

151 FERC ¶ 61,005
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

New York Transco, LLC

Docket No. EC15-45-000

Central Hudson Gas & Electric Corporation
Consolidated Edison Company of
New York, Inc.

Niagara Mohawk Power Corporation
New York State Electric & Gas Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric Corporation

ORDER DISMISSING APPLICATION

(Issued April 2, 2015)

1. On December 4, 2014, Consolidated Edison Company of New York, Inc. (Con Edison)/Orange and Rockland Utilities, Inc. (Orange and Rockland), Niagara Mohawk Power Corporation (Niagara Mohawk), New York State Electric & Gas Corporation (New York State Electric & Gas)/Rochester Gas and Electric Corporation (Rochester Gas and Electric), and Central Hudson Gas & Electric Corporation (Central Hudson) (collectively, Applicant NYTOs), and New York Transco, LLC (NY Transco) (together with Applicant NYTOs, Applicants) filed, pursuant to sections 203(a)(1)(A) and 203(a)(1)(B) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² an application requesting authorization for the transfer from Applicant NYTOs to NY Transco of certain transmission facilities, and related books, records and accounts (the Transaction Assets), in connection with the development of five

¹ 16 U.S.C. §§ 824b(a)(1)(A) and 824b(a)(1)(B) (2012).

² 18 C.F.R. Pt. 33 (2014).

transmission projects in New York (Transmission Projects) (Proposed Transactions).³ As discussed below, we dismiss the Application for lack of jurisdiction.

I. Background

A. The Parties to the Proposed Transactions

1. Consolidated Edison Company of New York, Inc./Orange and Rockland Utilities, Inc.

2. Applicants state that Con Edison and Orange and Rockland are public utilities within the meaning of the FPA, and that each is a corporation organized under the laws of the State of New York. According to Applicants, both utilities are subsidiaries of Consolidated Edison, Inc. and have been granted authority by the Commission to make wholesale sales of electricity at market-based rates. Applicants explain that Con Edison and Orange and Rockland have transferred functional control over their transmission facilities to New York Independent System Operator, Inc. (NYISO), and that, with the exception of certain grandfathered agreements, transmission service over Con Edison's and Orange and Rockland's transmission facilities is provided pursuant to the NYISO Open Access Transmission Tariff (NYISO Tariff).

3. Applicants note that Con Edison's and Orange and Rockland's retail and distribution sales are regulated by the New York Public Service Commission (New York Commission), and that the retail distribution and service provided by Orange and Rockland in Pennsylvania and New Jersey is regulated by the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utilities, respectively.⁴

2. Niagara Mohawk Power Corporation

4. Applicants state that Niagara Mohawk is a New York corporation and an indirect wholly-owned subsidiary of National Grid plc, a publicly-traded multi-state public utility holding company organized under the laws of Great Britain. Applicants state further that the Commission has granted Niagara Mohawk authority to make wholesale sales of electricity at market-based rates. According to Applicants, Niagara Mohawk has transferred functional control over its transmission facilities in New York to NYISO, and that, with the exception of certain grandfathered agreements, transmission service over

³ Joint Application for Authorizations Under Section 203 of the Federal Power Act for Dispositions and Acquisitions of Transmission Assets and Request for Waivers, Docket No. EC15-45-000 (Dec. 4, 2014) (Application).

⁴ *Id.* at 4-5.

Niagara Mohawk's transmission facilities in New York is provided pursuant to the NYISO Tariff. Applicants note that Niagara Mohawk's retail and distribution sales in New York are regulated by the New York Commission.⁵

3. New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation

5. Applicants state that New York State Electric & Gas and Rochester Gas and Electric are both public utilities within the meaning of the FPA, and that each is a corporation organized under the laws of the State of New York. Applicants state further that New York State Electric & Gas and Rochester Gas and Electric are both wholly-owned subsidiaries of Iberdrola USA, Inc., which itself is a subsidiary of Iberdrola, S.A., and that both are engaged in the transmission and distribution of electric power and natural gas. According to Applicants, New York State Electric & Gas and Rochester Gas and Electric have been granted authority by the Commission to make wholesale sales of electricity at market-based rates, and both have transferred functional control over their transmission facilities to NYISO. Applicants explain that, with the exception of certain grandfathered agreements, transmission service over New York State Electric & Gas' and Rochester Gas and Electric's transmission facilities is provided pursuant to the NYISO Tariff. Applicants note that New York State Electric & Gas' and Rochester Gas and Electric's retail and distribution sales are regulated by the New York Commission.⁶

4. Central Hudson Gas & Electric Corporation

6. Applicants state that Central Hudson is a public utility within the meaning of the FPA and is a corporation organized under the laws of the State of New York. Applicants state further that Central Hudson is a wholly-owned subsidiary of CH Energy Group, Inc., and an indirect wholly-owned subsidiary of Fortis, Inc., a publicly-traded Canadian utility holding company. According to Applicants, Central Hudson is engaged in the transmission and distribution of electric power and natural gas, and has been granted authority by the Commission to make wholesale sales of electricity at market-based rates. Applicants explain that Central Hudson has transferred functional control over its transmission facilities to NYISO, and that, with the exception of certain grandfathered agreements, transmission service over its transmission facilities is provided pursuant to the NYISO Tariff. Applicants note that Central Hudson's distribution of power for sale at retail is regulated by the New York Commission.⁷

⁵ *Id.* at 5.

⁶ *Id.* at 6.

⁷ *Id.* at 6-7.

5. New York Transco, LLC

7. Applicants state that NY Transco is a newly-formed limited liability company organized under the laws of the State of New York that will develop, own and maintain the Transmission Projects. Applicants explain that NY Transco has been formed for the purpose of planning, constructing, owning, operating, maintaining, and expanding electric transmission facilities and related activities in the State of New York. According to Applicants, NY Transco has submitted a proposed formula transmission rate with the Commission, and will become a public utility upon the Commission's acceptance of that filing.⁸ Applicants note that the equity members of NY Transco are affiliates of the Applicant NYTOs.

B. The Transmission Projects

8. The Transaction Assets that Applicant NYTOs propose to transfer to NY Transco as part of the Proposed Transactions are associated with two groups of transmission projects: the Transmission Owner Transmission Solution transmission projects (also known as the TOTS Projects), which have been selected and approved by the New York Commission, and the AC Projects, which are currently being evaluated by the New York Commission in an open and competitive solicitation initiated by the New York Commission.⁹ Applicants explain that each of the Applicant NYTOs will continue to develop its portion of the respective Transmission Projects until such time as all conditions to the Proposed Transactions have been met and the Proposed Transactions are consummated.

C. The Proposed Transactions

9. According to Applicants, the Transaction Assets that Applicant NYTOs propose to transfer to NY Transco include "certain new transmission equipment that will become part of the [Transmission Projects], but will not be energized at the time of closing"¹⁰ of the Proposed Transactions, and related books and records, including the balance of construction work in progress (CWIP) accrued by the applicable Applicant NYTO in

⁸ See Application for Acceptance of Transmission Formula Rate and Approval of Transmission Rate Incentives and Cost Allocation Method, Docket No. ER15-572-000 (Dec. 4, 2015) (NY Transco Rates Filing). The Commission is issuing concurrently with this order an order addressing the NY Transco Rates Filing. *New York Independent System Operator, Inc., et al.*, 151 FERC ¶ 61,004 (2015).

⁹ Application at 7.

¹⁰ *Id.* at 12.

connection with the Transmission Projects, any unamortized regulatory assets as recognized by the Commission and not included in CWIP and accounts reflecting associated material and supplies.

10. Applicants state, however, that “the precise Transaction Assets to be transferred from each of the Applicant NYTOs to NY Transco will continue to change until the time of closing as the Applicant NYTOs continue development work in their respective portions of the [Transmission Projects].”¹¹ Accordingly, Applicants request that the Commission approve the transfer of all Transaction Assets related to the Transmission Projects as those assets may exist at the time when each of the Proposed Transactions is consummated, including the associated books, records, and the balance of CWIP accounts accrued by the Applicant NYTOs in connection with the Transmission Projects, any unamortized regulatory assets as recognized by the Commission and not included in CWIP, and accounts reflecting associated materials and supplies. Applicants state that the Proposed Transactions “do not involve the transfer of any existing and energized conductor, transformer, or substation.”¹²

II. Notice of Filing and Responsive Pleadings

11. Notice of the Application was published in the *Federal Register*, 79 Fed. Reg. 74,079 (2014), with interventions and protests due on or before December 26, 2014. In response to several motions requesting extensions of time to file comments in this proceeding and Docket No. ER15-572-000, regarding the NY Transco Rates Filing, the Commission subsequently extended the comment date to and including January 16, 2015.¹³

12. Motions to intervene in this proceeding were filed by Multiple Intervenors;¹⁴ City of New York, New York (City of New York); Boundless Energy NE, LLC (Boundless Energy); Smart Wire Grid, Inc.; the New York Power Authority; the New York Association of Public Power; NextEra Energy Transmission, LLC; the Municipal Electric

¹¹ *Id.*

¹² *Id.* n.19.

¹³ Notice Granting Extension of Time, Docket Nos. ER15-572-000 and EC15-45-000 (not consolidated) (Dec. 22, 2014).

¹⁴ Multiple Intervenors is an unincorporated association of over 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State. Motion to Intervene of Multiple Intervenors, Docket No. EC15-45-000 (Dec. 11, 2014).

Utilities Association of New York (Municipal Utilities of New York); and Entergy Nuclear Power Marketing, LLC. The New York Commission filed a notice of intervention.

13. Protests were filed by Multiple Intervenors; City of New York; Boundless Energy; Municipal Utilities of New York; and the New York Commission. Applicants filed an answer to the protests on February 2, 2015.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁵ the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁶ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will reject the answer as moot because, as discussed below, we dismiss the Application for lack of jurisdiction.

16. In the Application, Applicants make clear that the transmission facilities to be transferred pursuant to the Proposed Transactions are not yet in existence, energized or in service. Applicants state, for example, that the transmission equipment to be transferred "will not be energized at the time of closing"¹⁷ and that the Proposed Transactions do not involve "the transfer of any existing and energized conductor, transformer, or substation."¹⁸ In addition, Applicants state that the Transmission Projects "are in the early permitting and development stage and will not be in-service at the time they are transferred to NY Transco."¹⁹ Under Commission precedent, transmission facilities that

¹⁵ 18 C.F.R. § 385.214 (2014).

¹⁶ 18 C.F.R. § 385.213(a)(2) (2014).

¹⁷ Application at 2.

¹⁸ *Id.* n.19.

¹⁹ *Id.* at 2. Applicants also state that, pursuant to the Proposed Transactions, they are proposing to transfer to NY Transco "certain new transmission equipment that will become part of the [Transmission Projects]," and note that "the precise Transaction Assets to be transferred from each of the Applicant NYTOs to NY Transco will continue to change until the time of closing as the Applicant NYTOs continue development work." *Id.* at 12.

are not in service are not subject to the Commission's jurisdiction.²⁰ Based on the information provided in the Application, the facilities that Applicants propose to transfer pursuant to the Proposed Transactions are not and will not be in service at the time of closing and therefore are not subject to the Commission's jurisdiction under FPA section 203. Accordingly, we will dismiss the Application for lack of jurisdiction.²¹

²⁰ See, e.g., *PacifiCorp*, 132 FERC ¶ 61,018, at P 20 (2010) (*PacifiCorp*) (citing *Gamma Mariah, Inc.*, 44 FERC ¶ 61,442 (1988) (*Gamma Mariah*)); *Idaho Power Company*, 132 FERC ¶ 61,019, at P 20 (2010) (*Idaho Power*) (same). In *PacifiCorp* and *Idaho Power*, the Bonneville Power Administration (Bonneville) argued, in two separate FPA section 205 proceedings addressing two joint ownership and operating agreements proposed by PacifiCorp and Idaho Power Company (Idaho Power), that the proposed agreements were part of a larger transaction and that PacifiCorp and Idaho Power were required to make a filing under FPA section 203 for approval of the transaction. Bonneville specifically argued that the substations subject to the proposed agreements were scheduled to be energized and that the companies could not argue that the substations were non-jurisdictional. The Commission rejected Bonneville's argument, stating that "[t]he transfer of ownership in transmission facilities not yet in service are not subject to the Commission's jurisdiction under section 203 of the FPA." *PacifiCorp*, 132 FERC ¶ 61,018 at P 20; *Idaho Power*, 132 FERC ¶ 61,019 at P 20. In *Gamma Mariah*, which *Idaho Power* and *PacifiCorp* rely on, the Commission found, in addressing applications for the certification of eight wind power facilities as qualifying facilities and the broader issue of whether qualifying facilities could collectively own undivided interests in a single transmission line, that "[t]he allocation of the shares of interest in the transmission facilities to the Applicants will take place prior to the Commission facilities being placed into service (i.e., before power actually flows through the transmission facilities to Edison) and, thus, these activities will not be subject to the Commission's jurisdiction under Part II of the [FPA]." *Gamma Mariah*, 44 FERC ¶ 61,442 at 62,399.

²¹ Based on our dismissal of the Application for lack of jurisdiction, we will dismiss as moot the protests of the Application.

The Commission orders:

The Application is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.