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NYISO ESPWG/TPAS - Mechanism to Implement Transmission Owners' ROFR over Upgrades in the Public Policy Transmission Planning Process

Comments of the New York Transmission Owners

The New York Transmission Owners (“NYTOs”)¹ submit the following comments concerning the implementation of their Right of First Refusal (“ROFR”) applicable to Upgrades in the Public Policy Transmission Planning Process.

I. Background

On April 14, 2021, the Federal Energy Regulatory Commission (“FERC”) issued a declaratory order confirming that the NYTOs have a federal ROFR to build, own, and recover the cost of certain upgrades of the transmission system, as permitted under FERC Order No. 1000,² including upgrades to the NYTOs’ existing bulk or local transmission facilities and upgrades that are part of a developer’s proposed transmission project that the NYISO selects in its competitive transmission planning processes.³ However, FERC found that the existing provisions of the NYISO OATT do not contain a mechanism to exercise this right.⁴

At the May 20, 2021 Electric System Planning Working Group (“ESPWG”) meeting, the NYISO presented its proposal on implementing the ROFR in the Public Policy Transmission Planning Process (“PPTPP”), accompanied by a discussion with stakeholders.⁵ The following comments are submitted in response to the NYISO’s request for robust stakeholder discussion and stakeholder feedback.

¹ The New York Transmission Owners include: Central Hudson Gas & Elec. Corp; Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, Niagara Mohawk Power Corporation d/b/a National Grid; New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Co.

² *Transmission Planning & Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g and clarification*, 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).

³ *N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038, at P 30 (April 14, 2021) (“Declaratory Order”).

⁴ *Id.* at P 40.

⁵ the NYISO, Mechanism to Implement Transmission Owners’ ROFR over Upgrades in the Public Policy Transmission Planning Process (May 20, 2021), available at <https://www.theNYISO.com/documents/20142/21653207/06%20UpgradeMechanism.pdf/ba0b255c-11ae-420b-d4fb-7f0304884ca4> (“May 20 Proposal”).

II. Comments

1. Definition of Upgrades

The ROFR applies to “Upgrades.” The NYISO has proposed to retain the definition of Upgrade from Order No. 1000.⁶ However, the NYTOs urge the NYISO to adopt the definition of Upgrades that MISO uses in its Tariff.⁷ The MISO definition has already been approved by FERC,⁸ and it is superior to the definition in Order No. 1000 because it is more specific. Adopting the MISO FERC-approved definition will help avoid uncertainty in the future as to whether a particular facility constitutes an Upgrade.

2. The NYISO Determination of Upgrades

The NYISO indicated it would consider relevant FERC guidance on Upgrade and presumably New Facilities determinations, whether from MISO or another ISO/RTO. To the extent the NYISO is relying on such precedent in its Upgrade and New Facilities determinations and does not include the more specific MISO definition of Upgrades in its Tariff, the NYISO should identify the guidance on which it plans to rely in advance of issuing a solicitation and when making Upgrade determinations.

3. Evaluation Process and Timing of TO Exercise of ROFR

The NYTOs request that the NYISO specify the Upgrade information and the timing of release of such information to the relevant TO at each significant stage of this process. For example, the NYISO proposed publishing a list of Upgrades for all project proposals 30 days prior to the presentation of its Viability and Sufficiency (“V&S”) Assessment. However, it is unclear whether this refers to the initial presentation of the V&S Assessment to stakeholders or the posting of the final report. Given the importance of this information in allowing a NYTO to make an informed decision on whether it will exercise its ROFR, the NYISO should clarify exactly when in the process this identification of Upgrades would be posted, and how much time is expected to elapse between this date and the posting of the final V&S Assessment. This information should be presented as early as possible to make sure we have a workable process.

The NYISO has proposed that each applicable TO must notify the NYISO in writing within 15 calendar days of the posting of the final V&S Assessment whether it will exercise its ROFR as the Designated Entity of an Upgrade.⁹ The NYTOs believe that in order to make reasonable determinations on whether to exercise their ROFR to build Upgrades on their systems, it may be necessary to defer the decision point until shortly after the Board selection announcement. Each Developer may propose numerous solutions with innovations that vary widely across Developers. It is expected that the TO would elect to exercise its right to upgrade,

⁶ May 20 Proposal at slide 14.

⁷ MISO OATT, Attachment FF, Section VIII.A.2.1.

⁸ See *Midwest Indep. Transmission Sys. Operator, Inc. et al.*, 147 FERC ¶ 61,127 (2014).

⁹ May 20 Proposal at slide 22.

but to require TOs to exercise earlier in the process than is necessary will require greater time dedication of TO resources to analyze all projects identified in the V&S Assessment applicable to their business. The following is a non-exhaustive list of examples of tasks that may be required for certain TOs to make their ROFR determination:

- Conduct engineering studies to determine the physical feasibility of each identified Upgrade on its system;
- Analyze design parameters, timing and costs of each Upgrade;
 - Note that the Network Upgrade Facilities associated with each Upgrade would not be known at this time and therefore cannot be factored into the decision;
- Determine whether the Upgrade fits within the TO's resource and financing capabilities;¹⁰
- Process and obtain necessary approvals from executive management and, in some cases, the board of directors.

To provide a meaningful and reasonable opportunity to exercise the ROFR with respect to all projects determined to pass the V&S threshold may require more time than the NYISO has proposed. In addition, while the NYISO may believe it is helpful to provide the upgrade information to the NYTOs sooner in the process, i.e., before completion of V&S, this would result in the NYTOs unnecessarily reviewing upgrades for projects that will not even pass the V&S.

The process could be handled much more efficiently by allowing each applicable TO to accept or reject its designation within 30 days of the NYISO Board's selection of the Project(s). This will focus the TO's decision only on the Project(s) selected by the NYISO Board, enabling the TOs to conduct the appropriate analysis more quickly and efficiently and to satisfy a reasonable internal decision making and approval processes.

Under the NYTO's proposal, the NYISO would complete the selection process before ascertaining whether a TO will be the designated entity for an Upgrade. The NYTOs recommend that the NYISO, for purposes of its evaluation, apply its independent consultant's cost estimate for the Upgrades included in each proposed project.

The NYTOs share the NYISO's objective to implement the ROFR without delaying the process. Additional time may be required to allow the NYTOs to evaluate the designation for one or more Upgrades by the NYISO. The NYTOs are conscious that their evaluation and election process should not present delay in the PPTPP. Adopting the NYTO proposal would allow for the reasonable implementation of FERC's order and would facilitate timely completion of the PPTPP.

¹⁰ Such considerations may include whether utility resources will be available given other planned projects needed to maintain reliability, whether funding the upgrades can be accommodated by existing capital budgets, or if new financing arrangements, potentially subject to PSC authorization, may be required.

4. Cost Containment

The NYISO correctly observes that cost containment is voluntary.¹¹ If a TO accepts its designation for an Upgrade, the TO is free to adopt, but is not required to adopt, cost containment.

5. Cost Allocation

the NYISO proposes that following the selection of a Project by the Board, the Designated Entity(ies) will have the opportunity to recover the costs for the selected project under Rate Schedule 10 as well as a reasonable rate of return.¹² The NYTOs concur with the NYISO's proposal. The NYISO's resolution of this issue recognizes the transmission projects are to satisfy public policy and are subject to the Order No. 1000, Rate Schedule 10 cost allocation as the default cost allocation. This is true irrespective of who builds each segment of a project. Cost allocation and recovery by a developer, including a transmission owner, also remain subject to a transmission owner's rights under the Federal Power Act: that is, each developer and transmission owner has the right to propose an alternative to the NYISO Tariff default cost allocation, as well as rates, subject to appropriate regulatory review.

6. Additional Comments

Each relevant Connecting Transmission Owner needs to see developer project proposals to fulfill its obligation to conduct the System Impact Study ("SIS"). the NYISO states on slide 15 that it will include a tariff requirement for applicable TO staff to execute a non-disclosure agreement ("NDA") when performing the SIS to prohibit communications between "staff performing the interconnection work and other [TO] staff that will be involved in decisions in the Public Policy Transmission Planning Process." This provision is too broad and vague. We look forward to reviewing the NYISO's clarification before the next stakeholder meeting.

In addition, the NYISO should clarify that developer determinations about Network Upgrade Facilities included in their bids are preliminary and non-binding on the NYISO. the NYISO should make the official determination subject to the applicable review process.

The NYTOs reiterate their request made during the May 20 ESPWG meeting, that the NYISO publish a list of facilities that it decided were *not* Upgrades in addition to posting the list of Upgrades. To the extent known, the NYISO should also publish a list of Network Upgrade Facilities. This practice would save time because it would allow participants to have the information sooner should there be a need to vet any of the facility classifications.

¹¹ *Id.* at slide 22.

¹² *Id.* at slide 24.

III. Conclusion

The NYTOs support the NYISO's proposed implementation of the ROFR, subject to the comments provided above.

Respectfully Submitted,

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