

# Applying the TO ROFR to Network Upgrade Facility “Upgrades”

New York Transmission Owners  
NYISO ESPWG Meeting

July 1, 2022

# Agenda

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# I. Introduction

- New York’s historic Climate Leadership and Community Protection Act has set the course for transformation of the electric system.
- New York needs major transmission infrastructure development to satisfy renewable and decarbonization mandates while maintaining reliability.
- The NYISO’s transmission planning process has resulted in case-by-case resolution of how to implement the transmission owners’ (“TOs”) reserved right to build and recover the costs of upgrades to their transmission systems.
- For the New York Transmission Owners (“NYTOs”), this reserved right was a fundamental consideration in forming the NYISO.

## Introduction (Cont'd)

- The NYISO tariff, however, lacked provisions governing how to implement this reserved right.
- The NYISO acted to remedy this deficiency in the Public Policy Transmission (“PPT”) process with FERC’s help.
- Today, the NYTOs propose complementary changes to address the full implementation of this reserved right for PPT projects.

## II. Background

- August 18, 2020: NYISO filed with FERC a Petition for a Declaratory Order to confirm:
  - Each NYTO has a right of first refusal to build, own and recover the costs of upgrades (“Upgrades”) to its transmission facilities, as distinct from New Facilities, including Upgrades proposed as part of another developer’s Order No. 1000 project.
- April 15, 2021: FERC issued a declaratory order confirming that the NYTOs have a Rights of First Refusal (“ROFR”) and observed that the NYISO tariff did not yet address how the ROFR was to be implemented. The Order is final and non-appealable.

## Background (Cont'd)

- October 12, 2021: the NYISO filed ROFR implementation tariff amendments with FERC under FPA section 206.
  - The NYISO filing only addressed Upgrades that are part of a Developer's proposed PPT project.
- March 11, 2022: FERC issued an order approving the NYISO's proposed implementation of the ROFR.
  - The order is final and non-appealable.
  - The NYISO has started to apply the ROFR procedures to the pending Long Island PPT solicitation.
- Additional Tariff changes are required to address Upgrades that arise in other contexts, in order to fully implement the TO ROFR as confirmed in the Declaratory Order. <sup>1</sup>

<sup>1</sup>See Appendix A for citations.

### III. NUF Upgrades

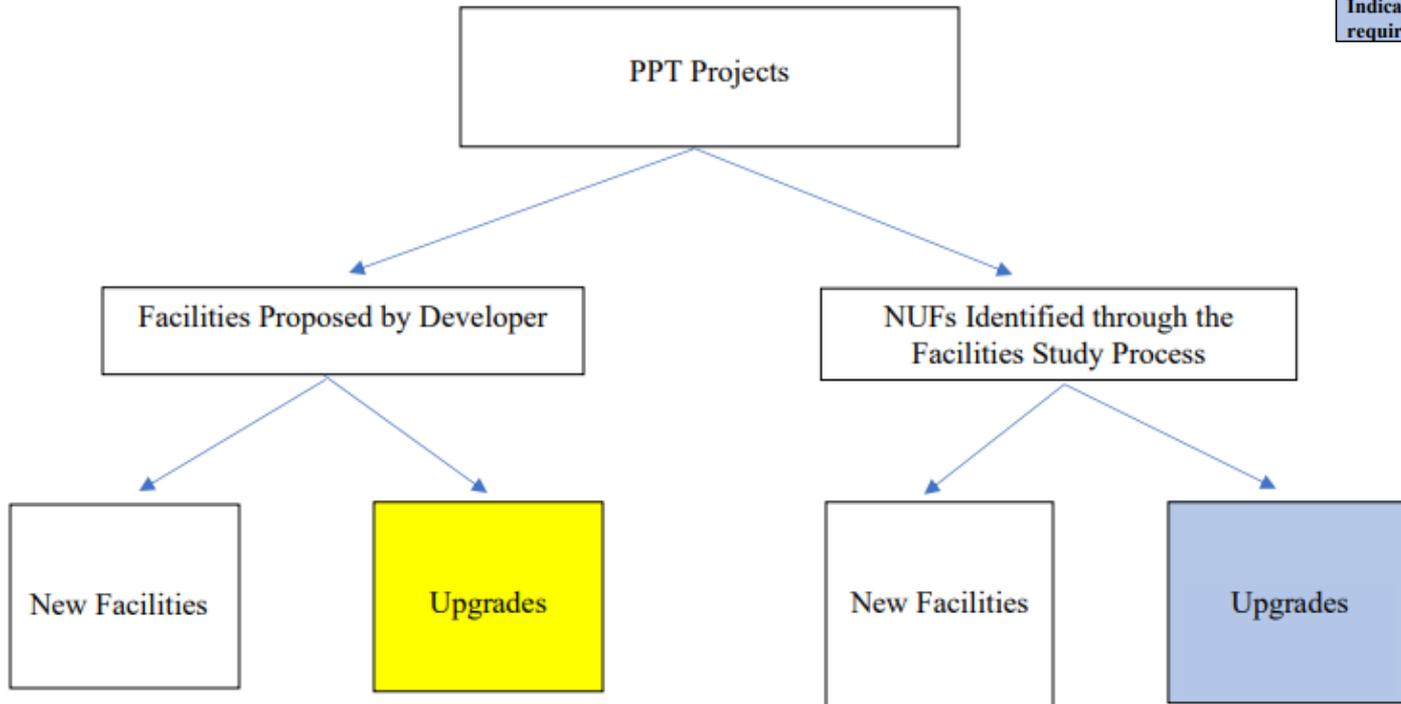
- The ROFR applies to upgrades as defined in OATT Attachment Y Section 31.6.4 (“Upgrades”).<sup>1</sup>
- A PPT project may require Upgrades that are identified in the interconnection process.
  - Network Upgrade Facilities or “NUFs” are identified pursuant to the transmission interconnection procedures of OATT Attachment P in Section 22.9.3.
  - NUFs are those facilities necessary to reliably interconnect a proposed transmission project to the system in accordance with all applicable requirements.
- NUFs may be New, or Upgrades (“NUF Upgrades”)
- The Declaratory Order applies to all Upgrades that are part of PPT projects, whether initially identified in the developer’s bid, or later through the interconnection process.<sup>2</sup>

<sup>1</sup>For purposes of Section 31.6.4, the term ‘upgrade’ shall refer to an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility.”

<sup>2</sup>See Appendix A for citations.

### III. NUF Upgrades (Cont'd)

Indicates ROFR applies and currently covered by the Tariff  
Indicates ROFR applies but requires revisions to the Tariff



## IV. Need for NUF Upgrade ROFR Procedures

- PPT NUF Upgrades, like all Upgrades, are subject to the ROFR.
- NYISO Tariff changes are needed to prevent future case-by-case litigation, and associated cost.
  - Without the tariff changes, there will be regulatory risks, potential delays and a lack of process transparency.
- The NYTOs are vetting their solutions to provide for clear, transparent rules to implement the ROFR as applied to PPT NUF Upgrades.
- The mechanism closely parallels the mechanism the NYISO is now using for Upgrades that are proposed by a Developer.
  - Follows as much of the NYISO process as possible.
  - FERC approved this process.
  - The NYISO and stakeholders are familiar with this process.

## V. Proposed NUF ROFR Implementation and Mechanics

### NYISO Posting of NUF Upgrades and New Facilities

- NUFs are identified in the interconnection process and are finalized in the Facilities Study.
- Within [x] days following the finalization of the Facilities Study for each PPT Project selected to proceed in accordance with OATT Attachment Y:
  - The NYISO would identify any NUFs or portion of NUFs that constitute Upgrades and New Facilities and post a list of the Upgrades and New Facilities, if any.
  - Interested parties would have 20 days to submit comments to the NYISO on the designation of NUFs as Upgrades and New Facilities.
  - The NYISO would consider the comments prior to finalizing the list of NUF Upgrades and NUF New Facilities, post the final list for each PPT Project and provide notice to the Developer and relevant Transmission Owner(s) (NUF Upgrade Notice).

## V. Proposed NUF ROFR Implementation and Mechanics (Cont'd)

### Designated Entity

- If the TO does not wish to be the Designated Entity for all or a portion of the PPT NUF Upgrades, the TO would have 30 days from NYISO NUF Upgrade Notice in which to issue a written declination notice to the NYISO.
- Absent a declination notice with respect to some or all of the PPT NUF Upgrades, the default shall be that the TO would be the Designated Entity.
- The Designated Entity is obligated to build and fund the NUF Upgrades identified in the final list of NUF Upgrades.
- The NUF Upgrades are subject to the relevant provisions of the OATT, Development Agreement(s) and Interconnection Agreement(s), including without limitation provisions concerning:
  - Project changes in the course of developing a project and
  - Cost recovery if a project is cancelled or halted.

## V. Proposed NUF ROFR Implementation and Mechanics (Cont'd)

**Cost Allocation and Recovery.** Each TO that is the Designated Entity (exercises its ROFR) for any PPT NUF Upgrades, for those Upgrades:

- is responsible for building and funding the NUF Upgrades.
- may allocate and recover the costs for a project under the PPT process pursuant to the NYISO OATT provisions governing cost allocation and recovery of the PPT Project for which the NUF Upgrades were identified.
- reserves its Federal Power Act rights to seek alternate recovery and cost allocation.

**Security Posting.** A Developer would not be required to post security for PPT NUF Upgrades for which a TO is the Designated Entity.

## V. NYTO Proposed NUF ROFR Implementation and Mechanics (Cont'd)

**TO Declinations.** If a TO declines its ROFR, then:

- the existing requirements of the OATT would apply, and
- would not limit the rights of the TO and the Developer to enter into an Interconnection Agreement governing each party's rights and obligations to build, post security for and fund the NUF facilities, subject to any necessary filings with FERC.

**Components of NUFs That Are New Facilities.**

- If there are any components of PPT Project NUFs that are not Upgrades, then the existing tariff provisions would apply to such facilities.

## VI. Supporting Transmission Development

- The ROFR applies to Upgrades, including upgrades that are part of a proposed PPT.
- Absent a clear and transparent process, NUFs will be identified in Facilities Studies, leaving Transmission Owners and Developers without a NYISO Upgrade identification process. This in turn can lead to:
  - Disputes over which parts of NUFs are Upgrades,
  - Disputes over the terms of the interconnection agreement,
  - FERC litigation to solve the disputes,
  - Delay,
  - Uncertainty and
  - Absorption of scarce NYISO, stakeholder and FERC resources.
- By following implementation procedures that closely track those that FERC recently approved, we can provide stability and transparency with clear timelines.

## VII. Next Steps

- Comments
  - Please provide any comments by July 14<sup>th</sup> .
  - Email Comments to: [katherine.okonski@troutman.com](mailto:katherine.okonski@troutman.com), [antonia.douglas@troutman.com](mailto:antonia.douglas@troutman.com) and [stuart.caplan@troutman.com](mailto:stuart.caplan@troutman.com) .
  - The NYTOs will consider comments.
- ESPWG Meeting July 26<sup>th</sup>
- Following consideration of comments, NYTOs plan to file tariff changes with FERC,
  - With a proposed effective date to make implementation procedures applicable to the Long Island OSW PPT process.

# Questions

**Thank You!**

## Appendix A - Citations

- “On April 15, 2021, the Commission granted in part NYISO’s petition for declaratory order (Petition), confirming that the NYTOs have a federal ROFR under NYISO’s foundational agreements and section 31.6.4 of NYISO’s OATT to build, own, and recover the cost of upgrades to their existing transmission facilities, as permitted under Order No. 1000.” *NYISO*, 178 FERC ¶ 61,179 at P 4 (March 11, 2022) (footnotes omitted); *id.*, P 50 (same), discussing *NYISO*, 175 FERC ¶ 61,038 (2021).
- “[W]e grant the Petition on Issue 1, in which NYISO sought confirmation that the NYTOs have a federal ROFR under NYISO’s foundational agreements and OATT section 31.6.4 to build, own, and recover the costs of upgrades to their existing transmission facilities, as permitted under Order No. 1000, *including upgrades that are part of another Developer’s proposed transmission project that NYISO selects in its regional transmission plan for purposes of cost allocation. Id.* at P 30 (emphasis added), see also P 33, 35 (same).