¶ 61,220.

²⁴³ See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,224 (2014).

²⁴⁴ Order No. 845 at P 112 ("While we recognize that questions regarding what constitutes a stand alone network upgrade could lead to disputes, interconnection customers are free to seek dispute resolution on such questions and/or pursue a complaint under section 206 of the FPA.").

customer's FPA Section 206 complaint.²⁴⁵ Therefore, if the interconnection customer has a *prima facie* case, which is required under an FPA Section 206 undue discrimination claim,²⁴⁶ the risk on the interconnection customer of pursuing a complaint is *de minimis*. Indeed, if the interconnection customer prevails, overcollections are subject to refund, plus interest.²⁴⁷

An interconnection customer who elects to protest an unexecuted interconnection agreement filed at the Commission by a transmission provider pursuant to FPA Section 205 must establish issues of fact that call into question whether the Section 205 proposal is just and reasonable.²⁴⁸ If the Commission finds that the interconnection customer has raised issues of fact such that the record before it is insufficient to resolve the proceeding, the Commission typically accepts the jurisdictional agreement for filing, suspends it for a nominal period, subject to refunds, and establishes hearing and settlement procedures.²⁴⁹

Typically, the process before a settlement administrative law judge leads to a negotiated resolution between the parties. If a freely negotiated resolution between the parties is not possible, the proceeding may be fully adjudicated in a paper hearing or full evidentiary hearing under the

²⁴⁵ See 16 U.S.C. § 824e(b).

²⁴⁶ *Solar Energy Indus. Assoc. v. Midcontinent Indep. Sys. Operator, Inc.*, 185 FERC ¶ 61,186, at P 18 (2023) (finding that “SEIA has not established a prima facie case of undue discrimination and, thus, there is no shift in burden requiring MISO to come forward with an affirmative defense.”).

²⁴⁷ *Tenaska Alabama II Partners, L.P. v. Alabama Power Co.*, 118 FERC ¶ 61,037, at Ordering Paragraph (C) (2007).

²⁴⁸ See, e.g., *New England Power Co.*, 94 FERC ¶ 61,176 (2001) (finding that “RISEP has raised issues of fact that we cannot summarily decide based on the evidence before us. Our preliminary analysis indicates that the proposed service agreement between NEPCO and RISEP has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, we will accept the proposed service agreement for filing, suspend it for a nominal period, and make it effective December 22, 2000, subject to refund, and set the service agreement for hearing under section 205 of the FPA.”).

²⁴⁹ *Id.*

Commission's part 385 procedures.²⁵⁰ Any payments made by the customer under a jurisdictional agreement set for hearing and settlement procedures in the interim would be subject to refund. Interconnection customers possess the necessary opportunity to obtain relief of rates, terms and conditions of TO Initial Funding arrangements. Such a cause of action is no more uniquely situated than other FPA disputes that are adjudicated before the Commission. In summary, Congress via FPA Section 206 or the filing of a challengeable unexecuted interconnection agreement pursuant to FPA section 205 provides (1) interconnection customers the necessary tools to adjudicate rates such customers believe are unjust and unreasonable and thereby provides sufficient protection against any risk of undue discrimination or preferential treatment by transmission owners; (2) public utility transmission providers the necessary statutory protection to fend off meritless claims; and (3) the Commission with the necessary authority to resolve such disputes.

11. In the Responding RTO/ISO, please indicate whether transmission owners have engaged in undue discrimination or preferential treatment by electing unilateral TO Initial Funding for non-affiliated interconnection customers and by allowing Generator Upfront Funding for affiliated interconnection customers. Please provide detail.

Response to Question 11:

The NETOs have never engaged in undue discrimination or preferential treatment. No NETO to date has invoked the ISO-NE OATT's unilateral option of TO Initial Funding. Some of the NETOs, however, have had interconnection customers request the initial funding of network upgrades by the transmission owner in connection with the interconnection of certain generating facilities to the New England transmission system. To date, in the ISO-NE region, initial funding of interconnection upgrades by NETOs has been entirely in coordination with customers.

²⁵⁰ 18 C.F.R. Part 385.

Even if the NETOs at some future date elect to invoke the Commission's *pro forma* unilateral option of TO Initial Funding, it is important to note that the Commission has provided the NETOs this right via Article 11.3 and Article 5.2 of its *pro forma* LGIA and SGIA, respectively. The Commission has provided the same right to public utilities across the country following the Commission's *pro forma* OATT. There is a presumption that this right is just and reasonable because it is contained in the Commission's *pro forma* OATT.

Although the NETOs have not yet invoked their unilateral right to utilize TO Initial Funding, because of the influx of large quantities of generation in ISO-NE's interconnection queue and the numerosity of large-scale network upgrades expected as a result, the NETOs anticipate situations could arise where they might invoke TO Initial Funding for network upgrades caused by interconnections. Whether such interconnection is with a generator affiliate or non-affiliate, it makes little difference. The NETOs have an obligation to act in a manner that is not unduly discriminatory or preferential and consistent with the open access safeguards the Commission has established. The NETOs have also agreed to voluntarily join an RTO where they collaborate with ISO-NE to ensure a reliable transmission system and to grant open access to generation developers seeking to deliver their products to market.

Lastly, as discussed in detail in Section III.C, the NETOs, as regulated public utilities providing service under the FPA have a fundamental right long-recognized by the courts to earn a reasonable rate of return on all of the transmission investments they construct, own, or operate to provide jurisdictional service.

12. Please identify the transmission owners that own generation and/or have affiliates that own generation, the nameplate capacity (MW amount) of the transmission owners' owned generation and affiliated generation, and the percentage of generation in the Responding RTO's/ISO's footprint consisting of the transmission owners' owned generation and affiliated generation.

Response to Question 12:

The following NETOs own generation or have affiliates that own generation in ISO-NE:

- CL&P, NSTAR, and PSNH and affiliates: 201 MW²⁵¹
- CMP and UI and affiliates: 1,347 MW²⁵²
- New England Power Company and affiliates: 34.881 MW²⁵³
- Fitchburg Gas and Electric Light Company: 1.3 MW²⁵⁴

This represents a total of approximately 1,584.2 MW of generation owned by the NETOs and their affiliates. There is approximately 29,700 MW of generation in ISO-NE.²⁵⁵ Thus, the NETOs are affiliated with approximately 5.33 percent of the generation in ISO-NE.

²⁵¹ This number includes 131 MW for South Fork Wind, an offshore windfarm that became fully operational in March 2024. South Fork Wind is owned by a 50/50 joint venture between Orsted and Eversource Investment, an affiliate of CL&P, NSTAR and PSNH. On June 7, 2024, the Commission authorized a proposed transaction in Docket No. EC24-59 whereby Eversource Investment will divest of its indirect interest in South Fork Wind. The transaction is expected to close in Q3 of 2024. This number also includes 70 MW of solar generation owned by NSTAR, which NSTAR was authorized to construct and own pursuant to Massachusetts legislation. See MA G.L. c. 164 § 1A(f).

²⁵² This number includes 806 MW for Vineyard Wind, an offshore windfarm which is only partially constructed and will be 806 MW once completed. Avangrid Renewables, an affiliate of CMP and UI owns a 50% interest in Vineyard Wind. This number also include 200 MW each for GenConn Devon and GenConn Middletown, two natural gas units. UI owns a 50% share of GenConn Energy LLC, the owner of GenConn Devon and GenConn Middletown.

²⁵³ This total does not include the National Grid-owned 6 MW/48 MWh battery energy storage system paired to a 15 MW diesel generator on Nantucket, MA installed to support the reliability of the transmission system. Because these facilities are properly classified as transmission in accordance with a service agreement accepted by the Commission, these facilities are not reported to the Commission as generation and do not implicate the undue discrimination concerns discussed in the Order to Show Cause.

²⁵⁴ This number represents a 1.3 MW solar facility that is interconnected only to Unitil's distribution system.

²⁵⁵ ISO-NE, Resource Mix, <https://www.iso-ne.com/about/key-stats/resource-mix>.

13. Please detail the protections the Responding RTO's/ISO's OATT provides against the potential for undue discrimination or preferential treatment by transmission owners in their election of which network upgrades the transmission owners will fund (i.e., TO Initial Funding). Explain whether these protections are adequate to prevent undue discrimination or preferential treatment by transmission owners.
- a. Please describe any information that the Responding RTO's/ISO's OATT requires transmission owners to post on the Responding RTO's/ISO's website on network upgrades financed through TO Initial Funding and network upgrades financed through Generator Upfront Funding, including, but not limited to, the cost of the network upgrade and whether the interconnection customer is an affiliate of the transmission owner.
 - b. Please describe any criteria in the Responding RTO's/ISO's OATT that is used by transmission owners for determining how they will choose to elect TO Initial Funding for network upgrades.
 - c. Please explain whether the Responding RTO's/ISO's OATT requires posting of the financing option for all network upgrades so interested parties can determine which network upgrades that transmission owners elected, and did not elect, to fund through TO Initial Funding.
 - d. Please explain if there are any other protections in the Responding RTO's/ISO's OATT against the exercise of undue discrimination outside of transparency measures and/or criteria for electing to use TO Initial Funding to finance certain network upgrades.
 - e. Please explain how the Commission or an interested party, i.e., an interconnection customer, could use the information, which is required to be publicly disclosed by the Responding RTO's/ISO's OATT, to: (1) determine the facts and circumstances as to why a transmission owner exercised the option for TO Initial Funding of network upgrades; and (2) determine whether a transmission owner is exercising the option for TO Initial Funding of network upgrades in an unduly discriminatory or preferential manner among interconnection customers.

Response to Question 13:

As discussed above in response to Question 2, the interconnection process administered by ISO-NE includes extensive transparency measures, including several opportunities for the interconnection customer to assess and discuss proposed network upgrades. The TO Initial Funding Option in Article 11.3 of ISO-NE's *pro forma* LGIA is, in all material respects, identical and limited to the provision in the Commission's *pro forma* LGIA. The ISO-NE OATT thus does not contain formalized procedures or transparency measures specific to a transmission owner's

decision to elect to use TO Initial Funding to finance network upgrades. Indeed, because the NETOs have not elected to fund interconnection-related network upgrades pursuant to Article 11.3, there has been no need for such formalized procedures or transparency measures as described in Question 13. If a transmission owner were to elect to fund a network upgrade, that information would be publicly available because all LGIAs and SGIAs are posted on the ISO-NE's website.²⁵⁶ To the extent there is stakeholder interest in the future, the NETOs would not oppose reasonable procedures and transparency measures consistent with those developed in other RTOs/ISOs.

14. Please explain if undue discrimination is mitigated where transmission owners have divested their generation assets in the Responding RTO/ISO.

- a. Please explain what percentage of interconnection requests in the interconnection queue of the Responding RTO/ISO have been submitted by transmission owners or their affiliates that are building generation interconnecting to the transmission owners' own transmission facilities.*

Response to Question 14a:

As noted above in response to Question 7, as predominantly wires-only companies, the NETOs are in the business of providing transmission service in New England in a manner that is open, transparent, and not unduly discriminatory. Each of the NETOs has largely divested its generation in New England. This circumstance eliminates any incentive of the NETOs or ability of the NETOs to exercise vertical market power, undue discrimination, or preferential treatment.

According to the ISO-NE Generator Interconnection Queue report,²⁵⁷ as of September 2024, there are 246 active, FERC jurisdictional projects in the ISO-NE queue. None of the

²⁵⁶ ISO-NE, Interconnection Agreements Related Materials, <https://www.iso-ne.com/system-planning/interconnection-service/interconnection-agreements>.

²⁵⁷ ISO-NE, Generator Interconnection Queue, <https://irtt.iso-ne.com/reports/external>.

interconnection requests in the ISO-NE interconnection queue have been submitted by a NETO or an affiliate that is building generation interconnecting to the NETO's own transmission facilities.

15. Please explain whether the risks associated with owning, operating, and maintaining network upgrades are already incorporated into, i.e., "baked into," the transmission owner's Commission-approved ROEs, such that transmission owners are already compensated for these alleged risks through applying the Commission-approved ROE to the net plant value of transmission assets that do not include Generator Upfront Funded network upgrades. Please explain why or why not.

Response to Question 15:

As explained in Ms. Lapson's testimony, the ROEs the Commission accepts for transmission-owning public utilities are designed to compensate for, among other things, the risks of constructing, owning, and operating facilities that are used to provide services subject to the Commission's jurisdiction under the FPA.²⁵⁸ The Commission's ROE methodology as it applies to the NETOs has remained uncertain since the Commission has not yet issued a substantive order on an ROE proceeding affecting the NETOs' ROE that was remanded to the Commission by the D.C. Circuit in *Emera Maine* in 2017.²⁵⁹ For purposes of this response, the NETOs assume that the Commission will continue to determine the NETOs' ROE through some combination of the following four methodologies: the Discounted Cash Flow method ("DCF"), the Capital Asset Pricing Model ("CAPM"), the Risk Premium method, and the Expected Earnings approach. None of these methods will adjust the NETOs' allowed ROE upward to account for the fact that the Commission is excluding a growing portion of the assets they construct, own, or operate to provide jurisdictional transmission service from the rate base on which the NETOs are allowed to earn a return.

²⁵⁸ Lapson Testimony at 8-9.

²⁵⁹ *Emera Maine*, 854 F.3d 9.

For example, the Commission’s method for selecting members of the “comparable risk” proxy group do not distinguish between those utilities where the Commission allows an ROE covering the entire set of assets owned and operated by the utility and other utilities (all of which are in ISOs and RTOs) where the Commission either has excluded or proposes to exclude a portion of their assets from earning a reasonable return. The Commission’s ROE methodology ultimately relies on this proxy group. As such, the risks associated with owning, operating, and maintaining network upgrades are not and have never been “baked into” the transmission owner’s Commission-approved ROEs for utilities where the Commission deprives the transmission owner of earning an ROE on all the assets it uses to provide service.

The D.C. Circuit has expressed great skepticism with the proposition that the risks of depriving a public utility of a return on a portion of its assets is justifiable because the risks of such an exclusion are baked into the ROE of that utility, stating “[w]e therefore think that FERC inadequately considered Petitioners’ argument that all costs, and risks, are not baked in—that, in fact, shareholders are forced to accept incremental exposure to loss with no corresponding benefit.”²⁶⁰

As Ms. Lapson explains, the Commission’s ROE methodology does not permit an ROE to be “stretched” to compensate for risks incurred in owning and operating assets outside of rate base without depriving the transmission owner of a portion of its Commission approved ROE.²⁶¹ Indeed, the stretching would result in a taking of NETO property by depriving them of rightful returns.²⁶² Such an inappropriate expropriation will over time only grow in significance

²⁶⁰ *Ameren*, 880 F.3d at 580-81 (citation omitted).

²⁶¹ Lapson Testimony at 12.

²⁶² *Id.*

considering the increasing need of network upgrades to interconnect new generating facilities and storage.²⁶³

The Commission provides neither explanation nor support for how such a “stretching” could occur. Indeed, the absurdity of the Commission’s position is highlighted by the following hypothetical: under the Commission’s theory, it could deprive a public utility of an ROE on 90 percent of the assets used to provide jurisdictional service, and the ROE on the remaining 10 percent of assets would have the resulting risks “baked in” and would “stretch” to compensate the utility for all risks of providing service.

16. Addressing a similar dispute regarding the funding of network upgrades in the NYISO region, the Commission explained that “the Commission calculates a utility’s return on equity based on the risk profile of the enterprise as a whole.”²⁶⁴ Please explain whether the inability of the transmission owners to include network upgrades in their rate base impacts the transmission owners’ credit ratings due to increased enterprise-wide risk, which could affect the composition of the transmission owners’ proxy groups that are used to determine ROEs. In addition, please explain if there are any features of the mix of transmission owners in the Responding RTO/ISO or other factors that would prevent the proxy groups chosen via the existing ROE methodology from reflecting enterprise-wide risks.

Response to Question 16:

In her testimony, Ms. Lapson explains that there is no basis for the contention that the credit ratings of the NETOs will increase if the Commission eliminates the *pro forma* right to TO Initial Funding such that the resulting proxy group will produce an ROE that fully compensates the NETOs for the risks of owning and operating network upgrades funded by interconnection

²⁶³ See Divatia Affidavit at 3.

²⁶⁴ NYTO Complaint Order, 176 FERC ¶ 61,149 at PP 59 n.127, 60 (“When setting a just and reasonable return on equity for a utility, the Commission will typically construct a proxy group of utilities that were given similar credit risk ratings by a rating agency as the utility being reviewed. The proxy group utilities are then used to create an upper and lower limit on the zone of reasonableness for the return on equity that may be approved for the utility under review. As a result, if a utility has its risk profile downgraded then its proxy group will change accordingly and so will the return on equity zone of reasonableness.”).

customers.²⁶⁵ As Ms. Lapson explains, the Commission’s “enterprise-wide risk” standard is based on the faulty premise that the Commission’s ROE methodology “accurately captures the risks of owning and operating specific network upgrades and will automatically adjust the zone of reasonable ROEs to capture and compensate for changing risks of a transmission owner as a result of adding more network upgrades to its system.”²⁶⁶ This is simply not the case. The Commission’s proxy group methodology is simply not designed to be nor is it capable of the precision necessary to capture the risks of individual facilities.²⁶⁷ Ms. Lapson identifies several flaws in the assumption that the NYTO’s risk profile for its enterprise as a whole account for the risks of network upgrades. Significantly, the proxy groups selected in the Commission’s ROE methodology cannot precisely capture enterprise-wide risks, as the Commission suggested in the NYTO Complaint Order. Specifically, Ms. Lapson explains that companies in the proxy group by necessity are companies that have traded equity securities, and few if any are solely electric transmission companies.²⁶⁸ Ms. Lapson also states that because only companies with listed equity securities are eligible to be included in the proxy group, most company groups are made up primarily of holding companies that have a wide range of activities, including electric and gas distribution, and power generation.²⁶⁹ Moreover, the varying business portfolios of the holding companies in the proxy group create a disparity of businesses and exposures. These various factors introduce randomness into the proxy group formation process.²⁷⁰

²⁶⁵ Lapson Testimony at 13.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 15.

²⁶⁸ *Id.* at 13.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 14.

Ms. Lapson also explains that the Commission’s proxy group company methodology relies heavily on the action of a credit rating agency to evaluate the transmission owner’s credit risk profile, which determines the proxy group to which a transmission owner is assigned.²⁷¹ Ms. Lapson states that the enterprise-wide risk theory assumes that the evolving risks of a transmission owner will be “accurately gauged and adjusted through the proxy group mechanism, thus automatically capturing the changing risks caused by the incremental addition of network upgrades.”²⁷² Ms. Lapson further explains that this is not the case because a credit rating agency does not establish credit ratings that identify the risks of an electric transmission network or any particular facility on that network; instead, rating agencies identify and perform credit analyses for the purpose of predicting the likelihood of default.²⁷³ She explains that default predictions lag substantially behind the evolving enterprise-wide risks that affect the transmission network business. In fact, the processes and criteria used by crediting rating agencies to predict risk are “more likely to obscure the identification of changing or evolving risks affecting electric transmission networks or individual facilities on those networks.”²⁷⁴ Thus, they are not able to reflect specific risks affecting the enterprise such as the risks associated with owning and operating network upgrades. Rather, the Commission’s ROE methodology “will obscure and delay recognition of increasing uncompensated obligations resulting from the rapid growth of network upgrades.”²⁷⁵

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 15.

²⁷⁵ *Id.* at 17.

In advancing this “enterprise-wide” ratemaking standard, the Commission proposes to adopt a radical new interpretation of the Commission’s ratemaking authority under the FPA that is legally flawed and problematic. This interpretation could be applied to any individual transmission or wholesale power sales service provided by a public utility under the FPA, allowing a customer to claim a right to finance the investments associated with these jurisdictional transactions and thereby deny the public utility any opportunity to earn a return. It would effectively permit the Commission to set allowed returns for these services at any level (even zero), so long as the utility is providing some services at rates where it earns a return sufficient to maintain its financial integrity. This is contrary to decades of precedent.

The Supreme Court’s decision in *Hope* explicitly prohibits setting rates that do not offer the utility a reasonable return on capital. As the Supreme Court explained:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.²⁷⁶

The Commission focusses on the “financial integrity” aspect of the standard, ignoring the other requirements of *Hope* – that an allowed ROE be sufficient to provide revenue for not only operating expenses but also for the capital costs of the business and that the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. Nothing in *Hope* suggests that the Commission could compel a transmission owner to operate a part of its system on a non-profit basis so long as that directive could be implemented without fatal damage to the financial integrity of the public utility.

²⁷⁶ *Hope*, 320 U.S. at 603 (citations omitted)

17. In the Responding RTO/ISO, please estimate the percentage of the costs of interconnection-related network upgrades in relation to transmission owners' current aggregate rate base for the transmission system, including all underlying assumptions and calculations. If the costs of interconnection-related network upgrades represent an increasing portion of the transmission owners' overall transmission systems, please provide a similar estimate for the percentage of the costs of interconnection-related network upgrades in relation to the transmission owner's projected aggregate rate base for the transmission system, including all underlying assumptions and calculations.

Response to Question 17:

Eversource has calculated that the current cumulative total of network upgrades in relation to the total transmission rate base of the Eversource Companies is approximately 0.88 percent. To arrive at this number, Eversource divided the Eversource Companies' estimated cumulative cost of interconnection-related network upgrades (\$95.5 million) by the total transmission rate base of the Eversource Companies (\$10.8 billion) anticipated for 2024. Since 2021, this percentage has grown by approximately 0.3%. Eversource anticipates this increase to continue and potentially accelerate in light of changes to the interconnection process under Order No. 2023 and the significant network upgrades required to accommodate offshore wind projects.

CMP has calculated that the current percentage of the costs of interconnection-related plant in relation to transmission rate base is approximately 3.8 percent. To arrive at this number, CMP divided Interconnection Plant in Service (\$97,670,797) against Total Transmission Plant in Service (\$2,564,723,057). CMP currently has over 7,700 MW of queued generation and elective transmission upgrades in the ISO-NE interconnection queue, and it is expected that the percentage of cost of interconnection-related plant to total transmission plant will increase due to high generator interest in interconnection to the CMP system. However, CMP is unable to estimate dollars because cost estimates for necessary network upgrades have not yet been performed, and the queue is expected to change materially as ISO-NE's interconnection process transitions to the new Order No. 2023 compliant process.

UI has calculated that the current percentage of the costs of interconnection-related plant in relation to transmission rate base is approximately 0.8 percent. To arrive at this number, UI divided Interconnection Plant in Service (\$8,530,008) against Total Transmission Plant in Service (\$1,071,451,333).

National Grid has calculated that the current percentage of the costs of interconnection-related network upgrades in relation to transmission rate base is approximately 2 percent and growing. To arrive at this number, National Grid divided NEP's Interconnection Plant in Service (\$72,403,824.31) against Total NEP Transmission Plant in Service (\$3,624,809,787.00).

Versant Power estimates that the current percentage of the costs of interconnection-related network upgrades in relation to transmission rate base is well under 1 percent.

Rhode Island Energy and Unitil currently do not have any interconnection-related network upgrade cost in transmission rate base.

18. Please identify any risks the transmission owner has associated with owning, operating, and maintaining network upgrades. Please explain those risks. Also, please explain whether any such risks are development financing risks or are in addition to, or independent of, development financing risks.

Response to Question 18:

As explained in Ms. Lapson's testimony, network upgrades are no different than other transmission facilities and transmission owners face both ongoing operational and safety risks as well as financial risks associated with owning and operating network upgrades.²⁷⁷ These risks are in addition to any development financing risks. Whether the network upgrade assets are funded by the NETO or the interconnection customer, the network upgrades are operated and maintained

²⁷⁷ Lapson Testimony at 17.

by the NETO's personnel who manage and maintain the rest of the transmission system and are subject to similar risks and obligations.

Ms. Lapson identifies the following ongoing operational and safety risks related to the maintenance and daily operations of high-voltage transmission equipment and substations:²⁷⁸

1. Emergency Response: When any element of that system is on outage, the added network upgrade equipment creates additional risks and complexities that can affect the entire transmission system. The transmission owner has an ongoing obligation for emergency response, and in emergencies or outages it faces added risks and complexities due to the presence of the network upgrade facilities as a part of the total network.
2. Service Outages and Coordination: Installing and integrating interconnection equipment to a transmission owner's transmission system may require service outages of existing transmission equipment. The transmission owner must manage all such service outages and ensure that the outage does not interfere with the reliable provision of service or other planned outages. Any flaw in coordination could produce outages for other customers, thereby harming the transmission owner's reputation, and may entangle the transmission owner in litigation, investigation, penalties, or fines.
3. Environmental Liabilities: The transmission owner is exposed to ongoing environmental liabilities, including soil or ground water contamination, pre-existing contamination at sites at which the interconnection equipment is located, and retrofitting or conforming equipment to evolving environmental mandates.
4. Extreme Weather: Finally, severe weather events and changing climate situations can damage or destroy transmission interconnection equipment, resulting in burdens and liabilities for the transmission owner.

In his affidavit, Mr. Divatia confirms that Eversource, like the other NETOs, faces these risks and also discusses additional risks associated with reliability and cybersecurity compliance, including the risk of significant penalties associated with a violation of the North American Electric Reliability Corporation ("NERC") reliability standards, which are not recoverable in rates.²⁷⁹

With regard to financial risks, Ms. Lapson explains that "the transmission owner is burdened by the obligation to bear these operational risks and exposures without any profit relating

²⁷⁸ *Id.* at 18.

²⁷⁹ Divatia Affidavit at 7-8.

to network upgrade assets that are not included in rate base.”²⁸⁰ As Ms. Lapson confirms, if the Commission removes the option for the NETOs to fund network upgrades, the NETOs will have no compensation for undertaking these costs and exposures. They would then be forced to operate a part of their network at zero ROE, thus increasing their overall financial risk. She notes that “[i]t is highly unusual in our business environment for an enterprise to be conscripted into providing service on a not-for-profit basis. Investors have the option to invest capital in other business sectors and industries where there is an opportunity to earn a profit or to curtail services that are unprofitable.”²⁸¹

19. Please explain whether it is possible to value in monetary terms the increase in risk that a transmission owner could be exposed to when adding network upgrades to its system. Please provide that monetary value and explain and justify the method used to calculate the value.

Response to Question 19:

It is not possible to value in monetary terms the increase in risk that a transmission owner could be exposed to when adding network upgrades to its system. In *Ameren*, the court explained, risks are “contingent possibilities of future adverse effects,” which can be described only in “hypothetical terms.”²⁸² However, this does not mean that risks do not exist. Significantly, the court did not require the MISO Transmission Owners to quantify the risks in monetary terms. Instead, because of the hypothetical nature of risks, *Ameren* found sufficient the “specific examples” of the risks that the MISO Transmission Owners incur in connection with owning and operating network upgrades.²⁸³ As Ms. Lapson states, network upgrades are similar to other

²⁸⁰ Lapson Testimony at 19.

²⁸¹ *Id.*

²⁸² *Ameren*, 880 F.3d at 581 n.14 (“risks – which are contingent possibilities of future adverse events – must be described in hypothetical terms” and “Petitioners did offer specific examples to support the general argument” regarding the risks and uncompensated costs imposed upon the MISO Transmission Owners).

²⁸³ *Id.*

transmission assets yet “the Commission has never based its compensation for the operational and business risks of owning all other transmission facilities upon a monetary valuation of the individual business risks and operational exposures attendant upon all other transmission facilities.”²⁸⁴

Nevertheless, Ms. Lapson considered whether the commercial insurance market could provide pricing for the segregated risks and liability exposures related to owning and operating network upgrades.²⁸⁵ Specifically, she reviewed two types of relevant insurance products, liability insurance and property insurance, that a transmission owner may purchase to transfer risks.²⁸⁶ Liability insurance covers the cost to reimburse third parties for damage claims as well as third parties’ business interruptions and consequential damages.²⁸⁷ Because liability insurance covers the entire cost of the business, it is difficult to separate costs for transmission facilities, let alone specific transmission facilities from other insurance costs.²⁸⁸ Moreover, it has become increasingly difficult to secure necessary insurance as premiums have risen and exclusions are growing, thus increasing exposure.²⁸⁹ Property insurance covers the cost of damage to the owner’s property and replacement. When assessing property insurance for transmission, insurers use a metric of the replacement cost of the assets. Thus, as the cost of assets increase, so does the assessed risk.²⁹⁰

²⁸⁴ Lapson Testimony at 19.

²⁸⁵ *Id.* at 20.

²⁸⁶ *Id.* at 20-21.

²⁸⁷ *Id.* at 20.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 21.

Based on how commercial insurers measure these products, Ms. Lapson concludes that network upgrades increase risk exposure. Underwriting for liability insurance for transmission owners is based on the volume of energy transported on a system, thus as volume increases, so does the assessed risk.²⁹¹ As Ms. Lapson explains, “the commercial insurance marketplace does not provide a means for calculating the monetary value of the risks of owning and operating network upgrades,” but ROE is an established methodology for compensating such risks.²⁹²

20. The TO Initial Funding provisions in the Responding RTO's/ISO's OATT provide for transmission owners to earn a return of and on the capital costs of network upgrades financed through TO Initial Funding, which transmission owners claim will result in proper compensation for the risks associated with owning, operating, and maintaining those facilities consistent with the manner in which they are compensated for owning, operating, and maintaining other transmission facilities on their systems.

a. Assuming for the purposes of this question that the alleged risks are not already incorporated into the transmission owners' Commission-approved ROEs that are applied to transmission facilities in rate base that do not include network upgrades, explain why incorporating the capital costs of the network upgrades that transmission owners own, operate, and maintain into transmission owners' rate base, such that transmission owners' Commission-approved ROEs are applied to those network upgrade capital costs while security is also posted on such network upgrade capital costs, would result in appropriate compensation for these alleged risks.

Response to Question 20a:

Network upgrades are no different than other transmission facilities and, thus, applying the Commission-approved ROEs to these assets is just and reasonable. Indeed, the Commission's longstanding practice has been to roll in the costs of all network facilities, including network upgrades, on an integrated transmission system without regard to the particular purpose for which

²⁹¹ *Id.*

²⁹² *Id.* at 21.

any individual transmission facility has been constructed.²⁹³ The Commission should thus continue to find it just and reasonable to use the ROE for network upgrades that is used to calculate the revenue requirement for any other transmission facilities on the transmission owner's system.

Ms. Lapson's testimony confirms that "[t]he collection of security on network upgrades as well as an ROE on those same network upgrades if funded by the transmission owner under the TO Initial Funding option is appropriate."²⁹⁴ She goes on to explain that "[i]f we accept the appropriateness of the ROE authorized by the Commission for assets that are valued in the transmission owner's rate base, then that is also the ROE that should be applied to network upgrades if those assets are funded pursuant to TO Initial Funding. No other ROE would be appropriate, because the risks and obligations would be the same."²⁹⁵ The presence of security does not change this fact because the ultimate beneficiary of the security arrangements is not the transmission owner, but other transmission customers.

- b. Explain whether there are costs associated with these alleged risks that are appropriate to include in the recovery of the transmission owners' Commission-approved ROEs instead of including such costs in rates charged to interconnection customers or transmission customers.*

Response to Question 20b:

As an initial matter, this question fails to recognize the difficulty in determining the costs of those particular risks. See response to Question 19. Moreover, the assertion that the transmission owner's recovery should be limited to some subset of the total capital cost of the upgrade is inconsistent with the Commission's ratemaking principles. Network upgrades are no

²⁹³ Order No. 2003-A at P 657; Order No. 845-A at P 19 (stating that "Order No. 2003 established the Order No. 2003 crediting policy, a mechanism that explicitly allows transmission providers to earn a return of, and on the costs of network upgrades.").

²⁹⁴ Lapson Testimony at 22.

²⁹⁵ *Id.*

different than any other transmission facility owned and operated by the transmission owner and therefore, there is no difference to distinguish in the compensation that the transmission owner receives for owning and operating those facilities for the benefits of its customers.

Ms. Lapson explains that neither compensation via expense reimbursement nor a management fee could adequately compensate for the risks of owning and operating network upgrades. A reimbursement methodology would require the risk and liability exposure to be quantified, but as explained in response to Question 19, this is a very difficult task. Ms. Lapson explains, however, that even if it were possible to quantify the risks, compensation via reimbursement would lead to contentious disputes about the method used to calculate charges, and new precedent would need to be developed to address such disputes.²⁹⁶ ROE, in contrast, already has a substantial body of legal and regulatory precedent.

As Ms. Lapson explains, a risk management fee would also be untenable. A risk management fee would likely be subject to challenges and could easily be reduced by future Commission orders because management fees lack the legal protections that *Hope* and *Bluefield* provide to returns on equity.²⁹⁷ These protections are meaningful to investors and without them, a management fee cannot incentivize the same level of investment.²⁹⁸

- c. If there are costs associated with these alleged risks associated with network upgrades, explain whether transmission owners already recover those costs through O&M or other charges to interconnection customers or transmission customers.*

Response to Question 20c:

Ms. Lapson confirms that the recovery of operating expenses does not provide any compensation for the operating and business risks discussed in response to Question 18. She

²⁹⁶ *Id.* at 23.

²⁹⁷ *Id.* at 23-24.

²⁹⁸ *Id.* at 24.

explains that “[c]ompensation for the risks of network upgrades is not recovered in O&M charges pursuant to the FERC Uniform System of Accounts, while realized costs such as penalties are not recoverable at all.”²⁹⁹ At best, cost recovery is neutral, providing no return or profit. The NETOs do not recover any other fees that compensate for such risks and exposures.³⁰⁰ It is fundamentally prejudicial and discriminatory to require a private enterprise to operate a non-profit business for the benefit of the single class of generator interconnection customers.

- d. If there are uncompensated risks, explain whether transmission owners can buy additional insurance to offset any or all of these risks and recover the costs for those insurance premiums from interconnection customers as a means of receiving reasonable compensation for owning, operating, and maintaining the network upgrades financed through TO Initial Funding, instead of earning a return of and on the capital costs of the network upgrades.*

Response to Question 20d:

Ms. Lapson’s response to Question 19 discusses the difficulty of obtaining insurance coverage that covers all or most of the liability exposures and reputational risks associated with network upgrades, or with the full range of transmission assets. Many risks are not covered or not fully covered by policies available in the commercial insurance market. Moreover, as Ms. Lapson notes, many transmission owners do not seek to fully insure all risks of their transmission systems because the cost of doing so would be imprudent and pose a significant financial burden to other transmission customers.³⁰¹

- e. Explain whether the interconnection customer’s security requirement lowers the risk of a loss to the transmission owner and, if so, if it is appropriate to consider that reduced risk*

²⁹⁹ *Id.* at 24.

³⁰⁰ Some NETOs have O&M carrying charges that are assessed on the network upgrade investments paid for by interconnection customers. These O&M carrying charges may include recovery of a return on investment. However, this return on investment is on transmission ratebase excluding net transmission plant and associated ADIT, not a return on the network upgrade investment paid for by the interconnection customer. As such, these O&M carrying charges do not compensate the transmission owner for the risk of owning network upgrades.

³⁰¹ *Id.* at 24-25.

of loss in the ROE that is applied by the transmission owner to earn a return of and on the capital costs of network upgrades financed through TO Initial Funding.

Response to Question 20e:

As Ms. Lapson confirms, the security provisions of the ISO-NE OATT do not provide compensation for the operational and business risks related to owning and operating network upgrade facilities.³⁰² In any event, in approving the MISO FSA, the Commission specifically found that the provision of security “is reasonable to protect transmission owner and transmission service customers from the risk that an interconnection customer will stop making payments under the FSA and the portion of the undepreciated costs would be borne by either the transmission owner or transmission service customers, or assigned to another interconnection customer.”³⁰³ The Commission did not find that the inclusion of a security requirement lowered the risks of the MISO Transmission Owners. Rather, the Commission explained that the ROE for the network upgrades and the security requirements addressed different risks.

21. Certain transmission owners point to the increasing number of network upgrades needed on their transmission systems to support the argument that TO Initial Funding is necessary to ensure that transmission owners can attract new capital that supports the financial integrity of their companies.

- a. To the extent that a transmission owner’s Commission-approved ROE for its rate base may be adjusted upward if a transmission owner takes on materially more enterprise-wide risk associated with network upgrades that transmission owners do not fund and earn a rate of return on, please explain why the upward adjustment in the ROE does or does not enable the transmission owner to continue to attract capital in a manner consistent with Hope and Bluefield.*

Response to Question 21a:

As explained in response to Question 16, it is extremely unlikely that the use of the proxy group methodology will result in timely or discerning adjustments to the enterprise-wide ROE.

³⁰² *Id.* at 25.

³⁰³ *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075 at P 32.

Ms. Lapson observes that “[t]he mechanism of the proxy group methodology and its underlying reliance upon credit ratings to discern changes in the risk of transmission companies that are not stand-alone entities is unlikely to capture and identify such risks either precisely or promptly.”³⁰⁴ Moreover, it would be inconsistent with the protections set forth in *Hope* and *Bluefield* to compensate for risks after the adverse effects are already suffered. As Ms. Lapson explains, this has real consequences to the transmission owner’s ability to attract capital because “investors in the equity of the NETOs cannot be assured that they would be compensated prospectively and not in retrospect for the underlying increase in risks associated with growing amounts of network upgrades, unless the upgrade investment is incorporated in rate base, where investors can look to the protections provided by *Hope* and *Bluefield*.”³⁰⁵

- b. *Explain whether, and if so, to what extent, the inability of transmission owners to earn a return of and on the capital costs of network upgrades that they currently own and operate has impacted their ability to attract new capital.*
- c. *Explain whether, and if so, to what extent and on what basis, transmission owners expect their inability to earn a return of and on the capital costs of network upgrades that they own, operate, and maintain will impact their ability to attract new capital in the future.*

Response to Questions 21b and c:

In *Ameren*, the court held that preventing transmission owners from earning a return on network upgrades “attack[s] their very business model and thereby *create[s] a risk that new capital investment will be deterred*.”³⁰⁶ The court noted that it is “undisputable that when portions of a business are unprofitable, it detracts from the attractiveness to investors of the business as a whole.”³⁰⁷ The court instructed the Commission to “explain how investors could be expected to

³⁰⁴ Lapson Testimony at 25.

³⁰⁵ *Id.*

³⁰⁶ *Ameren*, 880 F.3 at 581 (emphasis added).

³⁰⁷ *Id.*

underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return.”³⁰⁸ On remand, the Commission could not,³⁰⁹ and it has not provided further evidence in this proceeding.

Consistent with the court’s observation in *Ameren*, Ms. Lapson testifies that, while “[i]n the past, there has been minimal or no awareness among investment professionals or [credit rating agencies] regarding the existence of transmission assets owned and operated by the NETOs on which the NETOs earn no return[,] . . . [o]ver the coming years, as demand for interconnection continues to expand and assuming that the NETOs do not have the option to provide TO Initial Funding of network upgrades and earn a return on their resulting rate base assets, then the transmission owners’ overall return on all of the transmission facilities that are recorded in their rate base would be diluted by the ‘stretching’ of the ROE, as discussed in [her] response to Question 15.”³¹⁰ Ms. Lapson concludes that “[t]his will adversely affect [transmission owners’] ability to attract capital on reasonable terms, contrary to the general ratemaking standards of *Hope* and *Bluefield*.”³¹¹

Ms. Lapson further observes that the important lessons that utilities learned from the implementation of the Public Utility Regulatory Policies Act (“PURPA”) and the requirement that load-serving electric utilities must contract to buy power from Qualifying Facilities (“QFs”) demonstrate the importance of addressing these issues before there is general awareness among capital market participants.³¹² As Ms. Lapson explains, utilities were concerned about the impact

³⁰⁸ *Id.*

³⁰⁹ *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158 at P 31.

³¹⁰ Lapson Testimony at 26.

³¹¹ *Id.*

³¹² *Id.* at 27.

of PURPA on their financial stability when PURPA was initially enacted. However, for the first few years, there was no noticeable impact on the credit or financial standing of any electric utilities as power purchasers. This changed drastically for some utilities as utilities with disproportionately large impacts suffered declines in their credit ratings and the value of their equity was depressed. Ms. Lapson notes that one affiliate of the NETOs incurred a downrating in its credit rating and incurred unnecessary financial pressure by the excessive burden of its QF contracts.³¹³ Based on these observations, Ms. Lapson identifies three lessons learned:

1. Laws or regulatory mandates that place obligations and burdens on unwilling utilities can have unforeseen economic impact;
2. Adverse consequences may not be visible initially, when the quantity of such obligations is small, but may develop as the amounts in question rise;
3. The financial community's analysis of financial obligations can change over time. Very large obligations lead investors and [credit rating agencies] (and sometimes financial accounting standards setters) to evolve new methodologies that acknowledge burdens that were previously unacknowledged.

Applying these lessons here, Ms. Lapson concludes "that as the amount of network upgrades increases, investors will become more focused on this and see it as a problem."³¹⁴

22. Assuming, for the purposes of this question, that the Commission finds that provisions for transmission owners to unilaterally elect TO Initial Funding, which allow the transmission owner to recover a return on and of the capital costs of network upgrades, imposes unjust and unreasonable costs on interconnection customers, and the Commission also finds that transmission owners have uncompensated risks associated with owning, operating, and maintaining interconnection-related network upgrades, explain whether there is a replacement rate that would allow transmission owners to be compensated for those risks.

- a. Please explain how your proposed replacement rate would be calculated.*
- b. Please explain whether, and if so how, your proposed replacement rate would compensate transmission owners for the risks of owning, operating, and maintaining network upgrades.*
- c. Please explain whether, and if so how, your proposed replacement rate would address the concerns raised by the Ameren Court that denying transmission owners an opportunity to*

³¹³ *Id.*

³¹⁴ *Id.* at 28.

*earn a return on the capital costs of network upgrades leaves them with uncompensated risks (e.g., incremental operational risks of new facilities, compliance with reliability standards, liability for insurance deductibles, litigation stemming from personal injury, environmental, and reliability claims), and requires them to operate, at least in part, on a non-profit basis (i.e., modifying the transmission owners' business model creates risk that new capital investment will be deterred).*³¹⁵

- d. Please explain whether, and if so how, your proposed replacement rate ensures that transmission owners are able to attract new capital investment pursuant to Hope and Bluefield.*
- e. Please explain whether your proposed replacement rate includes a requirement for the interconnection customer to post security on the undepreciated plant value of assigned network upgrades. If so, please explain whether or not the security requirement lowers the risk of a loss to the transmission owner and, if it does lower such risk, how that reduced risk is accounted for in your proposed replacement rate. If your proposed replacement rate does not account for reduced risk due to the security requirement, please explain why there is no need to account for the security requirement impacts on the risk of non-recovery.*
- f. Please explain whether the proposed replacement rate would impact costs for interconnection customers as compared to the unilateral election of TO Initial Funding.*

Response to Question 22:

The NETOs maintain their position that the well-established right to elect TO Initial Funding is an appropriate mechanism for ensuring transmission owners are compensated for the risks associated with owning, operating, and maintaining interconnection-related network upgrades and oppose changes to that framework. As stated in Section III.A, the Order to Show Cause is not an appropriate proceeding for unilaterally revoking this right.

The complicated ratemaking nuances associated with revocation of TO Initial Funding require greater contemplation and broader involvement than can be accomplished in a show cause proceeding. Revoking TO Initial Funding renders transmission owners non-profit providers of generator interconnection services, and is blatantly inconsistent with the Commission's statutory

³¹⁵ *Ameren*, 880 F.3d at 580-582.

duty to ensure that ratemaking provides transmission owners the opportunity to recover their prudently incurred costs plus a reasonable rate of return.³¹⁶

Any replacement rate for the existing, just, and reasonable TO Initial Funding model would, at the least, need to comport with the Supreme Court's findings in *Hope*:

From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.³¹⁷

Even setting aside the concerns laid about above with the Order to Show Cause process, there are significant issues of Commission policy that should be discussed in an open forum comprised of diverse stakeholders before a replacement rate can be imposed on the NETOs. Further, revoking TO Initial Funding in favor of some entirely unidentified replacement rate in this proceeding or otherwise would raise grave concerns about (1) the Commission's adherence to the cost-causation/beneficiary pays principle that already strongly favors generators, and (2) the Commission's insistence on subsidizing generator revenues with transmission owners' returns.

23. *Assuming, for the purposes of this question, that the Commission finds that provisions for the unilateral election of TO Initial Funding imposes unjust and unreasonable costs on interconnection customers, and the Commission also finds that transmission owners have uncompensated risks associated with owning, operating, and maintaining interconnection-related network upgrades, please explain whether a management fee for the network upgrades would allow transmission owners to be compensated for those risks. If it would allow for compensation of such risks, please answer the following:*

a. *Please explain how such a management fee could be calculated.*

³¹⁶ See, e.g., *AEP Power Mktg., Inc.*, 108 FERC ¶ 61,026 at P 152 (“[The Commission’s] ratemaking policy is designed to provide for recovery of prudently incurred costs plus a reasonable return on investment”); Order No. 888-A at 12,414 (“[T]he Commission satisfies its statutory obligation under the FPA by allowing utilities an opportunity to recover their prudently incurred costs plus a reasonable rate of return.”).

³¹⁷ *Hope*, 320 U.S. at 603 (citations omitted).

- b. *Please explain how such a management fee would compensate transmission owners for the risks of owning, operating, and maintaining network upgrades.*
- c. *Please explain how such a management fee would address the concerns raised by the Ameren Court that denying transmission owners an opportunity to earn a return on the capital costs of network upgrades leaves them with uncompensated risks (e.g., incremental operational risks of new facilities, compliance with reliability standards, liability for insurance deductibles, litigation stemming from personal injury, environmental, and reliability claims), and requires them to operate, at least in part, on a non-profit basis (i.e., modifying the transmission owners' business model creates risk that new capital investment will be deterred).³¹⁸*
- d. *Please explain how such a management fee ensures that transmission owners are able to attract new capital investment pursuant to Hope and Bluefield.*
- e. *Please explain whether such a replacement rate would include a requirement for the interconnection customer to post security on any portion of the management fee. If so, please explain whether or not the security requirement lowers the risk of a loss to the transmission owner and, if it does lower such risk, how that reduced risk is accounted for in your proposed management fee. If such a replacement rate does not account for reduced risk due to the security requirement, please explain why there is no need to account for the security requirement impacts on the risk of non-recovery.*
- f. *Please explain whether such a management fee would impact costs for interconnection customers as compared to the unilateral election of TO Initial Funding.*

Response to Question 23:

Any management fee for network upgrades as proposed by the Commission in this question would be inconsistent with *Hope* and *Bluefield* and the Commission's statutory duty to ensure that ratemaking provides transmission owners the opportunity to recover their prudently incurred costs plus a reasonable rate of return. Moreover, as Ms. Lapson explains in her testimony, a management fee is not a viable substitute for compensation via an ROE.³¹⁹ A management fee carries none of the same legal protections as rates of return, and would certainly face immense legal challenge from interconnection customers.³²⁰ In the face of legal challenge, the Commission would be able

³¹⁸ *Id.*

³¹⁹ Lapson Testimony at 29-31.

³²⁰ *Id.* at 30-31.

to reduce the management fee or direct that the management fee be treated as a credit reducing the revenue requirement authorized to compensate for a transmission owner's investment in rate base. As Ms. Lapson notes, such a bait and switch has already happened in some states with the removal of the incentive ROE adder for RTO participation.³²¹

V. CONCLUSION

For the reasons discussed herein, the NETOs request that the Commission find that the ISO-NE OATT remains just and reasonable and not unduly discriminatory or preferential.

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³²¹ *Id.* at 29.

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September 11, 2024

ATTACHMENT A

PREPARED TESTIMONY OF ELLEN LAPSON, CFA

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc.

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Docket No. EL24-83-000

**PREPARED TESTIMONY OF ELLEN LAPSON, CFA
ON BEHALF OF
THE INDICATED NEW ENGLAND TRANSMISSION OWNERS**

September 11, 2024

INTRODUCTION

Q: WHAT IS YOUR NAME, OCCUPATION, AND BUSINESS ADDRESS?

A: My name is Ellen Lapson, CFA. I am a Principal in Lapson Advisory and a Partner of Trade Resources Analytics, LLC. My address is 370 Riverside Dr., New York, NY 10025.

Q: HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY IN THIS DOCKET?

A: No.

Q: HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION (“FERC” OR “COMMISSION”)?

A: Yes. A list of matters in which I have appeared as an expert financial witness before this Commission and in other jurisdictions appears in Exhibit EL-1.

Q: WHAT ARE YOUR QUALIFICATIONS AS AN EXPERT FINANCIAL WITNESS?

A: I have over fifty years of professional experience in public utility finance, starting as an equity analyst specializing in the securities of electric, gas and telephone utilities. Subsequently for nineteen years as a corporate banker and investment banker, I structured and executed financing transactions for utility and project finance infrastructure companies at a predecessor bank of J.P. Morgan Chase. I then worked at Fitch Ratings for seventeen years where I managed a team of analysts to provide credit ratings in the electricity, natural gas, and project finance sectors. Since founding Lapson Advisory in January 2012, I have participated as an expert financial witness in matters before the Commission, in state utility jurisdictions, and a U.S. federal court. Lapson Advisory provides independent consulting services relating to the financial strength of utilities and infrastructure companies and advises client utility companies on access to capital and debt markets. Typical topics are utility financial resilience, solvency, and capital structure. I earned an MBA with an emphasis in Accounting from NYU Stern School of Business and a Chartered Financial Analyst (“CFA”) charter. A summary of my professional qualifications, consulting assignments and regulatory proceedings appears in Exhibit EL-1.

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A: I have been asked by counsel for the Indicated New England Transmission Owners (collectively, “NETOs” and each a “NETO”)¹ to provide testimony in support of their responses to certain questions posed by the Commission in Appendix A to the Order to Show Cause in this proceeding issued on June 13, 2024 (the “Order to Show Cause”). Specifically, I have been asked to comment on matters regarding the reactions of key financial market participants, including equity and fixed income investors and credit rating agencies (“CRAs”), to risks and returns as posed by the Commission in Question Nos. 1, 3c and d, 5, 15, 16, 18, 19, 20, 21, and 23 of the Order to Show Cause.

My responses to these questions include the following views:

The operational risks and exposures associated with owning and operating interconnection-related network upgrades are the same as those associated with owning and operating other transmission assets, regardless of whether the network upgrades are funded by the transmission owner or the interconnection customer. The operational risks and liability exposures are real and of growing significance, even if they cannot readily be quantified in monetary terms. Adding network upgrades to a transmission owner’s network to serve interconnection customers increases the operational risk exposures and liabilities of the transmission system.

Also, recovering a reimbursement of operating expenses does not provide any return or compensation to a transmission owner for bearing the risks and potential liabilities associated with owning and operating those assets. Commercial insurance products available to transmission owners do not offset all or most of the risks of asset ownership and operation. Security provisions required of interconnection customers when network upgrades are funded by transmission owners do not compensate a transmission owner for bearing operational risks and liability exposures nor reduce or offset those risks.

¹ The NETOs, for purposes of this proceeding, are: Eversource Energy Service Company on behalf of The Connecticut Light and Power Company, NSTAR Electric Company, and Public Service Company of New Hampshire; Central Maine Power Company; The United Illuminating Company; New England Power Company d/b/a National Grid; The Narragansett Electric Company d/b/a Rhode Island Energy; Unitil Energy Systems, Inc.; and Versant Power.

While the methodology that has been used by the Commission to set return on equity (“ROE”) is a recognized and well-established way to compensate transmission owners for the risks of owning and operating assets that are in rate base, it is not finely tuned to expand the ROE to reflect the increase in risk related to particular assets or classes of assets such as network upgrades, that are not in rate base. Furthermore, the Commission’s hypothesis of “enterprise-wide risk” places excessive reliance on the role of CRAs to signal changes in a transmission owner’s risk, but that is inconsistent with the practices and focus of CRAs. At best it would capture changes in the risk profile of an electric transmission division within a larger, combined enterprise only in a few extreme cases and after a long delay and deterioration. Crucially, the constitutional protections against takings long enshrined in *Hope* and *Bluefield* operate prospectively, *i.e.*, at the time the rate is set, and not after the adverse effects are suffered.²

Finally, investors rely upon the protections of *Hope* and *Bluefield* regarding the determination of return on investment. If any approach other than a return on rate base were used—such as a management fee or other types of compensation—those protections would be lost.

RESPONSES TO APPENDIX A QUESTIONS

Question 1: Please explain whether the Responding RTO’s/ISO’s OATT provisions for transmission owners to unilaterally elect TO Initial Funding increase costs of interconnection service without corresponding improvements to that service.

Response to Question 1:

See response to Question 5.

² *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (“*Hope*”); *Bluefield Water Works & Improvements Co. v. Pub. Serv. Comm’n*, 262 U.S. 679 (1923) (“*Bluefield*”).

Question 3: Please identify and describe all security provisions applicable to the interconnection customer in the Responding RTO's/ISO's OATT concerning costs for network upgrades financed by unilateral TO Initial Funding.

c. Please explain whether the security requirement for unilateral TO Initial Funding lowers the risk that the transmission owner will not recover its initial investment in the network upgrades. As part of your response, please explain, if there are different security requirements for transmission facilities that are not interconnection-related network upgrades and the same ROE is applied to network upgrades financed through unilateral TO Initial Funding to other transmission facilities with different security requirements, why it is just and reasonable to apply the same ROE to network upgrade costs that have a security requirement post construction.

Response to Question 3c:

The security requirement for unilateral TO Initial Funding does lower the risk that the transmission owner will not recover its initial investment in the network upgrades as the first-order consequence of the default of an interconnection customer.³ However, the question presumes that the security requirement is intended to provide protection *only* to transmission owners, but that is not the ultimate purpose for the security requirement. The security requirement provides for a source of payment for the capital costs of the network upgrades if the interconnection customer defaults. Without the security to backstop payment for the network upgrades, if the interconnection customer defaults and does not pay its share of network upgrade costs, the costs would be reallocated through the ISO-NE formula rate to other users of the network, that is, wholly or largely to wholesale, and ultimately retail customers. Therefore, the ultimate risk of interconnection customer default is borne by other users of the transmission system. The security provisions protect the transmission owners and transmission customers from bearing the costs that would be allocated to the transmission customers if the interconnection customer fails.

It should be noted that the security provided by interconnection customers does not cover salient risks borne principally by the NETOs and their shareholders, including costs associated

³ *Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,075, at P 33 (2020), *order on reh'g*, 173 FERC ¶ 61,037, at PP 20-23 (2020) (“the purpose of security is to provide recourse where a party is unable to pay”).

with property damage or destruction of the network upgrade, and liability to third parties, including third-party damages from wildfire and extreme weather events and cyber risks.⁴

In summary, the ISO-NE security provisions primarily protect transmission service customers (including retail customers) from part of the cost increase (*i.e.*, the return of capital) that would result from the failure of an interconnection customer, and do not protect the NETOs from risks associated with property and casualty damage or third-party liability. Consequently, there is no reason to expect any difference in the cost of equity capital to a NETO because of the presence or absence of security for the initial investment amount.

d. Given that security provisions are intended to protect against potential non-payment by interconnection customers, please explain whether network upgrades financed through unilateral TO Initial Funding could be considered to have less risk, the same level of risk, or more risk than other transmission facilities that do not have similar security requirements.

Response to Question 3d:

Security requirements for interconnection customers lower the risk of non-payment of the capital investment (return of investment) by interconnection customers, but they do not provide security for the return on capital, nor do they address the operational, safety, and business risks that are borne by the transmission owner and compensated through the transmission owner's authorized ROE.

Although it may appear that the beneficiary of an interconnection customer's security provision is the NETO, the ultimate beneficiaries are the other customers of the transmission system. Absent the security provision, in the event of the default of an interconnection customer, the residual asset value of network upgrades undertaken for the benefit of the defaulted interconnection customer would be allocated via the ISO-NE formula along with other net plant investments to other transmission customers. Thus, the presence of security provisions safeguards the interests of the other transmission customers from an improper subsidy to the interconnection customer.

⁴ Even if a transmission owner purchases commercial insurance covering property damage or third-party liability claims, there is significant residual risk of the transmission system that is not covered, either because it is uninsurable, self-insured or subject to high deductibles and limits.

Therefore, the security requirements in generator interconnection agreements do not make the network upgrade facilities funded via TO Initial Funding less risky for the transmission owner than other rate base investments. In fact, the security provisions are designed to establish a level of cost recovery risk that is comparable to that which exists for the traditional utility rate base from the perspective of the transmission owner, while reducing an economic risk to other transmission customers.

Question 5: If interconnection customers can obtain financing at lower or similar rates as compared to transmission owners, please explain whether unilateral TO Initial Funding could result in an unjust and unreasonable increase in costs to interconnection customers interconnecting to the transmission owner's transmission system relative to the costs of interconnection customers who upfront fund network upgrades.

Response to Question 5:

First, I would note that TO Initial Funding does not always result in an increase in costs for the interconnection customer. The cost of capital varies among interconnection customers, and one cannot assume that the costs for interconnection service will be higher if the transmission owner elects to fund the network upgrades. Consistent with this observation, I understand that, in some circumstances, NETO interconnection customers have preferred the TO Initial Funding approach. But even if the transmission owner's cost of capital appears to be higher, the question is based on an inappropriate analogy of the cost of funding for a limited purpose entity (interconnection customer) with no obligation to provide ongoing service to the public in comparison to the cost of capital to a utility with a universal public service obligation and an ongoing obligation to maintain and operate the network upgrade as well as the entire network.

The public service utility must maintain a capital structure including a layer of equity capital that will allow the Transmission Owner to cover operational liabilities and risks, to meet all its current and future obligations, to raise capital in the financial markets regularly, to expand, repair, own and operate the full network. In contrast, the capital structure of the limited purpose entity (that is, the interconnection customer) is determined solely by the amount of debt leverage that the financial marketplace makes available, without regard to the ongoing ability to deliver reliable utility service to all of the transmission owners' customers, to the ISO-New England network, or to the public in general.

Further, the interconnection customer, as a limited purpose entity who does not contribute to the transmission owner's return on the capital needed to construct, operate, and maintain network upgrades, seeks to shift the burden of all future requirements for reliability and system compliance improvements to the transmission owner. Any claim that an interconnection customer can finance network upgrades at a lower cost is a faulty comparison because the cost of funding to a limited purpose entity with no ongoing obligation to universally serve the public does not recognize the full cost of ongoing service and is not an appropriate comparison for the cost of capital determined by the Commission in a cost of capital proceeding. The interconnection customer may lower its own costs to its advantage by funding the network upgrades on a stand-alone basis, but it creates a revenue deficiency for the transmission owner by transferring the ongoing risks of reliable and safe operations and obligations of service to the transmission owner. In short, the interconnection customer grabs a "bargain" at the expense of the transmission owner and all other transmission customers. Eventually that will raise the costs that must be borne by all other customers of the transmission owner. This results in an unfair shift of costs from the interconnection customer to other transmission customers.⁵

Question 15: Please explain whether the risks associated with owning, operating, and maintaining network upgrades are already incorporated into, i.e., "baked into," the transmission owner's Commission-approved ROEs, such that transmission owners are already compensated for these alleged risks through applying the Commission-approved ROE to the net plant value of transmission assets that do not include Generator Upfront Funded network upgrades. Please explain why or why not.

Response to Question 15:

The risks to transmission owners associated with owning, operating, and maintaining network upgrades that would be funded by interconnection customers are *not* already incorporated into, i.e., "baked into," the transmission owners' Commission-approved ROEs. A transmission owner receives no compensation for the risks associated with owning, operating, and maintaining network upgrades built for the interconnection customer when the network upgrades have no value as net plant in rate base. The Commission's approved ROEs are designed to compensate for the

⁵ Furthermore, the Commission rejected this argument in *Midcontinent Independent System Operator, Inc.*, 172 FERC ¶ 61,248, P 27 (2020) (holding that even if increased costs to interconnection customers are true, this does not outweigh the transmission owner's right to provide funding and to earn a return, as recognized by the D.C. Circuit in *Ameren*).

risks and burdens associated with owning and operating the transmission assets that are included in a NETO's rate base. The multiplication of an approved ROE times the applicable equity ratio times rate base produces a certain amount of compensation. That amount of compensation is intended to cover the risks of the assets included in a NETO's rate base. If interconnection-related network upgrades are not included in the NETO rate base, then under the current policies the transmission owners receive no incremental or intrinsic compensation for risks produced from incorporating the network upgrade into their transmission network. Questions as to whether there are risks to the transmission owner of owning and operating network upgrades are also at odds with long-standing Commission precedent that these upgrades are part of an integrated grid.⁶

The premise of the question is that the quantum of compensation produced by the existing Commission-approved ROE when applied to the assets that are in a NETO's rate base magically takes on the ability to compensate for the responsibilities and risks that result from activity and operations required to reliably and safely operate interconnection customer funded network upgrades. The Commission's existing ROE methodology, using a group of proxy utilities and market-derived data for those utilities, does not exercise any special procedures to produce compensation fine-tuned to assign a higher ROE to compensate for the risks of network upgrades not included in rate base.

If the quantum of compensation determined through the Commission's cost of capital proceeding is made to compensate for responsibilities and risks that would not exist but for the expansion of the transmission owner's network to include the network upgrades, then the compensation the NETO receives on its other rate base assets is diluted or reduced by the resultant "stretching" of the quantum of compensation to cover not only rate-based assets but also network upgrades that do not appear as rate base for the transmission owner. The consequence is that the NETO will receive inadequate compensation for its equity investment in its rate-based transmission assets as a result of that "stretching." In other words, when this happens, the

⁶ See, e.g., *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103, at PP 21, 65 (2003) ("Most improvements to the Transmission System, including Network Upgrades, benefit all transmission customers" and "Facilities beyond the Point of Interconnection are part of the Transmission Provider's Transmission System and benefit all users."), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 at P 585 (2004) ("the Commission has long held that the Transmission System is a cohesive, integrated network that operates as a single piece of equipment, and that network facilities are not 'sole use' facilities but facilities that benefit all Transmission Customers").

compensation the transmission owner receives from its other rate base assets is compromised and the transmission owner is deprived of the full compensation for the equity investment it made in its rate-based transmission assets.

From the perspective of an investor or potential investor in the equity or debt of a NETO, non-rate-base network upgrades clearly expose the transmission owner to the likelihood of incremental risks similar to the risks of network assets that are included in rate base, but without an attendant increase in compensation, that is, an asymmetric risk profile. Without the NETO's option to self-fund (TO Initial Funding), a transmission owner that owns and operates network upgrades receives, at best, the recovery of operating and maintenance expenses primarily from their network customers and not from the interconnection customers. Expense recovery alone is no better than a neutral outcome and provides no compensation. Nonetheless, once these enhancements are made to the transmission network, the NETO is obliged to operate the network upgrades and take on responsibilities and obligations, including safeguarding against cyber risks and other damage to the public (such as wildfire and extreme weather risk) and the obligation to operate the entire network, including all upgrades and attachments, efficiently and reliably. Under some circumstances, the transmission owner may be subject to the denial of expense recovery or even subject to penalties, despite having received no compensation for taking on those responsibilities and exposures. Thus, the NETO whose network is subject to the installation of network upgrades that are needed only because of an interconnection customer's project takes on the risks of those facilities with no reward for doing so; there is no compensation or upside, but there is downside exposure. However, if the transmission owner funds the network upgrade and earns the Commission-authorized return on the investment, the transmission owner will then have the opportunity to earn a return commensurate with the risks and responsibilities of operating the entire network, with rights that are protected by the principles of *Hope* and *Bluefield*.

If not currently visible, the resultant shortfall in compensation from "stretching" will become increasingly recognizable over time as a taking of the NETO's property as increasing amounts of network upgrades add to the complexity of the network and occasion more uncompensated responsibilities for the NETO. The lack of compensation for some assets will also cause the investment community to increase the cost of capital provided to the electric transmission sector, raising rates not only for all customers whose rates are calculated based on the transmission

owners' cost of capital, but also for retail rate customers because the same capital markets supply both jurisdictions.

Table 1: “Stretching” ROE, Hypothetical Case

Assumptions:

Authorized Transmission ROE **10.57%**

Equity % Capital **50%**

Scenarios

	Wire Co. 12/31/2023	A	B	C
Transmission assets, net of depreciation, \$ millions	\$ 10,000			
Value of generator-funded network upgrades as % of rate base transmission assets		1%	5%	10%
Equivalent value, \$ millions		\$ 100	\$ 500	\$ 1,000
Adjusted Wire Co. transmission assets, including value of generator-funded network upgrades, \$ millions		\$ 10,100	\$ 10,500	\$ 11,000
Equity component	50%			
Wire Co. pre-tax return based on authorized transmission ROE, \$ millions	\$ 529	\$ 529	\$ 529	\$ 529
Wire Co. effective ROE, “stretched” to compensate for generator-funded network upgrades		10.47%	10.07%	9.61%
Shortfall in effective ROE after stretching	-	-0.10%	-0.50%	-0.96%

Hypothetical scenarios for a transmission owner, “Wire Co”, are shown in Table 1 above. The three scenarios show the effect on ROE if the proportion of generator-funded network upgrades relative to total transmission assets is 1% of rate base transmission assets, 5%, or 10%.

In each scenario, the dollar value of profit recoverable by the transmission owner is the same, based upon its authorized ROE times the equity supporting rate base transmission assets. In

Scenario A, the effective ROE on rate base assets is modestly affected, but in Scenarios B and C, the effective ROE is diluted by approximately 50 basis points and 96 basis points respectively.

The net effect is that the real, effective equity return that the NETO earns on its transmission facilities will be lower than the allowed return approved by the Commission as just and reasonable. This may in turn negatively affect the NETO's ability to attract capital on reasonable terms, contrary to the requirements of *Hope* and *Bluefield*.

In conclusion, when the Commission's authorized cost of equity capital is applied to the value of rate-based transmission assets, the result is a quantum of compensation that cannot be stretched to cover the asymmetrical downside risk produced by the obligations of owning and operating network upgrades that have no asset value in the regulatory books of the NETO. In other words, as the owner of the generator-funded network upgrades that appear in rate base at a zero value, the NETO would incur operational and ownership risk without any compensation for those risks, resulting in asymmetrical risks with no rewards. The rationale of enterprise-wide risk and ROE "stretching" that the questionnaire suggests assumes that the mechanism used to determine enterprise-wide risk in rate proceedings is all-seeing and all-knowing, which in my professional experience is not the case.

Question 16: Addressing a similar dispute regarding the funding of network upgrades in the NYISO region, the Commission explained that "the Commission calculates a utility's return on equity based on the risk profile of the enterprise as a whole."⁷ Please explain whether the inability of the transmission owners to include network upgrades in their rate base impacts the transmission owners' credit ratings due to increased enterprise-wide risk, which could affect the composition of the transmission owners' proxy groups that are used to determine ROEs. In addition, please explain if there are any features of the mix of transmission owners in the Responding RTO/ISO or other factors that would prevent the proxy groups chosen via the existing ROE methodology from reflecting enterprise-wide risks.

Response to Question 16:

The question points to the Commission's recent NYTO Complaint Order in which the Commission asserts that its formula for setting the cost of equity capital for a transmission-owning

⁷ NYTO Complaint Order, 176 FERC ¶ 61,149, at PP 59 n.127, 60 (2021) ("When setting a just and reasonable return on equity for a utility, the Commission will typically construct a proxy group of utilities that were given similar credit risk ratings by a rating agency as the utility being reviewed. The proxy group utilities are then used to create an upper and lower limit on the zone of reasonableness for the return on

company is capable of accurately determining the return needed to compensate a transmission owner for the risks of its “enterprise as a whole” and that these enterprise risks should already capture the risks associated with network upgrades. The Commission’s existing ROE methodology is based on a number of models, including the DCF and CAPM which use transmission owner credit ratings to select proxy companies of equivalent risk as matches for the transmission owner’s risk profile and establish an ROE based on the proxy group.

Based on my professional experience, I do not share the Commission’s confidence that this methodology accurately captures the risks of owning and operating specific network upgrades and will automatically adjust the zone of reasonable ROEs to capture and compensate for changing risks of a transmission owner as a result of adding more network upgrades to its system.

The proxy group-based ROE approach used by the Commission is not designed to or capable of capturing the risk of individual transmission facilities or even a group of transmission facilities of a particular type. The methodology is shaped by several substitutions and approximations for convenience and ease of administration. However, such substitutions and approximations, as described below, tend to homogenize the data, promote time lags and cross-subsidization, and blur distinctions. The following discussion reviews the numerous flaws or fallacies in the Commission’s “enterprise-wide risk” policy espoused in the NYTO Complaint Order, as applied to network upgrades.

1. First, the companies in the proxy group by necessity are companies that have traded equity securities, and as a result few if any are solely electric transmission companies. It is impractical to form proxy groups that are entirely comprised of companies solely in the electric transmission business; the data set would be far too small to have statistical validity. In practice, many or most proxy groups contain no pure interstate electric transmission entities, or only a minority.
2. Because only companies with listed equity securities are eligible as proxies, most proxy company groups are made up primarily of holding companies that have a wide range of activities, including electric and gas distribution, power generation, and possibly energy marketing and wholesaling. Some proxies own interstate electric transmission in varying proportions, while some may own none or very little, but in many cases the interstate transmission business is no more than a small fraction of the total proxy company.

equity that may be approved for the utility under review. As a result, if a utility has its risk profile downgraded then its proxy group will change accordingly and so will the return on equity zone of reasonableness.”).

3. The varying business portfolios of the holding companies in the proxy group create a disparity of businesses and exposures. Most proxy companies own state jurisdictional electric or gas distribution businesses, and some own integrated power generation or possibly competitive power generation, renewable energy, or wholesale or retail energy marketing businesses.
4. The components of a proxy group may be altered on any specific occasion by the exclusion of one company or another for a host of reasons, such as a pending merger transaction or other events that could potentially cause market price distortions. This introduces randomness into proxy group formation.

In particular, the proxy group methodology that the Commission proposes be applied as part of an enterprise-wide risk ratemaking standard to capture the risks associated with network upgrades falls short. It does so due in large part to its underlying reliance upon the action of a CRA to judge the transmission owner's credit risk profile, which is purported to automatically shift the assignment of the subject transmission owner into the appropriate proxy group. The enterprise risk theory in the NYTO Complaint Order assumes that evolving risks of a transmission network and more specifically, a subset of facilities on that network, will be accurately gauged and adjusted through the proxy group mechanism, thus automatically capturing the changing risks caused by the incremental addition of network upgrades. The Commission's reliance upon credit ratings for this purpose is unjustified. Based upon my professional experience and the CRAs' published methodologies, the target audience for the CRAs' ratings are credit counterparties, bondholders and lenders; the CRAs' primary objective is to predict the likelihood of default on rated debt instruments.⁸ When an electric transmission business is just one division of a larger corporate entity with several or many businesses, the credit rating does not focus on the specific risks of the transmission network or classes of facilities on that network. Furthermore, predictions of default affecting holders of bonds and notes will lag substantially behind the evolving enterprise-wide risks that affect a transmission network business. The lag could be at least two years for a company focused solely on the electric transmission business but may be materially

⁸ The National Association of Insurance Commissioners ("NAIC"), "Rating Agencies", Update May 27, 2021, states: "Credit rating agencies were founded on the premise they provide informed, expert and neutral assessment of the likelihood of default on or the expected loss of debt (issued by entities, such as corporations, governments, ...) to assist investors compensate for the information asymmetries they face in the market." (https://content.naic.org/cipr_topics/topic_rating_agencies.htm).

longer if the electric transmission business is small in proportion to the rated entity's assets and cash flow.⁹

Also, CRAs' rating procedures incorporate assumptions of cross-subsidization across business units within a corporation or ownership group, which is antithetical to the principle of rate setting in cost-of-service regulation. For example, consider a hypothetical entity (very similar to many of the proxy companies in electric ROE proceedings) that derives 85% of its cash flow from one or several state-regulated electric operating subsidiaries and gas distribution subsidiaries and 15% from Commission-regulated electric transmission activities. CRAs apply financial benchmarks to the financial performance of the rated entity as a whole, using financial ratios to compare operating cash flow from all sources in relation to the entity's total outstanding debt or to the related interest expense. While this approach may match the needs of bond investors for predictions of default, it does not suit the context of the utility cost-of-service rate-setting paradigm; it presumes cross-subsidy across different business units within the corporate entity and offers no precision about the cash flow or risks and return of the transmission facilities and transmission business. The processes and criteria used by CRAs are more likely to obscure the identification of changing or evolving risks affecting electric transmission networks or individual facilities on those networks as explained below.

1. Not all transmission owners subject to the Commission's jurisdiction are stand-alone companies that do business solely as owners of interstate electric transmission network and have individual credit ratings.
2. In many cases, the regulated transmission owner is a division within a company or an affiliate within a utility holding company structure, and it does not have its own individual credit rating. In such cases, the corporate entity with a published credit rating is a utility company that derives the majority or great majority of its cash flow from businesses other than the electric transmission business. The businesses may include state jurisdictional electric and gas distribution businesses, integrated electric utilities that own rate-regulated

⁹ See my response to Questions 21b and c regarding the very slow recognition by CRAs and the financial market of the financial problems created by the Public Utility Regulatory Policy Act of 1978 ("PURPA"). After the passage of PURPA, the financial performance of utilities showed minimal impact until 1983-1985, with increasing financial impacts by 1986 or 1987. The adverse financial effects became very clear for those electric utilities with the greatest exposure to PURPA contracts by 1987-1992, at which time there were credit rating downgrades of the most exposed utilities. The lag in that example was at least nine years from the passage of the Act and five or six years after the start of deliveries of meaningful amounts of electricity under PURPA contracts.

power generation, or competitive wholesale power generators or renewable energy companies. For convenience, I will refer to such a company as a combined enterprise.

3. In a combined enterprise as described above, the credit rating determined for the enterprise does not focus upon a close examination of the changing risks within the electric transmission business. In fact, it would require a massive shift in the credit fundamentals of a transmission business that comprises 15% or even 20% of a combined enterprise to stimulate even as much as a one-notch change in the credit rating of the combined enterprise.
4. CRAs such as Moody's, S&P Global Ratings, and Fitch Ratings conduct credit rating analyses to measure the sufficiency of the combined operating cash flow produced by the mingled operations of the rated entity relative to the rated entity's debt and fixed obligations. Unlike the Commission, which uses regulatory financial statements to account for a single line of business even if it is a division of a company, CRAs use GAAP financial statements for the rated corporation, not regulatory accounts for a line of business. Within a combined enterprise, CRAs do not publish credit ratings for individual business segments. In essence, whenever a rated entity has more than one business unit, cross-subsidization is intrinsic to the credit process. As a result, whenever an interstate electric transmission business operates as a division of a combined enterprise, it is highly unlikely that credit ratings will be sufficiently sensitive to reflect clearly or quickly a cash flow deficiency in the interstate electric transmission network.
5. Although all CRAs purport to use forward-looking financial projections in their credit analyses, it has been widely observed, including by the U.S. Securities and Exchange Commission ("SEC"), that CRAs' credit ratings are neither leading nor coincident indicators, but rather are lagging indicators. An SEC internal interdisciplinary task force reported in 2020:

Rating agency actions—including (1) changes in rating outlook, (2) placement on or changes in "watch" status and (3) changes in ratings—are generally lagging indicators of cost of debt capital.¹⁰

In another example, the NAIC states in its report on rating agencies, most recently updated in May 2021:

The 2008 financial crisis exposed the weaknesses of regulatory reliance on NRSROs' [*nationally recognized CRAs*'] credit ratings. Rating agencies' rating revisions tend to lag behind market and economic developments as ratings tend to be long-term and meant to be relatively stable over an economic cycle. ***As a result, ratings typically fail to react fast enough or be sufficiently current to satisfy regulatory needs.***¹¹ (emphasis added).

¹⁰ U.S. Securities and Exchange Commission, COVID-19 Market Monitoring Group, "Statement: Credit Ratings, Procyclicality and Market Stability Issues," 2 (July 15, 2020), <https://www.sec.gov/news/public-statement/covid-19-monitoring-group-2020-07-15>.

¹¹ NAIC, "Rating Agencies" (updated May 9, 2024), https://content.naic.org/cipr_topics/topic_rating_agencies.htm.

Credit ratings would substantially lag behind increased risk facing transmission owners due to increasing exposure to network upgrades that are not part of rate base.

In summary, the NYTO Complaint Order characterizes the use of proxy groups and the transmission owner's credit ratings as an effective and self-correcting system to match transmission owner with proxy companies of equivalent risk.¹² But the methodology used by the Commission is not that precise, and thus it distorts and muffles the process. Rather than a precise pairing of proxy companies of matching risk profiles to that of a transmission owner, the Commission's methodology will obscure and delay recognition of increasing uncompensated obligations resulting from the rapid growth of network upgrades.

To be clear, I am not saying that the proxy group methodology is intrinsically flawed or inappropriate for use in finding the cost of capital in ROE proceedings generally. The proxy group methodology for estimating the cost of equity is recognized for its original purpose (estimating the cost of equity in rate setting proceedings). However, the Commission is placing excessive confidence on a methodology that is not capable of the precision to perform the task that the NYTO Complaint Order calls for.

Question 18: Please identify any risks the transmission owner has associated with owning, operating, and maintaining network upgrades. Please explain those risks. Also, please explain whether any such risks are development financing risks or are in addition to, or independent of, development financing risks.

Response to Question 18:

Network upgrade assets related to generator interconnections are no different than other transmission facilities, and may include transmission lines, switchgear, transformers, and substation equipment that are identical to other transmission assets. Whether the network upgrades are funded by the NETO or the interconnection customer, the network upgrades are operated and maintained by the NETO's personnel who manage and maintain the rest of the transmission system and are subject to similar risks and obligations.

¹² See NYTO Complaint Order, 176 FERC ¶ 61,149, at P 59, n.127.

Some of the ongoing operational and safety risks related to the maintenance and daily operations of high-voltage transmission equipment and substations include the following responsibilities:¹³

1. Emergency Response: When any element of that system is on outage, the added network upgrade equipment creates additional risks and complexities that can affect the entire transmission system. The transmission owner has an ongoing obligation for emergency response, and in emergencies or outages it faces added risks and complexities due to the presence of the network upgrade facilities as a part of the total network.
2. Service Outages and Coordination: Installing and integrating interconnection equipment to a transmission owner's transmission system may require service outages of existing transmission equipment. The transmission owner must manage all such service outages and ensure that the outage does not interfere with the reliable provision of service or other planned outages. Any flaw in coordination could produce outages for other customers, thereby harming the transmission owner's reputation, and may entangle the transmission owner in litigation, investigation, penalties, or fines.
3. Environmental Liabilities: The transmission owner is exposed to ongoing environmental liabilities, including soil or ground water contamination, pre-existing contamination at sites at which the interconnection equipment is located, and retrofitting or conforming equipment to evolving environmental mandates.
4. Extreme Weather: Finally, severe weather events and changing climate situations can damage or destroy transmission interconnection equipment, resulting in burdens and liabilities for the transmission owner.

It is notable that any flaw in managing the operational and safety risks and liabilities associated with network upgrades can impact service to all other customers, thereby harming the transmission owner's reputation, and may entangle the transmission owner in litigation, incurring damage that is not subject to insurance. Even if some of the operational and safety risks listed above are subject to some insurance recovery, the losses and damages typically are not fully insurable. When problems occur, the transmission owner may be subject to the following consequences, none of which are covered by commercial insurance products:

1. fines that are not recoverable through customer rates;
2. disallowances of recovery of some operational expenses;
3. reputational harm adversely affecting the transmission owner's business and customer relationships;
4. reputational harm affecting regulatory affairs; and

¹³ See also Divatia Affidavit at 6-9.

5. diversion of staff time and management resources from other productive business activities.

From a financial viewpoint, the transmission owner is burdened by the obligation to bear these operational risks and exposures without any profit relating to network upgrades if they are not included in rate base. If the Commission removes the option for the NETOs to fund network upgrades, NETOs will have no compensation for undertaking these costs and exposures. The transmission owners are forced to operate a part of their network at zero ROE, thus increasing their overall financial risk. It is highly unusual in our business environment for an enterprise to be conscripted into providing service on a not-for-profit basis. Investors have the option to invest capital in other business sectors and industries where there is an opportunity to earn a profit or to curtail services that are unprofitable.

Contrary to the Commission's assertion in its NYTO Complaint Order that the risks of network upgrades funded by interconnection customers are automatically incorporated in the resulting enterprise-wide ROE determination by virtue of the proxy group methodology, the real-world result of that approach from an investor viewpoint is that the ROE authorized for rate base assets is "stretched". The effective earned ROE is progressively diminished as the proportion of network upgrade assets funded by interconnection customers, and the related operational burden, increases. The consequence will be to put interstate transmission facilities at a disadvantage in the capital markets in attracting equity and debt capital.

Question 19: Please explain whether it is possible to value in monetary terms the increase in risk that a transmission owner could be exposed to when adding network upgrades to its system. Please provide that monetary value and explain and justify the method used to calculate the value.

Response to Question 19:

The question of valuing in monetary terms the incremental risks and liabilities to which a transmission owner may be exposed by the addition of interconnection-related network upgrades to its system is strange, because such network upgrades are similar to other types of assets in the transmission system, and yet the Commission has never based its compensation for the operational and business risks of owning all other transmission facilities upon a monetary valuation of the individual business risks and operational exposures attendant upon all other transmission facilities. It would be completely outside the model of utility regulatory finance for the Commission to disaggregate and compensate in monetary terms for the risks of a transmission owner's entire plant

and facilities, and to substitute that regime as a means to compensate for risk in place of ROE and it is equally unusual to ask this question with regard to network upgrades.

Notwithstanding this objection, for the sake of argument I sought a paradigm for the pricing of risk protection for transmission utility networks by considering whether the commercial insurance market could provide pricing for the segregated risks and liability exposures related to network upgrades. Exploring the market for insurance of transmission company risks contributes to a more detailed understanding of the risks borne by various parties, but it underscores the difficulty of assigning monetary values to these various risks. Furthermore, it illuminates that even if I have not precisely valued the risks of owning and operating network upgrades, the difficulty to assign a monetary value does not mean that the ownership and operation of network upgrade facilities is without risk.

There are two broad types of insurance products that an owner of a transmission business may use to transfer risk to a third party at a price:

1. Liability and excess liability insurance covers the costs to reimburse third parties for damage including claims for physical damage to third parties as well as third parties' business interruption and consequential damages. A transmission owner can purchase this type of insurance coverage, but typically it covers all the businesses of the owner, not solely the transmission business. In assessing and underwriting the general liability exposure of a transmission system, commercial insurers use a metric of the volume of electricity transported on the system. Network upgrades related to the needs of interconnection customers are typically occasioned by increased volumes of energy transported, regardless of which party funds the network upgrades.

In addition to the challenge of separating costs relating to transmission from other insurance costs, it has become more difficult to obtain liability coverage, as the capacity to write coverage for liability and excess liability of hazards of all types has been shrinking in recent years. Premiums for such insurance have risen and are still rising, and insurance writers have introduced exclusions and limits to reduce the insurers' exposure. Separate riders have been introduced for different types of liabilities (notably, wildfire risk and cyber risk), but in future years, additional risks may be identified, and additional charges may arise to insure against hazards that are not yet identified separately.

The price of such liability and excess liability coverage is typically set for only a year at a time, while carriers have been raising premiums and reducing the amount of their maximum exposure every year. Insurance products such as coverages for wildfire risk exposure have become constrained (even in areas in which wildfires are not an obvious hazard), and going forward, other types of liability and excess liability coverage, such as cyber risks, may also become subject to price escalation and reduced availability. Additional risks of owning and operating transmission networks may emerge in the next several years that are not obvious at this moment but in the future may become evident.

2. Property insurance covers the risk of damage to the owner's property and costs of replacement. When network upgrades are added to a NETO's network and funded by the interconnection customer (not via TO Initial Funding or self-funding), the transmission owner bears the full risk for restoration of the property after physical damage or destruction, and the interconnection customer does not reimburse the transmission owner for that risk. In assessing and underwriting property risks of a transmission system, commercial insurers use a metric of the replacement costs of assets, regardless of which party funds the network upgrades, so property insurers view more assets as proportionately more risk. The transmission owner may purchase insurance coverage for property damage or may elect to self-insure; commercial insurance is typically not available for poles and wires.

In summary, a review of the commercial insurance market practices leads me to conclude that increased volume of energy transported on the transmission network and increased replacement value of transmission facilities correspond proportionately to greater risk exposures. Also, commercial insurers rarely forecast or commit for more than one year at a time the market cost of increased risk in the electric transmission business. Many risks are self-insured by transmission owners or subject to very high deductibles because the cost of purchasing insurance covering the full risk would be a cost burden upon other transmission customers. Moreover, this analysis reveals that interconnection customers that fund network upgrades lay off various risks to the NETOs for which the NETOs receive no compensation from the interconnection customer. Many risks occasioned by the assets constructed for interconnection customers are borne either by other transmission customers or by the NETOs' shareholders.

The lessons I draw from this research are, *first*, that interconnection customers are heavily subsidized by other users of the transmission system and by transmission owners. *Second*, the commercial insurance marketplace does not provide a means for calculating the monetary value of the risks of owning and operating network upgrades. *Third*, ROE is an established methodology that is well-known and well-documented for compensating such risks when and only when the assets involved are included in a transmission owner's rate base.

Question 20: The TO Initial Funding provisions in the Responding RTO's/ISO's OATT provide for transmission owners to earn a return of and on the capital costs of network upgrades financed through TO Initial Funding, which transmission owners claim will result in proper compensation for the risks associated with owning, operating, and maintaining those facilities consistent with the manner in which they are compensated for owning, operating, and maintaining other transmission facilities on their systems.

a. Assuming for the purposes of this question that the alleged risks are not already incorporated into the transmission owners' Commission-approved ROEs that are applied to transmission facilities in rate base that do not include network upgrades, explain why incorporating the capital costs of the network upgrades that transmission owners own, operate, and maintain into transmission owners' rate base, such that transmission owners' Commission-approved ROEs are applied to those network upgrade capital costs while security is also posted on such network upgrade capital costs, would result in appropriate compensation for these alleged risks.

Response to Question 20a:

The collection of security on network upgrades as well as an ROE on those same network upgrades if funded by the transmission owner under the TO Initial Funding option is appropriate. If we accept the appropriateness of the ROE authorized by the Commission for assets that are valued in the transmission owner's rate base, then that is also the ROE that should be applied to network upgrades if those assets are funded pursuant to TO Initial Funding. No other ROE would be appropriate, because the risks and obligations would be the same. The presence of security does not affect the calculation of the cost of equity to the transmission owner, because the ultimate beneficiary of the security arrangements is not the transmission owner, but other transmission customers.

b. Explain whether there are costs associated with these alleged risks that are appropriate to include in the recovery of the transmission owners' Commission-approved ROEs instead of including such costs in rates charged to interconnection customers or transmission customers.

Response to Question 20b:

The question suggests that it may be possible for the NETOs to be compensated by formulating recovery of specific costs or expenses associated with the operational and safety risks discussed in the response to Question 18, as opposed to a TO Initial Funding option by the NETOs and earning an authorized ROE on a rate base asset.

This suggestion poses many difficulties. If, for the sake of argument, it were possible to identify and quantify as expenses those risk and liability exposures, separation is at odds with the Commission precedent that network upgrades ultimately are part of the transmission owners'

integrated transmission system,¹⁴ and compensation via expense reimbursement would not provide any profit or return to the owner of a transmission system for bearing the risks of owning and operating network upgrades that have zero value in rate base. It would at best be a neutral outcome that does not replace the component of a just and reasonable ROE that compensates the transmission owner for bearing exposure to risks.

Also, it would be difficult to identify and quantify the value of operational, safety, and reputational risks that are borne by the NETOs in relation to network upgrades owned and operated by the utility but that have zero value in rate base. Since the quantification of the risk exposures resulting from the ownership and operation of network upgrades would be subject to debate, it is easy to foresee that rate proceedings and the allocation of such cost-of-service fees would become a contentious part of rate proceedings. If the cost-of-service charges were to be allocated to the interconnection customers whose service occasioned the costs, there is no doubt that the interconnection customers would dispute the validity of the charges. Similarly, if the cost-of-service charges were allocated to other transmission customers, intervenors would contest those charges. There is already a substantial body of legal and regulatory precedent regarding the setting of the ROE. This is a well-documented and well-established way to find the cost of risks.

If Question 20b suggests another method of compensating the NETOs for bearing risks in the form of a risk management fee, this also raises significant concern. Current and potential future investors in transmission owners' equity and debt securities would have reason for concern that any management fee that is authorized by the Commission would be challenged by interconnection customers, and future Commissioners (or even the same Commissioners acting at a different point in time) might issue subsequent decisions reducing or undermining the compensation provided by such management fees. For instance, the Commission today might authorize such a management fee, and then in a future order may direct that such a management fee be treated as a credit reducing the revenue requirement authorized to compensate for a transmission owner's investment in rate base. Investors are aware that a management fee of that type would not be subject to any of the

¹⁴ Order No. 2003 at P 65 ("The Final Rule revises the definition of Network Upgrade to include the phrase "at or beyond the Point of Interconnection," instead of "beyond the Point of Interconnection," to make it consistent with established Commission precedent. The network begins at the point where the Interconnection Customer connects to the Transmission System, not somewhere beyond that point. Facilities beyond the Point of Interconnection are part of the Transmission Provider's Transmission System and benefit all users.") (footnote omitted).

protections that investors have come to expect of *Hope* and *Bluefield*. Therefore, it would not be an effective incentive to investors to warrant investment in the securities of transmission owners.

c. If there are costs associated with these alleged risks associated with network upgrades, explain whether transmission owners already recover those costs through O&M or other charges to interconnection customers or transmission customers.

Response to Question 20c:

Compensation for the risks of network upgrades is not recovered in O&M charges pursuant to the FERC Uniform System of Accounts, while realized costs such as penalties are not recoverable at all.¹⁵ Moreover, the manifestation of actual costs in any given time period is not the same as the cost of capital required for the risk exposure.¹⁶ Recovery of O&M costs does not include an ROE and therefore does not compensate for risk of owning and operating the network facilities.

d. If there are uncompensated risks, explain whether transmission owners can buy additional insurance to offset any or all of these risks and recover the costs for those insurance premiums from interconnection customers as a means of receiving reasonable compensation for owning, operating, and maintaining the network upgrades financed through TO Initial Funding, instead of earning a return of and on the capital costs of the network upgrades.

Response to Question 20d:

Commercial insurance carriers can provide coverage of some risks, as described in the response to Question 19, but the coverage that is available is incomplete and subject to limits and exclusions. In the commercial insurance market, capacity for coverage of liability and excess liability of hazards of all types has been shrinking in recent years. Premiums for such insurance have risen and are still rising, and insurance writers have introduced exclusions and limits to reduce the insurers' exposure. Separate riders have been introduced for different types of liabilities (notably, wildfire risk and cyber risk), but in future years additional risks may be identified, and additional charges may arise to insure against hazards that are not yet identified separately. Most

¹⁵ The Commission would essentially have to make all currently unrecoverable costs recoverable as O&M in order to offset the elimination of ROE compensation.

¹⁶ For example, the costs experienced during a season of mild weather does not equal the cost of capital required by investors that are exposed to risks of extreme weather consequences.

NETOs report that obtaining full coverage of all the related risks would be prohibitively expensive and a financial burden to other transmission customers. Please see the response to Question 19.

e. Explain whether the interconnection customer's security requirement lowers the risk of a loss to the transmission owner and, if so, if it is appropriate to consider that reduced risk of loss in the ROE that is applied by the transmission owner to earn a return of and on the capital costs of network upgrades financed through TO Initial Funding.

Response to Question 20e:

The security provisions of the ISO-NE OATT do not cover the compensation for the operational and business risks related to owning and operating network upgrade facilities. Please see the response to Questions 3c and 3d.

Question 21: Certain transmission owners point to the increasing number of network upgrades needed on their transmission systems to support the argument that TO Initial Funding is necessary to ensure that transmission owners can attract new capital that supports the financial integrity of their companies.

a. To the extent that a transmission owner's Commission-approved ROE for its rate base may be adjusted upward if a transmission owner takes on materially more enterprise-wide risk associated with network upgrades that transmission owners do not fund and earn a rate of return on, please explain why the upward adjustment in the ROE does or does not enable the transmission owner to continue to attract capital in a manner consistent with Hope and Bluefield.

Response to Question 21a:

As explained in my response to Question 16, it is extremely unlikely that the use of the proxy group methodology will result in timely or discerning adjustments to the enterprise-wide ROE. The mechanism of the proxy group methodology and its underlying reliance upon credit ratings to discern changes in the risk of transmission companies that are not stand-alone entities is unlikely to capture and identify such risks either precisely or promptly. It would not satisfy the protections against takings in *Hope* and *Bluefield* regarding prospective compensation for risks, *i.e.*, at the time the rate is set, and not after the adverse effects are suffered. Therefore, investors in the equity of the NETOs cannot be assured that they would be compensated prospectively and not in retrospect for the underlying increase in risks associated with growing amounts of network upgrades, unless the upgrade investment is incorporated in rate base, where investors can look to the protections provided by *Hope* and *Bluefield*.

b. Explain whether, and if so, to what extent, the inability of transmission owners to earn a return of and on the capital costs of network upgrades that they currently own and operate has impacted their ability to attract new capital.

c. Explain whether, and if so, to what extent and on what basis, transmission owners expect their inability to earn a return of and on the capital costs of network upgrades that they own, operate, and maintain will impact their ability to attract new capital in the future.

Response to Questions 21b and c:

In the past, there has been minimal or no awareness among investment professionals or CRAs regarding the existence of transmission assets owned and operated by the NETOs on which the NETOs earn no return. This is consistent with the relatively small proportion of such property relative to the overall transmission assets of the NETOs historically. The D.C. Court of Appeals decision in the first *Ameren* case stimulated some awareness of the topic. There is no indication, however, that any awareness will translate into adjustments in how investment professionals determine the market data that are inputs into the Commission's ROE methodology.

Over the coming years, as demand for interconnection continues to expand and assuming that the NETOs do not have the option to provide TO Initial Funding of network upgrades and earn a return on their resulting rate base assets, then the transmission owners' overall return on all of the transmission facilities that are recorded in their rate base would be diluted by the "stretching" of the ROE, as discussed in my response to Question 15. This will adversely affect their ability to attract capital on reasonable terms, contrary to the general ratemaking standards of *Hope* and *Bluefield*.

As the number of not-for-profit network upgrades grows, the impact on the NETOs would become increasingly apparent to the investment market. It would make investment in any interstate electric transmission business that is subject to the Commission's rate jurisdiction and forced to submit to uncompensated upgrades less attractive relative to other types of utility and infrastructure investments. For example, investment in the securities of the NETOs would be at a disadvantage relative to interstate pipelines that earn a return on gas system upgrades; in the parallel context in which gas system upgrades are required due to interconnecting pipeline customers, a pipeline owner funds the required upgrades, which then become a part of the rate base; consequently, the pipeline owner earns the same authorized ROE on rate base occasioned by

the upgrade as on the other gas transmission facilities that they own and operate.¹⁷ There is no justification for treating electric transmission owners differently from gas transmission owners in this respect.

During the course of my professional career, I have witnessed the adverse financial impact upon utilities and their investors of unforeseen consequences of legislative and regulatory initiatives. The affected utilities were aware of an evolving issue and foresaw the problem before there was any general awareness among capital market participants or regulators. The history of PURPA illustrates this point. PURPA requires load-serving electric utilities to contract to purchase power that is generated by Qualifying Facilities (“QFs”) at a price determined to be a utility’s “avoided cost”. It took a few years after the passage of PURPA in 1978 for state regulators to enact rules and regulations that defined avoided cost in each state and establish standardized forms of contracts for the resulting power contracts, during which time very little contracting took place. By 1981-82, the earliest sales of power to utilities from such independent non-utility sources took place, but volumes were very low, mostly involving very small power sources (for example, 2 to 20 MW). In the early 1980s, investors therefore were not aware of any noticeable impact upon the credit or financial well-being of any electric utilities as power purchasers.

Over the next decade, some states established avoided cost determinations that were ample to attract independent generators, and regulations provided opportunities for developers to pursue far larger QF projects. As a result, certain utilities had to accept ever larger purchase obligations. By 1987, a few utilities were sounding alarms and seeking reforms to PURPA without success. Some utilities went to court or petitioned FERC, unsuccessfully seeking to be relieved of the obligation to enter into new contracts or to purchase unneeded power under existing contracts. Between 1987-1992, the impacts of PURPA on electric utilities became apparent. Those utilities with disproportionately large PURPA impacts (for example, utilities in Maine and upstate New

¹⁷ See, e.g., *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at P 51 (2019) (allowing the pipeline to include in rate base the costs of expanding its existing system to provide service to customers and stating that “in developing incremental rates for expansions of existing systems, our general policy is to use the rate of return components approved in the pipeline’s last NGA section 4 rate proceeding.”); *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 38, *order on reh’g*, 161 FERC ¶ 61,250 (2017) (noting that the Commission’s consistent policy is to allow the pipeline to rate base the costs of expanding its existing system and to allow the pipeline to use a rate of return from its most recent general rate case approved by the Commission).

York and northern California where hydroelectric QF projects were plentiful) suffered declines in their credit ratings and the value of their equity was depressed. Niagara Mohawk Power Corporation is an example of a utility that was pushed toward extreme financial distress by the excessive burden of its QF contracts. Between 1994 and 2002, utilities with the greatest exposures to uneconomic power contracts negotiated buy-outs of power contracts that were partially recoverable from customers and partially came at the cost of shareholders in states with the largest burdens.

The lessons learned from the PURPA experience are:

1. Laws or regulatory mandates that place obligations and burdens on unwilling utilities can have unforeseen and potentially significant economic impact;
2. Adverse consequences may not be visible initially, when the quantity of such obligations is small, but may develop as the amounts in question rise;
3. The financial community's analysis of financial obligations can change over time. Very large obligations lead investors and CRAs (and sometimes financial accounting standards setters) to evolve new methodologies that acknowledge burdens that were previously unacknowledged.

Applying the lessons of PURPA, I conclude that as the amount of network upgrades increases, investors will become more focused on this and see it as a problem. And an order in this proceeding revoking transmission owners' ability to elect TO Initial Funding on interconnection-related network upgrades will certainly draw increased attention to the matter.

Question 23: Assuming, for the purposes of this question, that the Commission finds that provisions for the unilateral election of TO Initial Funding imposes unjust and unreasonable costs on interconnection customers, and the Commission also finds that transmission owners have uncompensated risks associated with owning, operating, and maintaining interconnection-related network upgrades, please explain whether a management fee for the network upgrades would allow transmission owners to be compensated for those risks. If it would allow for compensation of such risks, please answer the following:

- a. Please explain how such a management fee could be calculated.*
- b. Please explain how such a management fee would compensate transmission owners for the risks of owning, operating, and maintaining network upgrades.*

c. Please explain how such a management fee would address the concerns raised by the Ameren Court that denying transmission owners an opportunity to earn a return on the capital costs of network upgrades leaves them with uncompensated risks (e.g., incremental operational risks of new facilities, compliance with reliability standards, liability for insurance deductibles, litigation stemming from personal injury, environmental, and reliability claims), and requires them to operate, at least in part, on a nonprofit basis (i.e., modifying the transmission owners' business model creates risk that new capital investment will be deterred).

d. Please explain whether, and if so how, your proposed replacement rate ensures that transmission owners are able to attract new capital investment pursuant to Hope and Bluefield.

Response to Questions 23a, b, c, and d:

From the viewpoint of current and potential future investors in transmission owners' equity and debt securities, investors would have reason for concern that any management fee that is authorized by the Commission would be challenged by interconnection customers, and future Commissioners (or even the same Commissioners acting at a different point in time) might issue subsequent decisions reducing or undermining the compensation provided by such management fees. For instance, the Commission today might authorize such a management fee, and then in a future order may direct that such management fees be treated as a credit reducing the revenue requirement authorized to compensate for a transmission owner's investment in rate base. Investors are aware that the incentive ROE adder that was originally authorized to compensate transmission owners for accepting the burdens and limitations of participation in RTOs has been eliminated by the Commission for certain transmission owners ordered by their state regulators to participate in an RTO, but denied the Congressionally-authorized incentives for such burden. This issue remains under judicial review, but the harm from an investment perspective is already done. In such cases, the transmission owner and its investors continue to suffer all the burdens and limitations of participation in an RTO, but are denied the compensation for that burden. Similarly, one of the flaws with a management fee is that it would not provide the NETOs with the necessary regulatory certainty to assuage concerns that at a moment's notice agency action could trigger a market response that inhibits the transmission owner from attracting capital to finance generator interconnection-related network upgrades.

In terms of the questions posed by the Commission in this proceeding, a management fee or other alternative fee would still be "an increase in costs without an increase in services." Both

questions have the issue exactly backwards in that the real question should be: “Is it just and reasonable to give interconnection customers a decrease in rates absent a decrease in the cost of service?”

In summary, investors cannot have any confidence that the Commission possesses any regulatory power that would permit it to formulate a management fee that would not subsequently be diminished or negated by future Commission actions. A management fee that initially appears to offer appropriate compensation could be viewed by investors as a “bait and switch” tactic. Initial funding by the transmission owner of interconnection-related network upgrades is a viable and credible means for investors in the transmission owners’ equity and debt instruments to be assured of obtaining compensation for the risks of operating and maintaining their transmission networks that minimizes regulatory uncertainties.

e. Please explain whether such a replacement rate would include a requirement for the Interconnection Customer to post security on any portion of the management fee. If so, please explain whether or not the security requirement lowers the risk of a loss to the transmission owner and, if it does lower such risk, how that reduced risk is accounted for in your proposed management fee. If such a replacement rate does not account for reduced risk due to the security requirement, please explain why there is no need to account for the security requirement impacts on the risk of non-recovery.

Response to Question 23e:

As indicated in my responses to Questions 3c, 3d, and 20e above, while security is required to mitigate the risks of the transmission owner, ultimately security exists in order to alleviate the risks of other transmission customers. This would be the same with regard to a management fee.

f. Please explain whether such a management fee would impact costs for Interconnection Customers as compared to the unilateral election of TO Initial Funding.

Response to Question 23f:

Initially, in my professional opinion, all else being equal a management fee would have to match the revenue requirement cost of capital in order to be just and reasonable. However, investors or potential investors in a transmission owner’s debt or equity securities would view a proposed management fee as not very credible or reliable as a continuing source of income because it would entail an excessive regulatory risk. Investors would not give full value to the cash flow derived from such fees as a basis for the issuance of long-term bonds or equity securities, unless

the Commission had the authority to authorize such fees in an irrevocable manner. Absent irrevocability, a just and reasonable management fee would cost interconnection customers more than the traditional rate of return enshrined in the ISO-NE OATT.

On the other hand, the assets associated with TO Initial Funding would be viewed as a reliable source of ongoing income, subject to the Commission's customary regulatory paradigm and subject to *Hope* and *Bluefield* protections. It seems at best irrelevant and inappropriate to compare the cost to interconnection customers of a management fee that is of very low credibility to investors versus the property created by way of TO Initial Funding. As the Commission well knows, the cost of capital is determined by the rate of return investors demand for the risks they perceive when they commit their capital—not via an invoice for services rendered.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes.

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc.)

Docket No. EL24-83-000

AFFIDAVIT OF ELLEN LAPSON

I, Ellen Lapson, CFA, pursuant to 28 U.S.C. § 1746, state, under penalty of perjury, that I am the Ellen Lapson referred to in the attached prepared testimony of Ellen Lapson, CFA on behalf of the ISO New England Transmission Owners, that I have read the same and am familiar with the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

Executed this 10th day of September 2024.

Handwritten signature of Ellen Lapson in blue ink, followed by the letters "CFA" in blue ink.

Ellen Lapson, CFA

EXHIBIT EL-1 TO LAPSON TESTIMONY

EXPERIENCE AND QUALIFICATIONS

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LAPSON ADVISORY: Financial Consulting. Expert Testimony. Financial Training.

SUMMARY

Expert on financing utilities and infrastructure projects, with over 50 years of professional MBA Accounting and finance, NYU Stern School of Business; Chartered Financial Analyst

EMPLOYMENT HISTORY

Lapson Advisory, Trade Resources Analytics	Financial consulting services to utilities and infrastructure project developers. Financial strategy and credit advisory; expert financial witness.	2012 to present
Fitch Ratings Utilities, Power & Gas Managing Director; Senior Director	Manager or primary analyst on credit ratings of over 200 utility, pipeline, and power generation companies and utility tariff securitizations. Chaired rating committees for energy, utility, and project finance committees. Liaison with major fixed income investors.	1994 - 2011
JP Morgan Chase (formerly Chemical NY Corp.) Vice President, 1975-94 Asst. Vice President, 1974-75	Managed financial advisory transactions, structured debt placements, syndicated credit facilities for utilities, mining and metals, project finance. First of its kind stranded cost securitization for Puget Sound P&L, 1992-94. Led financings for utilities in bankruptcy or reorganizations. Divisional controller, 1981-86.	1974-1994
Argus Research Corp. Equity Analyst, Utilities	Equity analysis of U.S. electric and gas utilities, natural gas pipelines, regulated telephone companies. Research coverage and reports; forecasts and models.	1969-1974

EDUCATION & PROFESSIONAL ORGANIZATIONS

Stern School of Business, New York University, MBA.	1975
Accounting major; Finance minor	
Barnard College, Columbia University, BA.	1969
Earned CFA Institute Charter, 1978	
Institute of Chartered Financial Analysts	Since 1978
Wall Street Utility Group	Since 1996

ADVISORY COUNCILS AND BOARD SERVICE

Electric Power Research Institute, Advisory Council, 2004-2011; Chair, 2009 and 2010.
MIT Energy Institute, External Advisory Council, The Future of Solar Energy, 2012-2014.
Represented U.S. fixed income investors in responding to proposed financial accounting rules for rate-regulated utilities by the International Accounting Standards Board (IASB) at a panel sponsored by Edison Electric Institute and American Gas Assoc., December, 2014.

EXPERT TESTIMONY

Jurisdiction	Proceeding	Topic
Public Utilities Commission of Nevada	Dockets 24-02026 and 24-02027, Applications of Sierra Pacific Power Company to change rates (2024)	Capital structure and financial strength.
Public Utilities Commission Texas	Docket No. 55867, Application of LCRA Transmission Services Corp. to change rates, on behalf of LCRA TSC (2024)	Financial strength and access to capital for a public power transmission service provider.
Public Utilities Commission of Colorado	Proceeding No. 22AL-0530E, electric rate case on behalf of Xcel Public Service Colorado (2023)	Financial strength and appropriate capital structure.
California Public Utilities Commission	Docket No.A2211010, Joint application of Corix Infrastructure (US) and SW Merger Acquisition Corp and Suburban. (2022-23)	Merger application: adequate financial strength
Illinois Commerce Commission	Docket No. 22-0670, Joint application of Corix Infrastructure (US) and SW Merger Acquisition Corp and... (2022-23)	Merger application: adequate financial strength
Kentucky Public Service Commission	Docket No.2022-00396, Joint Application of Corix Infrastructure (US) and SW Merger Acquisition Corp and... (2022-23)	Merger application: adequate financial strength
Public Utilities Commission of Nevada	Docket No. 22-11030, Application of Great Basin Water Co.... for Approval of business combination, Corix Infrastructure (US) and SW Merger Acquisition Corp... (2022-23)	Merger application: adequate financial strength
New Jersey Board of Public Utilities	Docket No. WM22110690, Joint Petition for change of control, Corix Infrastructure (US) and SW Merger Acquisition Corp.(2022-23)	Merger application: adequate financial strength
North Carolina Utilities Commission	Docket No. W-354, Sub 412, Application for approval of business combination, Corix Infrastructure (US) and SW Merger Acquisition Corp (2022-23)	Merger application: adequate financial strength
Pennsylvania Public Utility Commission	Docket No. A-2022- 3036744, Joint Application of CUPA Water Systems for Approval of a Business Combination (2022-23)	Merger application: adequate financial strength
Public Utilities Commission Texas	Docket No. 54316, Joint Application of Corix Infrastructure (US), SW Merger Acquisition Corp and Monarch Utilities I LP (2022-23)	Merger application: adequate financial strength
Federal Energy Regulatory Commission	Docket No.ER22-2379, Southwest Power Pool, Inc., supporting Southwestern Public Service Co.'s right under Generator Interconnection Agreement (2022-23)	Application by a transmission owner to fund investment in Network Upgrades
Federal Energy Regulatory Commission	Docket No.ER22-2274, Southwest Power Pool, Inc., supporting Southwestern Public Service Co.'s right under Generator Interconnection Agreement (2022)	Application by a transmission owner to fund investment in Network Upgrades

Jurisdiction	Proceeding	Topic
Massachusetts Department of Public Utilities	DPU Docket No. 22-70, 22-71, 22-72; Long-term purchase contracts for offshore wind energy, on behalf of three MA electric distribution utilities (2022)	Remuneration to distribution utilities for entering into long-term supply contracts
New Jersey Board of Public Utilities	BPU Docket No. GM 2204, Merger Application of South Jersey Industries, Inc. and Boardwalk Merger Sub, Inc. on behalf of Joint Applicants (2022)	Financial strength in the context of merger proceeding and appropriate corporate commitments.
Public Utilities Commission Texas	Docket No. 53601, Application of Oncor Electric Delivery LLC to Change Rates, on behalf of Oncor. (2022)	Financial strength and appropriate capital structure.
Public Utilities Commission Texas	Docket No. 52487, Application of Entergy Texas to Alter its CCN for Orange County Advanced Power Station, on behalf of Entergy Texas, Inc. (2022)	Impact of a power purchase contract on the balance sheet, financial ratios, and credit ratings of the utility purchaser.
Federal Energy Regulatory Commission	Docket No. ER21-2282, Application re Open Access Transmission Tariff, on behalf of PJM Transmission Owners (2022)	Application by Transmission Owners to invest in Network Upgrades
Federal Energy Regulatory Commission	Docket No. EL-20-72, LA Public Service Comm. et al. vs. System Energy Resources, Inc. on behalf of SERI (2022)	Financial impact of the termination of a support agreement; capital structure.
Federal Energy Regulatory Commission	Docket No. RM20-10-000, Electric Transmission Incentive Policy, on behalf of PJM Transmission Owners (2021)	In support of financial incentives for RTO membership
Public Utilities Commission of Colorado	Proceeding No. No. 21R-0314G, NOPR on Purchased Gas Cost Adjustment on behalf of Public Service Company of CO (2021)	Investor and credit rating impact of proposed gas cost recovery rules
New Mexico Public Regulation Commission	Docket No 20-00222-UT, Application of Public Service Co. of NM, PNM Resources, Avangrid Inc., and NM Green Resources on behalf of Applicants (2020-21)	Financial strength and resilience in the context of merger proceeding
Public Utilities Commission Texas	Docket No 51547, Application of Texas-New Mexico Power Co., Avangrid Inc., and NM Green Resources on behalf of the Joint Applicants (2020-21)	Financial strength and resilience in the context of merger proceeding
Massachusetts Department of Public Utilities	DPU 20-16, 20-17, and 20-18, Long-term purchase contract for offshore wind energy, Eversource, National Grid, Unitil (2020)	Remuneration to utilities for entering into long-term contracts
Public Utilities Commission Texas	Docket No. 49849, Joint Application of El Paso Electric, Sun Jupiter Holdings and IIF US Holding 2 to acquire utility (2019-20)	Conditions & commitments for utility merger and formation of holdco; financial strength

Jurisdiction	Proceeding	Topic
New Mexico Public Regulation Commission	Docket No. 19-00234 UT, Joint Application of El Paso Electric, Sun Jupiter Holdings, and IIF US Holding 2 to acquire El Paso Electric (2019-20)	Conditions & commitments for utility merger and formation of holdco; financial strength
Public Utilities Commission of Colorado	Proceeding No. 19AL-0268E, Filing to Revise Electric Tariff, on behalf of Xcel Public Service Co, of Colorado (2019)	Capital structure and cash flow measures
Public Utilities Commission Texas	Docket No. 49421, Application of CenterPoint Energy Houston to change rates, on behalf of CEHE (2019)	Separateness commitments in the context of a rate proceeding; financial strength
Public Utilities Commission Texas	Docket No. 48929, Application of Oncor Electric Delivery Co. LLC, Sharyland Utilities LP, and Semptra Energy, on behalf of Sharyland Utilities (2019)	Appropriate governance conditions and commitments for partner ownership of an electric transmission utility
Public Utilities Commission of Colorado	Proceeding No. 17AL-0363G, Filing to Revise Gas Tariff, on behalf of Xcel Public Service Co, of Colorado (2018)	Cash flow and credit impacts of tax reform; capital structure
South Carolina Public Service Commission	Docket No. 2017-370-E; Joint Application for Merger and for Prudency Determination, on behalf of South Carolina Electric & Gas Company (2018)	Benefits of merger and proposed rate plan; impact on cash flow and access to capital.
U.S. Federal District Court, District of SC	Civil Action No.: 3:18-cv-01795-JMC, Motion for Preliminary Injunction, on behalf of South Carolina Electric & Gas	Financial harm of rate cut compliant with Act
Public Utilities Commission Texas	Docket No. 48401, Texas-New Mexico Power Co. Application to Change Retail Rates, on behalf of TNMP (2018)	Cash flow and credit impacts of tax reform
Public Utilities Commission Texas	Docket No. 48371, Entergy Texas Inc., Application to Change Retail Rates, on behalf of ETI (2018)	Cash flow and credit impacts of tax reform
Public Utilities Commission Texas	Docket No. 47527, Southwestern Public Service Co. Application for Retail Rates, on behalf of SPS Co. (2018)	Adverse cash flow and credit impacts of tax reform; cap structure
New Mexico Public Regulation Commission	Case No. 17-00255-UT, Southwestern Public Service Co. Application for Retail Rates, on behalf of SPS Co. 2018)	Adverse cash flow and credit impacts of tax reform; cap structure
South Carolina Public Service Commission	Docket No. 2017-305-E, Response to ORS Request for Rate Relief, on behalf of S. Carolina Electric and Gas (2017)	Adverse financial implications of rate reduction sought by ORS
DC Public Service Commission	Formal Case No. 1142, Merger Application of AltaGas Ltd. and Washington Gas Light, Inc. (2017)	Financial strength; Conditions and commitments in a utility merger
Public Service Commission of Maryland	Docket No. 9449, In the Matter of the Merger of AltaGas Ltd. and Washington Gas Light, Inc. (2017)	Financial strength; Conditions and commitments in a utility merger
Public Utilities Commission Texas	Docket No. 46957, Application of Oncor Electric Delivery LLC to Change Rates, on behalf of Oncor. (2017)	Appropriate capital structure. Financial strength.

Jurisdiction	Proceeding	Topic
Public Utilities Commission Texas	Docket No. 46416, Application of Entergy Texas, Inc. for a CCN, on behalf of Entergy Texas (2016-2017)	Debt equivalence and capital cost associated with capacity purchase obligations (PPA)
U.S. Federal Energy Regulatory Commission	Dockets No. EL16-29 and EL16-30, NCEMC, et al. vs Duke Energy Carolinas and Duke Energy Progress, on behalf of the Respondents (2016)	Capital market environment affecting the determination of the cost of equity capital
Hawaii Public Utilities Commission	Docket No. 2015-0022, Merger Application on behalf of NextEra Energy and Hawaiian Electric Inc. (2015)	Financial strength and conditions & commitments in merger context
U.S. Federal Energy Regulatory Commission	Dockets No. EL14-12 and EL15-45, ABATE, vs MISO, Inc. et al., on behalf of MISO Transmission Owners (2015)	Capital market environment; capital spending and risk
U.S. Federal Energy Regulatory Commission	Dockets No. EL12-59 and 13-78, Golden Spread Electric Coop., on behalf of South-western Public Service Co. (2015)	Capital market environment; capital spending and risk
U.S. Federal Energy Regulatory Commission	Dockets No. EL13-33 and EL14-86, on behalf of New England Transmission Owners. (2015)	Capital market environment affecting the cost of equity capital
U.S. Federal Energy Regulatory Commission	Dockets No. ER13-1508 et alia, Entergy Arkansas, Inc. and other Entergy utility subsidiaries, on behalf of Entergy (2014)	Capital market environment affecting the measurement of the cost of equity capital
Delaware Public Service Commission	DE Case 14-193, Merger of Exelon Corp. and Pepco Holdings, Inc. on behalf of the Joint Applicants (2015)	Financial strength and conditions & commitments in merger context
Maryland Public Service Commission	Case No. 9361, Merger of Exelon Corp. and Pepco Holdings, Inc. on behalf of the Joint Applicants (2015)	Financial strength and conditions & commitments in merger context
New Jersey Board of Public Utilities	BPU Docket No. EM 14060581, Merger of Exelon Corp. and Pepco Holdings, Inc., on behalf of the Joint Applicants (2015)	Financial strength and conditions & commitments in merger context
U.S. Federal Energy Regulatory Commission	Docket ER15-572 Application of New York Transco, LLC, on behalf of NY Transmission Owners (2015)	Incentive compensation for electric transmission; capital market access
U.S. Federal Energy Regulatory Commission	Docket EL 14-90-000 Seminole Electric Cooperative, Inc. and Florida Municipal Power Agency vs. Duke Energy FL on behalf of Duke Energy (2014)	Capital market environment affecting the determination of the cost of equity capital
DC Public Service Commission	Formal Case No. 1119 Merger of Exelon Corp. and Pepco Holdings Inc., on behalf of the Joint Applicants (2014-2015)	Financial strength and conditions & commitments in merger context
U.S. Federal Energy Regulatory Commission	Docket EL14-86-000 Attorney General of Massachusetts et. al. vs. Bangor Hydro-Electric Company, et. al., on behalf of New England Transmission Owners (2014)	Return on Equity; capital market environment
Arkansas Public Service Commission	Docket No. 13-028-U. Rehearing on behalf of Entergy Arkansas. (2014)	Investor and rating agency reactions to ROE set by Order.

Jurisdiction	Proceeding	Topic
Illinois Commerce Commission	Docket No. 12-0560 Rock Island Clean Line LLC, on behalf of Commonwealth Edison Company, an intervenor (2013)	Access to capital for a merchant electric transmission line.
U.S. Federal Energy Regulatory Commission	Docket EL13-48-000 Delaware Public Advocate, et. al. vs. Baltimore Gas and Electric Company and PEPCO Holdings et al., on behalf of (i)Baltimore Gas and Electric; (ii) PEPCO subsidiaries (2013)	Return on Equity; capital market view of transmission investment
U.S. Federal Energy Regulatory Commission	Docket EL11-66-000 Martha Coakley et. al. vs. Bangor Hydro-Electric Company, et. al. on behalf of New England Transmission Owners (2012-13)	Return on Equity; capital market view of transmission investment
New York Public Service Commission	Cases 13-E-0030; 13-G-0031; and 13-S-0032 on behalf of Consolidated Edison Company of New York. (2013)	Cash flow and financial strength; regulatory mechanisms
Public Service Commission of Maryland	Case. 9214 re “New Generating Facilities To Meet Long-Term Demand For Standard Offer Service”, on behalf of Baltimore Gas and Electric Co., Potomac Electric Power Co., and Delmarva Power & Light (2012)	Effect of proposed power contracts on the credit and financial strength of MD utility counterparties

CONSULTING & ADVISORY ASSIGNMENTS ⁽¹⁾

Client	Assignment	Objective
Utility Holding Company (undisclosed)	Credit advisory on ratings impact of merger. 2022	Understand credit effects of merger for previously unrated entities.
SouthWest Water Company	Review of proposed debt funding plan.	Appropriate mix of long-term and short-term debt.
Xcel Energy/ Public Service Co. of CO	Studied likely investor and credit impact of the PSC’s proposed changes in the recovery of purchased gas cost (Docket 21R-0314G). 2021	Analyze financial impacts of regulatory proposal.
Eversource Energy Inc./Public Service Co. of New Hampshire	Prepared white paper analyzing the financial implications of two methods for recovering costs of energy efficiency programs (related to Docket DE 20-092). 2020	Analyze feasibility and financial impacts of regulatory proposal; prepare white paper
Washington Gas Light Co.	Quantified the effect of merger upon the cost of long-term and short-term debt. 2019	Comply with regulatory requirement
Cravath, Swaine & Moore LLP	Evaluated factors that influenced utility spending decisions on operations, maintenance, and capital projects. 2019	Support litigation strategy in bankruptcy proceedings.
NJ American Water Co.	Analyzed impacts of tax reform on water utility’s cash flow and ratings. 2018	Support regulatory strategy
AltaGas Ltd.	Credit advisory on ratings under merger and no-merger cases. 2017	Compare strategic alternatives
Entergy Texas, Inc.	Research study on debt equivalence and capital cost associated with capacity purchase obligations. Impact of new GAAP lease accounting standard on PPAs. 2016	Economic comparison of power purchase obligations and self-build options.
Eversource Energy	Evaluated debt equivalence of power purchase obligations. 2014	Clarify credit impact of various contract obligations.

Jurisdiction	Proceeding	Topic
International Money Center Bank (Undisclosed)	Research study and recommendations on estimating Loss Given Default and historical experience of default and recovery in regulated utility sector. 2014	Efficient capital allocation for loan portfolio.
GenOn Energy Inc.	White Paper on appropriate industry peers for a competitive power generation and energy company. 2012	Appropriate peer comparisons in SEC filings and shareholder communications, compensation studies
Transmission utility (Undisclosed)	Recommended the appropriate capital structure and debt leverage during a period of high capital spending. 2012	Efficient book equity during multi-year capex project; preserve existing credit ratings
Toll Highway (Undisclosed)	Advised on adding debt while minimizing risk of downgrade. Recommended strategy for added leverage and rating agency communications. 2012	Free up equity for alternate growth investments via increased leverage while preserving credit ratings

1. Confidential assignments are omitted or client's identity is masked, at client request.

Professional and Executive Training

Southern California Edison Co., Rosemead CA	Designed and delivered in-house training program on evaluation of the credit of energy market counterparties. 2016	
Financial Institution, NYC (Undisclosed)	In-house training. Developed corporate credit case for internal credit training program and coordinated use in training exercise. 2016	
CoBank, Denver CO	Designed and delivered "Midstream Gas and MLPs: Advanced Credit Training". 2014	
Empire District Electric Co., Joppa MO	Designed and delivered in-house executive training session Utility Sector Financial Evaluation. 2014	
PPL Energy Corp, Allentown PA	Designed and delivered in-house Financial Training. 2014	
SNL Knowledge Center Courses, New York NY	Designed and delivered public courses "Credit Analysis for the Power & Gas Sector", 2011-2014	
SNL Knowledge Center Courses, New York NY	Designed and delivered public courses "Analyst Training in the Power & Gas Sectors: Financial Statement Analysis. 2013 -2014	
EEI Transmission and Wholesale Markets	Designed and delivered "Financing and Access to Capital". 2012	
National Rural Utilities Coop Finance Corp.	Designed and delivered in-house training "Credit Analysis for the Power Sector". 2012	
Judicial Institute of Maryland	Designed and delivered "Impact of Court Decisions on Financial Markets and Credit", section of continuing education seminar for MD judges: "Utility Regulation and the Courts", Annapolis MD. 2007	
Edison Electric Institute, New York, NY	"New Analyst Training Institute: Fixed Income Analysis and Credit Ratings", 2008; 2004	

ATTACHMENT B
AFFIDAVIT OF VANDAN DIVATIA

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc.

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Docket No. EL24-83-000

AFFIDAVIT OF VANDAN DIVATIA

I. Introduction

1. My name is Vandan Divatia. I am Vice President Transmission Policy, Interconnections & Compliance at Eversource Energy (“Eversource”). I oversee Eversource’s Transmission Policy, Interconnections, and Compliance organizations.
2. Over the past 22 years in the energy industry, I have held various positions in the areas of operations, outage coordination, project management, planning, economic analysis, business development, interconnections, reliability compliance, policy, and strategy. Besides familiarity with the operational and compliance requirements of operating and maintaining a reliable transmission system in New England, I have also explored and evaluated numerous competitive transmission opportunities outside the Eversource footprint during the early days after issuance of the Federal Energy Regulatory Commission’s (“Commission’s”) Order No. 1000. One of the areas of responsibility in my current role includes negotiation of commercial agreements (including interconnection agreements) with industrial, commercial and generation customers interconnecting into the Eversource system. In that capacity, I am familiar with and responsible for the obligations imposed on Eversource to own and operate such interconnection facilities and interconnection-related network upgrades.
3. I am submitting this Affidavit in support of the Indicated New England Transmission Owners (“NETOs”) response to the Commission’s Order to Show Cause issued on June 13, 2024 in this proceeding.¹ The NETOs include three subsidiaries of Eversource, The Connecticut Light and Power Company (“CL&P”), NSTAR Electric Company (“NSTAR”), and Public Service Company of New Hampshire (“PSNH”) (collectively, the “Eversource Companies”).

¹ *Midcontinent Indep. Sys. Operator, Inc.*, 187 FERC ¶ 61,170 (2024) (“Order to Show Cause”).

4. In this Affidavit, I discuss the significant amount of renewable generation that will need to interconnect to the ISO New England Inc. (“ISO-NE”) transmission system in order to achieve the New England states’ decarbonization and clean energy goals. To facilitate these interconnections will require significant network upgrades on the ISO-NE transmission system and will create additional risks and obligations for the transmission owners who own and operate such network upgrades. I then detail the efforts that go into planning and constructing network upgrades and the risks that Eversource, like all transmission owners, face as a result of their obligation to own and operate network upgrades to accommodate the interconnection of new generation. Finally, I explain that when the network upgrades are funded by the interconnection customer, the transmission owner is not compensated for these risks. As a result, and in light of the significant investment required to interconnect clean energy resources to the grid, the Commission’s decisions in this proceeding will have vast economic implications for the future of the transmission owners’ businesses.

II. To Achieve the New England States’ Clean Energy Goals Will Require Interconnection of a Large Amount of New Renewable Energy Generation.

5. The New England region has some of our nation’s leading decarbonization policies and those are driving a significant increase in the need to interconnect new, renewable generation. Five of the six New England states have committed to decarbonization and clean energy goals and requirements.² In addition, in the coming decade, the ISO-NE region is expected to experience significant demand growth as the system peak shifts from summer to winter due to increased building and transportation electrification.³

² See Massachusetts Exec. Office of Energy and Env. Affairs, Determination of Statewide Greenhouse Gas Emissions Limit and Sector-Specific Sublimits for 2050 (Dec. 21, 2022), <https://www.mass.gov/doc/determination-letter-for-the-2050-cecp/download>, (adopting Massachusetts statewide GHG emissions limit of net zero); Conn. Gen. Stat. § 22a-200a (providing that Connecticut shall reduce the level of GHG emissions by 2025 “to a level at least eighty per cent below the level emitted in 2001”); Vt. Stat. Ann. tit. 10, § 578 (directing Vermont to reduce GHG emissions within the state by 80 percent from 1990 GHG by January 1, 2050); R.I. Gen. Laws § 42-6.2-9 (requiring that Rhode Island’s GHG emissions be net zero by 2050); Me. Rev. Stat. tit. 38, § 576-A (requiring that Maine reduce gross GHG emissions to at least 80% below the 1990 gross annual GHG emissions level by 2050).

³ ISO-NE, ISO New England Power Grid Outlook, 12 (June 6, 2024), https://www.iso-ne.com/static-assets/documents/100012/iso_new_england_overview_and_regional_update_2024_cbia_wide.pdf.

6. To achieve the New England states' clean energy goals and reliably serve the region's demand growth will require a significant increase in renewable generation interconnected to the ISO-NE transmission system and investment in that system to accommodate the new generation. A recent analysis by ISO-NE found that the "New England system will need 97 GW of total new renewable capacity by 2050 to achieve state goals."⁴ On an annual basis, ISO-NE estimates a need to simultaneously add to the system, on average, 1,293 MW offshore wind, 955 MW solar, 268 MW of land-based wind, and 952 MW of batteries to meet this collective goal.⁵ ISO-NE expects that "\$620 million to \$1 billion in transmission reliability investment will be needed each year through 2050 to support the clean energy transition."⁶
7. Trends in the ISO-NE Interconnection Request Queue over the last decade reflect the region's efforts to both increase supply and change the generation mix. In 2014, ISO-NE was tracking approximately 7,000 MW in the ISO-NE Interconnection Request Queue and nearly all proposed projects were powered by gas or wind.⁷ Today, ISO-NE tracks 434 generation projects, totaling approximately over 46,444 MW,⁸ and the capacity consists largely of wind and battery storage proposals.⁹
8. I have no doubt that it will take significant interconnection-related network upgrades to safely and reliability interconnect these projects to the region's transmission system. In addition, under the Commission's new Order No. 2023 requirement to study interconnection requests on a clustered basis,¹⁰ I anticipate that a substantial amount of

⁴ ISO-NE, Economic Planning for the Clean Energy Transition, Final Report (Draft), 10 (Aug. 16, 2024), https://www.iso-ne.com/static-assets/documents/100014/2024_08_16_epcet_draft_report.docx.

⁵ *Id.*

⁶ ISO-NE, 2024 Regional Electricity Outlook, <https://www.iso-ne.com/about/where-we-are-going/regional-electricity-outlook/pillar-four-robust-transmission>.

⁷ ISO NE, 2014 Regional System Plan (RSP14), 13 (Sept. 11, 2024), <https://www.iso-ne.com/static-assets/documents/2014/09/rsp14publicmeetingslides.pdf>.

⁸ ISO-NE, NEPOOL Participants Committee Report, 44 (Sept. 2024), <https://www.iso-ne.com/static-assets/documents/100015/september-2024-coo-report.pdf>.

⁹ ISO-NE, Resource Mix, <https://www.iso-ne.com/about/key-stats/resource-mix>.

¹⁰ *Improvements to Generator Interconnection Procs. & Agreements*, Order No. 2023, 184 FERC ¶ 61,054 (2023), *order on reh'g & clarification*, Order No. 2023-A, 186 FERC ¶ 61,199 (2024) ("Order No. 2023").

large-scale network upgrades will be made as a result of the revised generator interconnection process. Moreover, similar to many regions across the country, the location of new generation in New England mostly is either distant from the load pockets or distributed across weaker segments of the transmission system. I expect that this will further increase the amount of network upgrades needed on the transmission system.

9. Eversource is committed to supporting the New England states' clean energy goals, including by enabling interconnection of these increasing amounts of generation from renewable sources. In Connecticut, Massachusetts and New Hampshire, our transmission projects have included transmission line upgrades, the installation of new transmission interconnection facilities, substations and lines, and transmission substation enhancements. And as further discussed below, Eversource successfully works with interconnection customers through all stages of the interconnection process to ensure that projects can safely and reliably interconnect to the region's transmission system.

III. Eversource Uses Its Extensive Expertise and Resources to Plan, License, Construct, and Operate Network Upgrades on Behalf of Generators.

10. Even though transmission owners have an obligation to build, own, operate, and maintain network upgrades and expense their expertise, when these upgrades are funded by the interconnection customer, transmission owners have no opportunity to earn a return on these investments. Especially with the Commission's Order No. 2023 mandate of cluster studies and associated cluster network upgrades, the future of interconnection-related network upgrades will include major transmission projects that could significantly change the topology of the grid and will require extensive investment, expertise, construction, and management. I agree that Eversource, like any transmission owner, should not be required to dispense its expertise and efforts on a non-profit basis.
11. Currently, Eversource simultaneously manages 168 individual interconnection requests, spanning across all the different stages of the interconnection process, and the vast majority are completed or closed out successfully and without dispute. As part of these efforts, Eversource actively works with ISO-NE and the interconnection

customer to develop network upgrades that allow for the efficient and reliable interconnection of the project to Eversource's transmission system. This process relies on Eversource's extensive resources and expertise to design, license, construct, own, and operate transmission facilities, including network upgrades.

12. Eversource follows an extensive process to plan, develop, and build network upgrades to meet the needs of its interconnection customers, ensure reliability, and comply with the requirements of the ISO-NE OATT. For example, Eversource allocates valuable resources early on to meet with the interconnection customer and ISO-NE during a pre-scoping meeting for the project. Upon better identification and understanding of customer needs, Eversource allocates additional resources from various departments including engineering, real-estate, system planning and asset management to determine viability of the interconnection and provide as much information to the customer to support a reliable and cost-effective interconnection.
13. Throughout the evolution of the interconnection project, Eversource diligently plans, engineers, procures, and constructs all necessary network upgrades to ensure reliability, compliance, and that generators are only charged for the but-for costs of network upgrades regardless of the generator and who funds the network upgrades. Indeed, Eversource often works with interconnection customers to develop network upgrades and funding mechanisms that benefit all stakeholders. In some instances, Eversource's ability to fund network upgrades allows the company to better identify opportunities for co-optimization that result in cost savings to an interconnection customer. These benefits recently came to light in Eversource's efforts to interconnect an offshore wind project under development by Park City Wind LLC ("PCW").¹¹ During the design of a nearby reliability project, NSTAR recognized the possible need for future expansion on the transmission system on Cape Cod to accommodate the interconnection of potential offshore wind facilities.¹² NSTAR then proposed to use larger and taller transmission structures and slightly larger conductors so that the project is capable of

¹¹ See NSTAR Electric Company, Docket No. ER22-1247, Petition for Approval of Settlement Transmission Support Agreement and Request for Shortened Comment Period and Expedited Approval (filed March 8, 2022).

¹² *Id.* at 8.

operating at 345 kV.¹³ By incorporating this variation into the reliability project, NSTAR was able to lower the overall cost to interconnect PCW's project to its transmission system by approximately \$40 million.¹⁴ NSTAR and PCW also reached agreement on their respective responsibilities to finance and pay for the transmission facilities, including by utilizing both generator and transmission owner funding mechanisms.¹⁵

IV. Eversource Is not Compensated for Assuming the Risks Associated with Owning and Operating Generator-Funded Network Upgrades.

14. As detailed below, there are significant risks associated with owning and operating interconnection-related network upgrades. While Eversource, like all transmission owners, has an obligation to build, own, operate, and maintain network upgrades, when these upgrades are funded by the interconnection customer, Eversource has no opportunity to earn a return on these assets. That is the case even though the risks associated with owning and operating network upgrades are the same for all transmission facilities on Eversource's system and regardless of who funds those facilities. Any risks assumed by Eversource when owning and operating interconnection-related network upgrades thus impose costs on the company without corresponding compensation.

15. The risks associated with owning and operating network upgrades include (1) operational and safety risks, (2) reliability and cybersecurity compliance risks; (3) environmental risks; (4) weather and climate risks; and (5) outage coordination risk. I describe each of these risks in more detail below.

16. *Operational and Safety Risks:* These risks stem from the inherent safety hazards involved in both the installation and day-to-day operations of high-voltage transmission equipment, as well as the added complexities and risks of running a transmission system when an element of that system is on outage. It is imperative that transmission owners protect the safety of employees, contractors, and the public when installing,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 12-13.

operating, and maintaining their transmission assets. Transmission owners must also monitor their systems continuously, ensuring that operational issues do not turn into customer outages. These operational and safety risks are part of each transmission owner's routine operations and maintenance of its transmission system, regardless of the type of transmission asset or who funded it. While the NETOs are compensated for prudent expenses incurred, they may ultimately not recover some costs related to emergency response and outages. Indeed, in Connecticut, state law requires that the electric distribution companies provide financial relief to their residential customers for prolonged power outages caused by an emergency.¹⁶ The NETOs may also face significant risks associated with investigations, litigation, and penalties if the emergency response did not meet stakeholder expectations.

17. *Reliability and Cybersecurity Compliance Risks:* Any additions to the transmission system increase its complexity and expands the potential exposure to reliability and cybersecurity risks. Eversource, as the transmission owner, is largely responsible for ensuring the reliable operation of its system and compliance with the Reliability Standards set forth by the North American Electric Reliability Corporation ("NERC"). These responsibilities include, but are not limited to, performing asset management and maintenance activities, accurately modeling, designing, and operating the transmission system, engaging in communications with and providing data to relevant parties, protecting assets from physical and cyber security risks, and managing supply chain risks. Eversource, like all transmission owners, designs programs, policies, processes, and internal controls governing these responsibilities that either meet or exceed the requirements of the NERC Reliability Standards while addressing new and emerging risks to the reliability and security of its assets and the broader ISO-NE transmission system. Adding interconnection-related network upgrades to the transmission system increases the size of Eversource's system and thus the risk of noncompliance and resulting financial penalties. This is especially so because the grid is no longer a closed system. Instead, it is becoming more open, and thus vulnerable, as the facilities used to interconnect new generation include more automation devices, communication

¹⁶ See Conn. Gen. Stat. §§ 16-32 and -32m, as amended by Conn. Pub. Acts 23-102, §§ 17-20.

devices, and other devices with internet connectivity. While Eversource may be able to recover costs associated with bolstering its compliance program to account for these additional assets, it cannot recover the cost of financial penalties associated with a violation of NERC's reliability standards.

18. *Environmental Risks:* Installing, owning, and operating network upgrades also exposes transmission owners like Eversource to risks and potential liabilities associated with the potential environmental impacts of constructing and maintaining transmission infrastructure. Such risks include, for example, soil and ground water contamination, and any violation of the associated environmental regulations governing these discharges can result in financial penalties, civil litigation, and even criminal liability. These risks are especially apparent when a project, like many network upgrades, involves work at transmission equipment with existing environmental conditions because even routine work may disturb contaminated sites in violation of environmental regulations.
19. *Weather and Climate Risks:* Severe weather events and changing climate and weather patterns, including increased drought conditions in the Northeast, are creating an increasing risk of damage or destruction to transmission equipment. Transmission owners carry risks and liabilities associated with those events, including customer outages, and the responsibility to engage in emergency response efforts to safely restore service and repair equipment. In addition, system performance during extreme weather events often comes with reputational risk and regulatory scrutiny that can impact the transmission owner's business beyond the immediate consequences of the event. Like other risks discussed here, the risks associated with weather events and climate change increase with any increase in the size of the transmission system, including by adding interconnection-related network upgrades.
20. *Outage Coordination Risks:* Installing and integrating network upgrades into a transmission owner's existing system often requires outages of existing transmission equipment. These outages are difficult to coordinate and the transmission owner must ensure that they do not interfere with the reliable provision of service or other planned outages. Any breakdown in coordination could lead to customer outages, damaging

the transmission owner's reputation and potentially resulting in litigation, penalties, and, as noted above, in Connecticut, payments to customers. Electrification, including of the heating and transportation sectors, means any outage will have an even greater impact on customers' daily lives than may have historically been the case, further increasing these risks for transmission owners. Moreover, because, unlike a greenfield project, network upgrades usually require upgrades to existing facilities, the required outage coordination is especially complicated.

21. Notably, these risks are becoming more significant in light of the expected buildout of network upgrades to accommodate the transformation of the generation mix discussed above. Moreover, as further noted above, changes to the interconnection process required by Order No. 2023 are expected to increase the scale of these upgrades. Clustering interconnection projects could result in a large batch of interconnection upgrades for multiple generation projects, thereby complicating opportunities to co-optimize upgrades for individual interconnection customers. In addition, the location of new generators in New England is either distant from the load pockets or distributed across weaker segments of the transmission system. I expect that this will further increase the amount of network upgrades needed on the transmission system and create additional risks and obligations to own and operate such network upgrades.
22. Eversource is not compensated for these risks assumed when owning and operating generator-funded network upgrades because Eversource does not earn a return on those assets. As noted below and as discussed in detail in Ms. Lapson's testimony, security requirements, operation and maintenance ("O&M") charges, and insurance are inadequate compensation for these risks borne by transmission owners.
23. *Security Requirements:* Existing security requirements do not address the risks associated with owning and operating network upgrades. Security requirements only address the risk of non-payment by interconnection customers, not the risk of owning and operating network upgrades.
24. *O&M Charges:* Likewise, O&M charges do not compensate for these risks. Instead, these charges compensate for the actual cost of operating and maintaining network upgrades. Thus, at best, they keep Eversource cost recovery neutral. But they do not

provide for a return on profit or compensation associated with the risks outlined above. I believe that it is fundamentally prejudicial and discriminatory to require private enterprise like the NETOs to operate a non-profit business for the benefit of the single class of interconnection customers.

25. *Insurance:* Finally, existing insurance does not protect against the full risks associated with owning and operating interconnection-related network upgrades. For example, while wildfire insurance may be available in the commercial insurance market, carriers limit the amount of their maximum exposure. Similarly, insurance designed to protect against cyber security risks may not be efficient to protect against the full liability associated with the cascading affects of a large-scale cyberattack. In any event, it would be imprudent to insure against every single risk associated with owning and operating network upgrades because the cost of doing so would be so great that it would pose a financial burden on Eversource's other transmission customers. This is especially so because most insurance policies are not specific to a particular transmission asset, they cover the entire business. I would expect that unbundling these policies to cover only interconnection-related network upgrades would significantly increase the cost of Eversource's insurance for its entire transmission system.

26. This concludes my Affidavit.

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc.

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Docket No. EL24-83-000

AFFIDAVIT

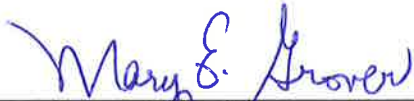
Vandan Divatia, being duly sworn, deposes and states:

That he is the Vice President Transmission Policy, Interconnections & Compliance at Eversource Energy, that the foregoing Affidavit was prepared by him or under his supervision, and that to the best of his knowledge, information, and belief, the statements contained in the foregoing Affidavit are true and correct.



Vandan Divatia
Vice President Transmission Policy,
Interconnections & Compliance
Eversource Energy

Subscribed and sworn to before me this 10th day of September, 2024.



Notary Public

Commonwealth of Massachusetts, Norfolk County

My Commission expires:

March 31, 2030