175 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

New York Independent System Operator, Inc. Docket No. EL20-65-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued April 15, 2021)

1. On August 18, 2020, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[1] the New York Independent System Operator, Inc. (NYISO) filed a petition for declaratory order (Petition) seeking from the Commission: (1) confirmation that the New York Transmission Owners (NYTOs)[2] have a federal right of first refusal (ROFR) under NYISO's foundational agreements[3] and section 31.6.4 of NYISO's Open Access Transmission Tariff (OATT) to build, own, and recover the cost of upgrades to their existing transmission facilities, as permitted under Order No. 1000;[4] (2)

[1] 18 C.F.R. § 385.207 (2020).

[2] NYTOs include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company, Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[3] NYISO states that its foundational agreements include: (1) the Agreement Between NYISO and Transmission Owners (ISO-TO Agreement); (2) the Independent System Operator Agreement (ISO Agreement); (3) Agreement Between NYISO and the NYTOs on the Comprehensive Planning Process for Reliability Needs; (4) New York Transco Operating Agreement; and (5) OATT § 31.11, Appendix H – Form of Operating Agreement (*Pro Forma* Operating Agreement).

[4] *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).

confirmation that, if a NYTO exercises its federal ROFR for upgrades to its existing transmission facilities, the NYTO should be treated under the existing OATT as a Developer for the upgrade portion of the transmission project; and (3) clarification of the scope of the definition of "upgrade" under OATT section 31.6.4. As discussed below, we grant in part and deny in part the Petition.

I. Background

A. Order No. 1000 Federal Rights of First Refusal Requirements

2. Order No. 1000 addressed federal ROFR provisions included in Commission-jurisdictional tariffs and agreements[5] for three categories of transmission facilities: (1) transmission facilities selected in a regional transmission plan for purposes of cost allocation;[6] (2) an incumbent transmission provider's upgrades to its own transmission facilities; and (3) an incumbent transmission provider's local transmission facilities.

3. For the first category of transmission facilities, Order No. 1000 required public utility transmission providers to "eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal [ROFR] for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation."[7] For the second category of transmission facilities, the Commission did not require the elimination of federal ROFR provisions from Commission jurisdictional tariffs and agreements. Rather, the Commission stated that Order No. 1000 does not affect the right of an incumbent transmission provider to build, own, and recover costs for upgrades to its own transmission facilities, regardless of whether an upgrade has been selected in the regional transmission plan for purposes of cost allocation.[8] The Commission explained that "an incumbent transmission provider would be permitted to maintain a federal right of first refusal for upgrades to its own

[5] The Commission stated that "the phrase 'a federal right of first refusal' refers only to ROFRs that are created by provisions in Commission-jurisdictional tariffs or agreements." Order No. 1000-A, 139 FERC ¶ 61,132 at P 415.

[6] Order No. 1000 defined a transmission facility selected in a regional transmission plan for purposes of cost allocation as a transmission facility that has been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because it is a more efficient or cost-effective solution to regional transmission needs. Order No. 1000, 136 FERC ¶ 61,051 at 5, 63.

[7] *Id.* P 313.

[8] *Id*. PP 226, 319; Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

transmission facilities."[9] The Commission also explained that it was not eliminating the transmission owner's right to improve its own existing transmission facility by allowing a third-party transmission developer to, for example, propose to replace the towers or the conductors of a transmission line owned by another entity.[10] For the third category of transmission facilities, the Commission stated that Order No. 1000 does not require the removal of a federal ROFR for local transmission facilities,[11] which the Commission defined as transmission facilities located solely within a public utility transmission provider's retail distribution service territory or footprint that are not selected in the regional transmission plan for purposes of cost allocation.[12]

4. The Commission also clarified that "the term upgrade means an improvement to, addition to, or replacement of a part of, an existing transmission facility."[13] The Commission found that it was not feasible to list every type of improvement or addition, or name all the parts of lines, towers and other equipment that may be replaced or otherwise be considered upgrades.[14] The Commission stated that "[t]he term upgrades does not refer to an entirely new transmission facility."[15]

5. If a public utility transmission provider's tariffs or other Commission-jurisdictional agreements did not contain a federal ROFR provision for the first category of transmission facilities, Order No. 1000 required the public utility transmission providers to state so in its compliance filing.[16] However, with respect to the second and third categories of transmission facilities, the Commission did not require the incumbent transmission provider to identify on compliance these federal ROFR provisions or take any other compliance action.[17] Most relevant to this proceeding is the second category of

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[9] Order No. 1000, 136 FERC ¶ 61,051 at P 319.

[10] Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

[11] Order No. 1000, 136 FERC ¶ 61,051 at PP 258, 318.

[12] *Id.* P 63; Order No. 1000-A, 139 FERC ¶ 61,132 at P 429.

[13] Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

[14] *Id*.

[15] *Id*.

[16] Order No. 1000, 136 FERC ¶ 61,051 at P 314 n.294.

[17] *Id*. ("The requirements adopted here *apply only to* public utility transmission providers that have *provisions in their tariffs or other Commission-jurisdictional*

transmission facilities – upgrades – specifically the question of whether there are provisions in NYISO's Commission-jurisdictional tariffs and agreements that establish a federal ROFR for NYTOs' upgrades to their own transmission facilities.

B. NYISO's Order No. 1000 Compliance

6. In response to the Order No. 1000 requirement to eliminate any federal ROFR for transmission facilities selected in the regional transmission plan for purposes of cost allocation, NYISO and NYTOs stated in their first Order No. 1000 compliance filing that "the NYISO tariffs do not contain any right of first refusal provisions."[18] NYISO and NYTOs also noted that Order No. 1000 clarifies that the requirement to eliminate ROFR provisions is not intended to interfere with upgrades made by incumbent transmission providers to meet their local needs. In the first Order No. 1000 compliance filing, they proposed a new section 31.6.4 of NYISO's OATT, which, among other things, NYISO and NYTOs stated was intended "to explicitly provide that incumbent TOs have the right to make upgrades to their own facilities . . . to meet their local system needs."[19] In the First Compliance Order, the Commission found that "NYISO does not have a right of first refusal designated in their existing OATT."[20] The Commission accepted NYISO's proposed exception for upgrades, in section 31.6.4, noting that "Order No. 1000 does not remove or limit any right an incumbent Transmission Owner may have to build, own and recover costs for upgrades to the transmission facilities owned by an incumbent."[21] The Commission accepted section 31.6.4, subject to NYISO defining the term "upgrade" consistent with the definition of upgrade in Order No. 1000-A.[22] In its second Order No. 1000 compliance filing, NYISO and NYTOs proposed revisions to OATT section 31.6.4 to state that NYTOs "shall have the right" to a federal ROFR for upgrades in NYISO's

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agreements granting a federal right of first refusal that is inconsistent with the requirements of this Final Rule.") (e*mphasis added*).

[18] NYISO and NYTOs' Compliance Filing, Docket No. ER13-102-000, Transmittal Letter, at 56 (filed Oct. 11, 2012) (First Order No. 1000 Compliance Filing). *See also N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 165 (2013) (First Compliance Order).

[19] First Order No. 1000 Compliance Filing, Transmittal Letter at 56.

[20] First Compliance Order, 143 FERC ¶ 61,059 at P 168.

[21] *Id.* P 170 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 319).

[22] *Id.* PP 170, 172.

OATT provisions for its regional transmission planning processes.[23] The Commission rejected those OATT revisions as beyond the scope of the First Compliance Order, because the Commission had accepted section 31.6.4 and only directed NYISO to add the definition for upgrade to section 31.6.4.[24]

II. Petition

7. NYISO is seeking from the Commission: (1) confirmation that the NYTOs have a federal ROFR under NYISO's foundational agreements and OATT section 31.6.4[25] 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[26] proposed transmission project that NYISO selects in its regional transmission plan for purposes of cost allocation; (2) confirmation that, if a NYTO exercises its federal ROFR for upgrades to its existing transmission facilities, the NYTO should be treated under the existing OATT provisions as the Developer for the upgrade portion of the transmission project; and (3) clarification of the scope of the definition of "upgrade" under OATT section 31.6.4.

8. NYISO states that NYISO and its stakeholders discussed tariff revisions to expand NYISO's existing procedures to more clearly address the federal ROFR for upgrades and the implementation and scope of that upgrade right. However, NYISO states that it believes there is no realistic chance that it will be able to obtain the super-majority stakeholder support necessary to make a Federal Power Act (FPA) section 205 filing to revise its OATT to address these issues.[27] NYISO asserts that the Commission's action on its Petition will assist NYISO in its treatment of proposed transmission projects that are upgrades or contain elements that are upgrades.

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[23] *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at P 142 (2014).

[24] *Id*. P 152.

[25] NYISO's Comprehensive System Planning Process in Attachment Y (section 31) of its OATT establishes, among other things, the rules by which NYISO solicits, evaluates, and selects solutions to address reliability, economic, and public policy driven transmission needs in New York.

[26] A Developer is a person or entity, including a Transmission Owner, sponsoring or proposing a project pursuant to this Attachment Y. NYISO OATT, § 30.1.1.

[27] Petition at 8.

A. Issue 1 - Federal ROFR for Upgrades

9. NYISO asserts that NYTOs possess a federal ROFR to build, own, and recover the cost of upgrades to their existing facilities because they have retained ownership rights to existing facilities in the foundational agreements. NYISO explains that NYTOs preserved their ownership rights to their existing transmission facilities in their foundational agreements as a condition for participating in NYISO and turning over operational control of these facilities to NYISO. For instance, NYISO explains that, in the ISO-TO Agreement's preamble, NYTOs expressly conditioned their delegation of certain responsibilities to NYISO on their continuing to "own, physically operate, modify, and maintain" their existing transmission facilities turned over to NYISO's operational control.[28] NYISO states that NYTOs preserved their ownership rights in section 3.10(c) of the ISO-TO Agreement and in other foundational agreements.[29] NYISO cites section 3.10(c) of the ISO-TO Agreement, which states:

> Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including, without limitation, the right to build, acquire, sell, merge, dispose of, retire, use as security, or otherwise transfer or convey all or any part of its assets . . . .

NYISO states that non-incumbent NYTOs who energize facilities in New York and turn over operational control of their transmission facilities to NYISO have similar property rights and obligations.[30]

10. NYISO states that OATT section 31.6.4 provides that nothing in NYISO's Attachment Y Comprehensive System Planning Process affects NYTOs' upgrade rights in the foundational agreements. As such, NYISO asserts that section 31.6.4 preserves the right of NYTOs contained in the foundational agreements to build, own, and recover the costs of upgrades to their respective transmission facilities as it relates to NYISO's

[28] *Id.* at 10 & n.22.

[29] *Id.* at 10 & n.23; *see also id*. (citing ISO Agreement, section 17.A.3). NYISO states that the foundational agreements for other RTOs/ISOs, which have a right for incumbent transmission owners to build upgrades, contain provisions that, similar to the ISO-TO Agreement and ISO Agreement, reserve the property rights of incumbent transmission owners in the transmission facilities that they own. *Id.* at 11.

[30] *Id.* at 11 & n.26 (citing New York Transco Operating Agreement, section 3.08; *Pro Forma* Operating Agreement, section 3.08).

transmission planning processes. NYISO points to specific language in OATT section 31.6.4, which provides, in relevant part:

> Nothing in this Attachment Y affects the right of a Transmission Owner to: (1) build, own, and recover the costs for upgrades to the facilities it owns, provided that nothing in Attachment Y affects a Transmission Owner's right to recover the costs of upgrades to its facilities . . . . 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.

NYISO states that the language in OATT section 31.6.4 tracks the language from Order No. 1000 concerning the permitted exception to the requirement to eliminate a federal ROFR for upgrades in Commission-jurisdictional tariffs and agreements.[31]

11. NYISO explains that, at the time of its first Order No. 1000 compliance filing, NYISO evaluated the non-incumbent transmission developer reforms in Order No. 1000 with a view towards the development of new, stand-alone transmission projects in New York, rather than the potential for modifying existing transmission facilities. NYISO states that, as a result, its focus in that first Order No. 1000 compliance filing was on the application of the Commission's exceptions to the requirement to eliminate the ROFR in the context of NYISO's then-existing planning process; thus, the first compliance filing stated that the OATT did not contain any ROFRs.[32] NYISO states that, given that focus, its first Order No. 1000 compliance filing did not discuss how it would apply NYTOs' federal ROFR for upgrades to their own transmission facilities that are included in the proposals of other Developers. NYISO states that, in its second Order No. 1000 compliance filing, it sought to clarify that a NYTO has an express right to build, own, and recover the cost of upgrades, i.e., a federal ROFR, but the Commission rejected the clarification as beyond the scope of the First Compliance Order's compliance directives.[33]

12. NYISO states that current circumstances make NYTOs' upgrade rights increasingly relevant and important because developers' Order No. 1000 transmission projects will likely modify NYTOs' existing transmission facilities. NYISO explains that there is a high likelihood that Order No. 1000 transmission projects will be located within

[31] *Id*. at 11.

[32] *Id*. at 12.

[33] *Id*. at 13-14 (citing First Compliance Order, 148 FERC ¶ 61,059 at P 152).

existing rights-of-way due to the unique circumstances in New York.[34] NYISO also explains that the New York Public Service Commission (New York Commission), which is responsible for identifying Order No. 1000 public policy transmission needs under NYISO's Public Policy Transmission Planning Process and for siting transmission projects, has expressed an intent that new transmission projects be located, to the extent possible, in existing rights-of-way.[35] NYISO states that, as a result of the likelihood that developers' proposed transmission solutions will be located within existing rights-of-way, their transmission projects will in many cases interface with or modify NYTOs' existing transmission facilities.[36] Therefore, NYISO asserts that the Commission's confirmation of NYISO's understanding of its foundational agreements and the OATT in regard to the federal ROFR will remove uncertainty for both NYTOs and non-incumbent developers, reduce any potential for disputes and litigation, and prevent any potential disruptions and delays in NYISO's transmission planning process.

B. Issue 2 - Implementation of Federal ROFR for Upgrades

13. NYISO states that, if the Commission confirms that NYTOs have a right to build, own and recover the costs of upgrades to their existing facilities, including upgrades proposed by another Developer that NYISO selects for inclusion in a regional transmission process for purposes of cost allocation, NYISO requests that the Commission confirm that a NYTO should be treated, to the extent applicable, under the existing OATT provisions as the Developer of the upgrade portion of any transmission project selected in the regional transmission plan for purposes of cost allocation and subject to OATT provisions relevant to the Developer of a selected transmission project. NYISO states that the OATT is ambiguous concerning how NYISO should treat a NYTO

[34] NYISO states that New York's unique circumstances include: (1) power needs that are largely located in the highly-populated southeastern portion of the state, including New York City and Long Island, while generation resources that serve that demand are spread across the state; and (2) limited rights-of-way to develop new transmission facilities to deliver the generation to serve these areas due to various environmental and agricultural impact concerns. *Id*. at 14.

[35] *Id*. (citing, e.g., *In the Matter of N.Y. Indep. Sys. Operator, Inc.'s Proposed Pub. Pol'y Transmission Needs for Consideration, Order Addressing Pub. Pol'y Transmission Need for Western N.Y.*, NYPSC Case No. 14-E-0454 at 16 (NYPSC October 13, 2016) (encouraging the use of existing rights-of-way to the maximum extent practicable); *Proceeding on Motion of the Comm'n to Examine Alternating Current Transmission Upgrades, Order Finding Transmission Needs Driven by Pub. Pol'y Requirements*, Case No. 12-T-0502 at App. B (NYPSC December 17, 2015) (requiring use of existing rights-of-way)).

[36] *Id*.

that has exercised its ROFR for an upgrade that is part of the selected transmission solution. Therefore, NYISO asserts that treating a NYTO as the Developer of the upgrade in this particular scenario is the most reasonable interpretation so that the NYTO then becomes a sponsor of the upgrade portion of any transmission project selected in the regional transmission plan for purposes of cost allocation.[37] As a Developer of the upgrade, NYISO states that a NYTO would be required to enter into a Development Agreement for the upgrade and seek necessary regulatory approvals.

14. NYISO notes, however, that any voluntary cost containment provisions that the original Developer agreed to in the NYISO public policy process would not apply to the NYTO's upgrade portion of a transmission project selected in the regional transmission plan for purposes of cost allocation. NYISO explains that this is because, if a NYTO elects to build an upgrade contained in another Developer's transmission project for which that Developer made a voluntary cost containment commitment, there is no mechanism in the existing OATT to subject the NYTO to the other Developer's cost containment commitment for a project that includes that upgrade. NYISO states that proposals to address cost containment for upgrades may be addressed in future NYISO stakeholder discussions.[38]

C. Issue 3 - Definition of Upgrade and Other Issues

15. NYISO requests that the Commission clarify the definition of "upgrade" in its OATT. NYISO explains that OATT section 31.6.4, which contains the Order No. 1000-A definition, states that an upgrade is "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."[39] NYISO asserts, however, that the difference between an upgrade and an entirely new transmission facility is not always clear. NYISO requests that the Commission clarify two specific points. First, whether, as NYISO believes, a new transmission facility that would require the retirement or decommissioning of a NYTO's existing transmission facility and connects to the transmission system in a different configuration than the original facility would constitute a new transmission facility, rather than an upgrade that is subject to NYTOs' federal ROFR for upgrades. Second, if such a facility should be treated as a new transmission facility, rather than an "upgrade," whether its inclusion in another Developer's Order No. 1000 transmission solution requires either the agreement of the NYTO that owns the existing transmission facility that is proposed to be decommissioned or retired, or an outcome of a state regulatory

[37] *Id*. at 15-16.

[38] *Id*. at 16 & n.39.

[39] *Id*. at 16-17 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 426).

proceeding or court proceeding authorizing the retirement or decommissioning of the existing transmission facility.[40]

16. NYISO states that Order No. 1000 provides limited guidance concerning what types of transmission facilities would and would not constitute upgrades, generally referencing tower change outs and reconductoring.[41] NYISO notes that the Commission found that additional criteria and principles that Midwest Independent Transmission System Operator, Inc. (MISO) proposed to determine whether a transmission facility constitutes an upgrade complied with Order No. 1000, and NYISO has tried to use these additional criteria as guidance for its Order No. 1000 transmission projects.[42] NYISO states, however, that the *MISO* precedent does not clearly address the scenario in which a developer is proposing to retire or remove an existing transmission facility to build a new transmission line that connects to the transmission system in a different configuration than the original facility. NYISO posits, for example, a scenario in which a developer proposes to remove an existing 115 kV transmission line to allow for a new 345 kV transmission line to take its place in the existing right-of-way. In this scenario, the new 345 kV transmission line would connect to the transmission system in a different configuration (i.e., connect to different buses and/or substations), which results in a different power flow, and the former line would no longer exist. NYISO states that, under this scenario, it seems that the new 345 kV line should be classified as a new transmission facility, rather than as an upgrade, because it performs different transmission functions on the bulk power system than those performed by the original 115 kV line.[43]

III. Notice of Filing and Responsive Pleadings

17. Notice of NYISO's Petition was published in the *Federal Register*, 85 Fed. Reg. 52,336 (Aug. 25, 2020), with interventions and protests due on or before September 17, 2020. Timely motions to intervene were filed by the entities listed in the Appendix.

18. The New York Commission filed a notice of intervention and protest. Timely protests were filed by Anbaric Development Partners, LLC (Anbaric), LSP Transmission Holdings II, LLC and its affiliate LS Power Grid New York, LLC (together, LS Power),

[40] *Id*. at 17-18.

[41] *Id*. at 18 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 319).

[42] *Id*. (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 (2013) (together, *MISO* precedent)).

[43] *Id*. at 19-20.

NextEra Energy Transmission New York, Inc. (NEET NY), and New York Consumer Advocates.[44] Timely comments were filed by NYTOs, Edison Electric Institute (EEI) and WIRES. On October 2, 2020, NYTOs and NYISO filed answers.

A. Protests

19. The New York Commission and New York Consumer Advocates argue that the Petition is procedurally infirm because it seeks to materially revise NYISO's Public Policy Transmission Planning Process as it relates to participation in the planning process and the evaluation and selection of transmission projects, which should be done through an FPA section 205 or 206 filing, not through a petition for declaratory order.[45] Similarly, NEET NY argues that the Petition is procedurally improper and should be denied because NYISO is attempting to amend its OATT without the support of a supermajority of stakeholders under FPA section 205.[46] The New York Consumer Advocates and LS Power state that declaratory orders are discretionary, and the Commission may deny the Petition on this basis.[47]

20. For the first issue, NEET NY, Anbaric, and LS Power assert that NYISO's OATT cannot be interpreted to provide NYTOs with a federal ROFR for upgrades included in a competing developer's proposal for a regional transmission project.[48] They emphasize

[44] New York Consumer Advocates include Multiple Intervenors, City of New York, Consumer Power Advocates, Natural Resources Defense Council, and the Sustainable FERC Project.

[45] New York Commission Protest at 4-5; and New York Consumer Advocates at 4.

[46] NEET NY Protest at 1.

[47] New York Consumer Advocates Protest at 4 & n.9 (citing, e.g., 5 U.S.C. § 554(e) (2018) (stating that, under the Administrative Procedure Act, the "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); *Continental Oil Co. v. FPC*, 285 F.2d 527, 527 (5th Cir. 1961) (per curiam); *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001 (1984) (noting that "there is ample authority for the proposition that Commission action on petitions for declaratory order is discretionary with the agency"); *accord Morgan Stanley Cap. Grp., Inc.,* 119 FERC ¶ 61,298, at P 17 (2007) (Commission "has discretion as to whether to issue a declaratory order in particular circumstances in order to terminate a controversy or remove uncertainty"); *Ark. Power & Light Co*., 35 FERC ¶ 61,358, at 61,818 (1986) (granting of petition for declaratory order "is a matter of agency discretion")).

[48] NEET NY Protest at 2-3; Anbaric Protest at 1-2; LS Power Protest at 11-12.

that, in NYISO's first Order No. 1000 compliance filing, NYISO explicitly stated that its tariffs do not contain any federal ROFR provisions, which the Commission confirmed in the First Compliance Order.[49] LS Power points out that other RTOs/ISOs identified federal ROFRs for upgrades in their Order No. 1000 compliance processes.[50] LS Power argues that although Order No. 1000 allowed the retention of certain ROFRs related to upgrades, NYISO and NYTOs did not seek to retain a ROFR that existed in jurisdictional agreements or tariffs because they reported there were none.[51] LS Power also argues that, in proposing OATT section 31.6.4, NYISO stated in its first Order No. 1000 compliance filing that the purpose of this section was related solely to a NYTO's upgrades to local transmission needs, rather than the bulk power transmission facilities that NYISO is responsible to plan.[52] LS Power states that NYISO submitted four separate compliance filings (October 15, 2013, September 15, 2014, September 13, 2016, and March 19, 2018) to broaden the scope of OATT section 31.6.4, but NYISO never changed its purpose (to apply to local plans) in spite of these numerous compliance filings.[53] LS Power argues that eight years later, NYISO cannot now seek an interpretation beyond what it told the Commission the provision was intended to accomplish.[54] NEET NY argues that NYISO's foundational agreements have not undergone any significant changes since NYISO's Order No. 1000 compliance filings, and NYISO does not explain why its foundational agreements together with OATT section 31.6.4 now create a federal ROFR for upgrades where one did not previously exist.[55]

21. Anbaric and LS Power also argue that NYISO is asking for clarifications that impact interpretations of state law regarding use of rights-of-way.[56] LS Power argues that, under Order No. 1000, the use of rights-of-way is a state law and policy issue for the State of New York and therefore retention, modification of transfer of these rights-of-way

[49] NEET NY Protest 3; Anbaric Protest at 1; LS Power Protest at 12-13.

[50] LS Power Protest at 15.

[51] *Id*.

[52] *Id*. at 13-14.

[53] *Id*. at 14.

[54] *Id*. at 14-15.

[55] NEET NY Protest at 3.

[56] Anbaric Protest at 3; LS Power Protest at 18-22.

are subject to any relevant law or regulation that grants these rights.[57] As such, Anbaric states that this issue is outside of the scope of the Commission's jurisdiction.[58] Furthermore, Anbaric and LS Power note that, in Order No. 1000, the Commission made clear that it was leaving state laws, up to and including the existence of state rights of first refusal, untouched.[59] While Anbaric acknowledges that the upgrades issue is important and needs to be addressed, Anbaric asserts that the correct forum to address it is through the state entities that regulate such subject matter. LS Power contends that if the New York Commission continues its policies of addressing aging infrastructure by rebuilding them and requiring incumbent transmission owners to make their existing rights-of-way available to non-incumbent transmission developers, a determination by the Commission in favor of NYISO here would create a conflict with these state policies. LS Power argues that the Commission would be reinterpreting the NYISO tariff in a manner inconsistent with its original intent, which would in turn allow NYISO to preempt the New York Commission from exercising its rights with respect to rights-of-way, including occupied rights-of-way.[60] Therefore, Anbaric and LS Power argue that the Commission should reject the Petition.

22. The New York Consumer Advocates urge the Commission to deny the Petition, arguing that the relief NYISO seeks will harm the competitive process and consumers in New York.[61] It asserts that the relief NYISO seeks is inconsistent with the Commission's competitive agenda under Order No. 1000. It is also concerned that ROFRs for upgrades would impair the future competitiveness of NYISO's Public Policy Transmission Planning Process.[62]

23. For the second issue, LS Power argues that the implementation process NYISO proposes – i.e., to treat a NYTO that exercises its right to upgrade its existing

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[57] LS Power Protest at 20-21.

[58] Anbaric Protest at 3.

[59] *Id.* at 3; LS Power Protest at 20-21 (citing, e.g., Order No. 1000, 136 FERC ¶ 61,051 at P 287 ("Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.")).

[60] LS Power Protest at 21-22.

[61] New York Consumer Advocates Protest at 2, 7-9.

[62] *Id*. at 2-3.

transmission facilities as the Developer of the upgrade – is not permitted by the OATT.[63] It asserts that the plain reading of the definition of Developer in NYISO's OATT is the entity submitting a proposal, and a NYTO is not a proposal sponsor if it is seeking to exercise a ROFR for upgrades in another developer's proposal.[64] The New York Commission asserts that NYISO's proposed implementation would undermine NYISO's competitive transmission process by allowing a NYTO to step into the shoes of the Developer *after* NYISO has already selected a transmission project through the transmission planning process; this would discourage, if not eliminate, proposed projects from non-incumbent developers where the transmission projects involved upgrades to a NYTO's existing transmission facilities.[65]

24. NEET NY argues that granting NYISO's Petition would effectively end competitive cost containment in New York and is not supported by the majority of stakeholders. The New York Consumer Advocates argue that, if the Commission determines that the federal ROFR for upgrades is valid, any exercise of that right should include the competitive developer's cost containment commitment that was the basis for the project selection as the more efficient or cost-effective solution.[66] It also requests that the Commission require the federal ROFR for upgrades to be exercised at the outset of NYISO's Public Policy Transmission Planning Process, and not after the competitors in the process have expended significant time, effort, and cost to develop detailed project proposals.[67] The New York Consumer Advocates argue that by requiring a decision by NYTOs to build upgrades at the outset of NYISO's Public Policy Transmission Planning Process, the cost borne by captive customers would be less, because there would no longer be a need for developers to incur the engineering and design costs for projects that would ultimately be undertaken by NYTOs as upgrades.[68]

25. The New York Commission and New York Consumer Advocates argue that, if the Commission determines that there is a federal ROFR for upgrades, the Commission should direct NYISO to work with stakeholders to design a workable competitive process

[63] LS Power Protest at 22.

[64] *Id*.

[65] New York Commission Protest at 3.

[66] New York Consumer Advocates Protest at 12-13.

[67] *Id*. at 3-4.

[68] *Id*. at 15-17.

around those rights.[69] The New York Commission contends that if an FPA section 205 filing with tariff modifications is not possible, NYISO may file a complaint under FPA section 206.[70] The New York Commission asserts that, contrary to NYISO's assertion that NYISO is "not asking the Commission to modify or expand existing tariff language[,]" granting the Petition on this issue would effectively modify the tariff by selecting one way to implement such rights.[71]

26. For the third issue regarding the clarification of the "upgrade" definition, LS Power argues that the Commission should reject NYISO's request that the Commission rule whether the proposed scenario is a new transmission facility or an upgrade, because the Commission's regulation requires a petition for declaratory order to be based on specific facts and circumstances, not hypothetical ones, and the Commission requires that the controversy be more than speculative.[72] Given New York State's preference that new transmission lines be developed within existing utility rights-of-way, New York Consumer Advocates argue that NYISO's expansive definition of upgrade would bring virtually all future potential transmission projects within the scope of a federal ROFR.[73]

B. Comments In Support

27. In their comments in support of the Petition, NYTOs state that the Petition correctly establishes that NYTOs and NYISO agreed in NYISO's foundational agreements that NYTOs retain their existing rights incident to their ownership of transmission facilities, including the right to upgrade such facilities, as an essential condition to the formation of NYISO.[74] The NYTOs assert that these rights have their origin in a property owner's basic rights that are protected by law.[75] The NYTOs, EEI and WIRES also assert that, under NYISO's foundational agreements, NYTOs preserved these grandfathered property rights in a manner similar to the property rights preserved

[69] New York Commission Protest at 3-4; New York Consumer Advocates Protest at 11-19.

[70] New York Commission Protest at 4.

[71] *Id*. at 4-5 (citing Petition at 8).

[72] LS Power Protest at 4 (citing *New England Ratepayers Ass'n.,* 172 FERC ¶ 61,042, at P 35 & n.102 (2020)).

[73] New York Consumer Advocates Protest at 10-11.

[74] NYTOs Comments at 2.

[75] *Id*. at 5.

by other transmission owners in foundational agreements for other RTO/ISO regions.[76] With respect to the third issue, NYTOs also assert that under section 3.10(c) of the ISO-TO Agreement, the retirement or decommissioning of an existing transmission facility requires a NYTO's agreement.[77]

IV. Discussion

A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept NYTOs' and NYISO's answers and, therefore, reject them.

B. Substantive Matters

30. As discussed below, we 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. We deny the Petition on Issue 2, in which NYISO sought confirmation that, if a NYTO exercises its federal ROFR for upgrades to its existing transmission facilities, the NYTO should be treated under the existing OATT provisions as the Developer for the upgrade portion of the transmission project, as that term is defined in the NYISO OATT. On Issue 3, we grant in part and deny in part NYISO's two-part request for clarification on the scope of the definition of "upgrade" under OATT section 31.6.4.

31. As a preliminary matter, we disagree with protestors' arguments that NYISO's requests in the Petition are not matters appropriate for resolution through a petition for declaratory order. The Commission's authority to issue declaratory orders is based on Rule 207(a)(2) of its Rules of Practice and Procedure and section 554(e) of the

[76] *Id*. at 7 and attach. A (including excerpted provisions in the foundational agreements of other RTOs/ISOs concerning transmission owners' ownership rights); EEI Comments at 7; WIRES Comments at 6.

[77] NYTOs Comments at 7.

Administrative Procedure Act, which provide the Commission with discretion to issue declaratory orders "to terminate a controversy or remove uncertainty."[78] We also disagree with arguments that the Petition is procedurally improper and should be denied because NYISO is attempting to amend its tariff through the Petition, rather than FPA section 205. We find that NYISO's Petition requires interpretation of Order Nos. 1000 and 1000-A, other Commission orders, and NYISO's OATT and foundational agreements, and therefore we are providing certain clarifications, as requested, to resolve uncertainties. The record reflects that NYISO has already expended considerable time and resources pursuing a stakeholder process to resolve these issues. Our action on the Petition will remove uncertainty by assisting NYISO in its treatment of proposed transmission projects that are upgrades or contain elements that are upgrades. Further, our action on the Petition does not amend the NYISO OATT in any way.

32. As discussed in detail below, parties protesting NYISO's Petition raise concerns that confirming that the NYTOs have a federal ROFR over upgrades that are part of a Developer's proposed transmission project will stifle competition. They point to uncertainties concerning when in the planning process a NYTO may exercise its ROFR over upgrades and whether a NYTO exercising a ROFR must abide by any cost containment provision in the selected Developer's bid. We agree that these are important questions, and we will evaluate these and other implementation issues when NYISO proposes specific tariff provisions to implement the ROFR.

1. Issue 1 - Federal ROFR for Upgrades

33. As to the issue of whether NYTOs have a federal ROFR under NYISO's foundational agreements and OATT section 31.6.4 to build, own and recover the cost 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, we find that the language in NYISO's foundational agreements is a permissible federal ROFR for upgrades. As described above, Order No. 1000 required public utility transmission providers to eliminate from Commission-jurisdictional tariffs and agreements provisions that establish a federal ROFR for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.[79] However, the requirement to eliminate a federal ROFR did

[78] 18 C.F.R. § 385.207(a) (2020); 5 U.S.C. § 554(e) ("[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); *see Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001 (noting that "there is ample authority for the proposition that Commission action on petitions for declaratory order is discretionary with the agency").

[79] Order No. 1000, 136 FERC ¶ 61,051 at P 313.

not apply to upgrades to existing transmission facilities[80] and local transmission facilities.[81] The provisions that NYISO cites in the foundational agreements recognize and preserve NYTOs' ownership rights in their existing transmission facilities. For example, the preamble of the ISO-TO Agreement states that "the Transmission Owners will continue to own, physically operate, *modify*, [emphasis added] and maintain the Transmission Facilities under ISO Operational Control . . ." Also, section 3.10(c) of the ISO-TO Agreement provides that: "Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including, without limitation, *the right to build*, acquire, sell, merge, dispose of, retire, use as security, or otherwise transfer or convey *all or any part of its assets* [emphasis added] . . . ." These statements of NYTOs' rights – that transmission owners will continue to own their transmission facilities and that they retain the right to modify their transmission facilities and the right to build, maintain, replace, etc. all or any part of their assets – is a broad reservation of rights that encompasses the right to build upgrades to existing transmission facilities.

34. We agree with NYISO that the language in OATT section 31.6.4 tracks the language from Order No. 1000 concerning the permitted exception to the requirement to eliminate a federal ROFR in Commission-jurisdictional tariffs and agreements, so as to allow a transmission provider to maintain a federal ROFR for upgrades to existing transmission facilities. The Commission accepted NYISO's proposed exception for upgrades, in OATT section 31.6.4, noting that "Order No. 1000 does not remove or limit any right an incumbent Transmission Owner may have to build, own and recover costs for upgrades to the transmission facilities owned by an incumbent."[82] Therefore, Order No. 1000[83] and the terms of OATT section 31.6.4 do not affect NYTOs' rights to upgrade their transmission facilities, as found in NYISO's foundational agreements. As such, we find that NYTOs possess a federal ROFR for upgrades to their own existing transmission facilities and local transmission facilities, 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.

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[80] *Id*. PP 226, 319; Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

[81] Order No. 1000, 136 FERC ¶ 61,051 at PP 258, 318.

[82] First Compliance Order, 143 FERC ¶ 61,059 at P 170 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 319).

[83] Order No. 1000, 136 FERC ¶ 61,051 at P 319 (stating that its reforms "do not affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities . . . regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation.").

35. Various protestors argue that NYISO and NYTOs do not possess a federal ROFR for upgrades based on their representation in their first Order No. 1000 compliance filing[84] and the Commission's subsequent confirmation that "NYISO does not have a right of first refusal designated in their existing OATT."[85] We disagree with that argument. As previously noted, Order No. 1000 included an affirmative compliance obligation for public utility transmission providers to eliminate from Commission-jurisdictional tariffs and agreements any federal ROFRs for transmission facilities selected in a regional transmission plan for purposes of cost allocation, but it did not require public utility transmission providers to identify any federal ROFR provisions for an incumbent transmission provider's upgrades to its own transmission facilities or local transmission facilities or take any other compliance action concerning federal ROFRs for upgrades or local transmission facilities.[86] We interpret NYISO's statement and the Commission's prior finding in the First Compliance Order about the lack of a federal ROFR in that context. Therefore, we find that NYISO's statement and the Commission's finding were in relation to the first category of transmission facilities addressed in Order No. 1000 – a non-permissible federal ROFR.[87] The Commission, in the First Compliance Order, did not address whether NYISO's tariffs included a federal ROFR for a NYTO's upgrades to its own transmission facilities. Rather, in accepting OATT section 31.6.4, the Commission specifically noted that "Order No. 1000 does not remove or limit any right an incumbent Transmission Owner may have to build, own and recover costs for upgrades to the transmission facilities owned by an incumbent."[88]

36. We also disagree with protestors' contentions that, to the extent that there is a federal ROFR for a NYTO's upgrades to its own transmission facilities in NYISO's tariffs, NYISO limited the federal ROFR to upgrades needed to meet local transmission needs. Protestors argue that, in proposing OATT section 31.6.4, NYISO stated in its transmittal letter that the purpose of this section was related solely to a NYTO's upgrades

[84] First Order No. 1000 Compliance Filing, Transmittal Letter at 56 (stating that "the NYISO tariffs do not contain any right of first refusal provisions."). *See also* First Compliance Order, 143 FERC ¶ 61,059 at P 165.

[85] First Compliance Order, 143 FERC ¶ 61,059 at P 168.

[86] Therefore, for these reasons, we disagree with LS Power's argument that the fact that other RTOs/ISOs identified federal ROFRs for upgrades in their Order No. 1000 compliance processes is relevant or dispositive as to whether NYISO's tariffs or agreements include a federal ROFR for upgrades. *See supra* P 20.

[87] *See supra* PP 3, 5.

[88] First Compliance Order, 143 FERC ¶ 61,059 at P 170 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 319).

to meet local transmission needs.[89] Although NYISO may have made a statement in its transmittal letter about an intent to limit the language to upgrades needed to meet local transmission needs, the actual tariff language that was proposed and accepted in OATT section 31.6.4 controls.[90] OATT section 31.6.4 states that "[n]othing in this Attachment Y affects the right of a Transmission Owner to: (1) build, own, and recover the costs for upgrades to the facilities it owns. . .[,]" and the Commission did not qualify or limit that finding to upgrades needed to meet local transmission needs.

37. Based on the record before us, we are not persuaded by the New York Consumer Advocates' concerns that granting the relief that NYISO seeks in the Petition will harm the competitive process and consumers in New York and that it would be inconsistent with Order No. 1000. The New York Consumer Advocates have not provided any concrete evidence of any harm to the competitive process or consumers in New York by confirming the NYTOs' existing rights.[91] Further, while, under Order No. 1000, the Commission required the elimination of a federal ROFR for the first category of transmission facilities to remedy undue discrimination against non-incumbent transmission developers, the Commission struck a balance and determined that "incumbent transmission providers should be able to maintain an existing federal ROFR . . . [for] a local transmission facility and upgrades to its existing transmission facilities."[92] Therefore, Order No. 1000 preserved incumbent transmission owner's legal rights to build upgrades to their own transmission facilities and we find here that NYISO's foundational agreements preserved NYTOs' legal rights to build upgrades to their own transmission facilities.

38. We also disagree with arguments that the relief that NYISO seeks in the Petition will interfere with state law regarding use of rights-of-way, because our finding here is limited to NYISO's request to confirm that the foundational agreements and the OATT provide a federal ROFR for NYTOs to build, own, and recover the cost of upgrades to their existing transmission facilities. We make no findings in this proceeding concerning rights-of-way subject to state and local law. Order No. 1000 does not involve an exercise of authority over those specific substantive matters traditionally reserved to the states,

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[89] *Id*. P 166 ("Noting that Order No. 1000 clarifies that the requirement to eliminate federal right of first refusal provisions is not intended to interfere with upgrades made by incumbent Transmission Owners to meet their local transmission needs, the Filing Parties propose a new section 31.6.4 of Attachment Y. . . .").

[90] 16 U.S.C. § 824d.

[91] NYISO has not proposed, and the Commission is not accepting, any changes to the NYISO OATT herein.

[92] Order No. 1000-A, 139 FERC ¶ 61,132 at P 360.

including integrated resource planning, or authority over siting, permitting, or construction of transmission solutions.[93]

39. For these reasons, we grant the Petition on this issue and find that NYISO's foundational agreements provide NYTOs a federal ROFR for upgrades to their own existing transmission facilities, and OATT section 31.6.4 reflects the Commission's finding that Order No. 1000 did not affect the right of an incumbent transmission provider to build, own, and recover the costs for upgrades to its own transmission facilities.[94]

2. Issue 2 - Implementation of Federal ROFR for Upgrades

40. We deny the Petition on Issue 2. We find that NYISO's OATT does not support NYISO's requested confirmation that, if a NYTO exercises its federal ROFR for upgrades to its existing transmission facilities, the NYTO should be treated under the existing OATT provisions as the Developer for the upgrade portion of the transmission project. We disagree with NYISO's tariff interpretation that, given the ambiguity in the OATT concerning how NYISO should treat a NYTO that has exercised its ROFR for an upgrade that is part of a transmission project that NYISO has selected in the regional transmission plan for purposes of cost allocation, the NYTO should be treated as the Developer of the upgrade portion of any such transmission project.

41. Section 30.1.1 of NYISO's OATT defines a Developer as "[a] person or entity, including a Transmission Owner, sponsoring or proposing a project pursuant to this Attachment Y." Under this definition, we find that the entities that submit a bid to sponsor or propose an Order No. 1000 transmission project exclusively meet the definition of a Developer. We find that a NYTO that exercises a federal ROFR to build, own, and recover the costs of an upgrade to its own existing transmission facility that is included in another Developer's selected Order No. 1000 project is not submitting a bid to sponsor or propose an Order No. 1000 project; rather, the NYTO is claiming its right to upgrade its transmission facility as part of the Order No. 1000 project.[95] Therefore, we find that the definition of Developer, as contained in the existing OATT, cannot be interpreted to include a NYTO exercising its federal ROFR to build, own, and recover the

[93] Order No. 1000, 136 FERC ¶ 61,051 at PP 156, 159, 227, 287-89.

[94] *Id*. PP 226, 319.

[95] Similarly, NYISO's OATT contains no provision allowing Developers to be exempt from its Order No. 1000 compliant identification, information, qualification, evaluation, and selection requirements. NYISO OATT, Attachment Y, § 31.4.4.3 - 31.4.5.1.1.

costs of upgrades to its own transmission facilities, and the OATT is silent as to how to implement a federal ROFR for a NYTO's upgrades to its own transmission facilities.

42. Based on our determination on this issue, we find that there is no need to address the arguments on various aspects of the implementation of the federal ROFR for upgrades, such as cost containment and the timing of when the federal ROFR for upgrades should be exercised in NYISO's transmission planning process. Without a defined mechanism in the tariff for a NYTO to build, own, and recover the costs of an upgrade to its own existing transmission facility that is included in another Developer's selected Order No. 1000 project, it is premature to opine on how or when these aspects should be implemented for a NYTO who exercises its federal ROFR for upgrades to its own transmission facility included in a competitive developer's selected transmission solution. We will evaluate tariff revisions to effectuate implementation details when they are presented to the Commission.

3. Issue 3 - Definition of Upgrade and Other Issues

43. We grant in part and deny in part NYISO's two-part request for clarification on the definition of "upgrade" under OATT Section 31.6.4.

44. With respect to the first part of NYISO's two-part request, NYISO requests guidance on whether the scenario in which a new transmission facility, that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility, would constitute a new transmission facility, rather than an upgrade. NYISO also provides an example of this scenario involving the retirement and replacement of an existing 115 kV transmission line with a new 345 kV transmission line.

45. We grant NYISO's request and find that the scenario in which a new transmission facility, that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility, would constitute a new transmission facility, rather than an upgrade. In Order No. 1000-A, the Commission stated that "the term upgrades does not refer to an entirely new transmission facility."[96] The Commission has also "specifically limited what new transmission facilities replacing existing transmission facilities may qualify as upgrades, and, in doing so, required that *an upgrade cannot include the replacement of an entire transmission facility* rather than the replacement of a

[96] Order No. 1000-A, 139 FERC ¶ 61,132 at P 426.

part of an existing transmission facility."[97] However, as NYISO asserts, the Commission's *MISO* precedent does not clearly address the scenario in which a developer is proposing to retire or remove an existing transmission facility to build a new transmission line that connects to the transmission system in a different configuration than the original transmission facility. We agree with NYISO that, under the scenario NYISO provides, a new transmission facility that requires the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility would constitute an entirely new transmission facility, rather than an upgrade to an existing transmission facility. We base this finding on the specific facts NYISO presents, which are that the new transmission facility would connect to the transmission system in a different configuration (i.e., connect to different buses and/or substations), result in a different power flow, increase voltage/transfer capability, and perform different transmission functions on the bulk power system as compared to the existing transmission line that was retired.[98]

46. Regarding LS Power's protest that the clarification on the example proposed by NYISO lacks specificity, we disagree. As noted above, NYISO has provided a specific scenario with a retirement or decommissioning of a NYTO's existing transmission facility that connects to the transmission system in a different configuration than the original facility. We find that our clarification on this issue will aid parties in the development of new and/or upgraded transmission facilities in New York. Also, given that this clarification on the definition of upgrade is limited to the specific scenario that NYISO presents, we disagree with protestors' arguments that such a clarification of the definition of "upgrade" would bring virtually all future transmission projects within the scope of a federal ROFR for upgrades.

47. With respect to the second part of NYISO's two-part request, we deny NYISO's requested clarification. NYISO requests guidance, if a new transmission facility that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility should be treated as a new transmission facility, rather than an upgrade, whether such a proposal in another Developer's Order No. 1000 transmission solution requires either the agreement of the NYTO that owns the existing transmission facility that is proposed to be decommissioned or retired, or an outcome of a state regulatory proceeding or court proceeding authorizing the retirement or decommissioning of the existing transmission facility. We find that NYISO has not submitted sufficient

[97] *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,040, at P 96 (2015) (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 147 FERC ¶ 61,127 at P 238) (emphasis added).

[98] Petition at 19-20.

information concerning the relevant law, tariffs or agreements, and relevant facts concerning the retirement or decommissioning of the existing transmission line in its second request for clarification such that we can provide the requested clarification.

The Commission orders:

The Petition is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix - Timely Motions to Intervene

American Electric Power Service Corporation, on behalf of its affiliates Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company
Anbaric Development Partners, LLC (Anbaric)
City of New York, New York
Consumer Power Advocates (an alliance of large not-for-profit institutions who are end-use consumers in the greater New York region)
Dominion Energy Services, Inc., on behalf of its affiliate Virginia Electric and Power Company
Edison Electric Institute (EEI)
Exelon Corporation, on behalf of itself and its affiliates, Atlantic City Electric Company, Baltimore Gas and Electric Company, Commonwealth Edison Company, Delmarva Power & Light Company, PECO Energy Company, and Potomac Electric Power Company
FirstEnergy Service Company, as agent for its affiliates American Transmission Systems, Incorporated, Jersey Central Power & Light Company, Mid-Atlantic Interstate Transmission LLC, West Penn Power Company, The Potomac Edison Company, Monongahela Power Company and Trans-Allegheny Interstate Line Company
GridLiance Management LLC, on behalf of GridLiance
ITC Transmission Companies (International Transmission Company, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, ITC Great Plains LLC and ITC Interconnection LLC)
LSP Transmission Holdings II, LLC and its affiliate LS Power Grid New York, LLC (LS Power)
Minnesota Power
MISO Transmission Owners (Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company, and Ameren Transmission Company of Illinois; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power; Cleco Power LLC; Cooperative Energy; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; Lafayette Utilities System; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power and its subsidiary Superior Water, L&P; Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern States Power Company, a Minnesota corporation, and Northern States Power

Company, a Wisconsin corporation, which are subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.)
Multiple Intervenors (an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State)
Natural Resources Defense Council and the Sustainable FERC Project
New York Transco, LLC
NextEra Energy Transmission New York, Inc. (NEET NY)
NRG Power Marketing LLC
New York Transmission Owners (NYTOs)
Old Dominion Electric Cooperative
PPL Electric Utilities Corporation
Public Service Electric and Gas Company
Public Citizen, Inc.
Transource Energy, LLC and its subsidiary Transource New York, LLC
WIRES

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New York Independent System Operator, Inc. Docket No. EL20-65-000

(Issued April 15, 2021)

CLEMENTS, Commissioner, *concurring*:

1. I concur in today's order because I believe our findings are consistent with the most reasonable reading of NYISO's tariff. I write separately because today's order leaves unanswered the critical question of how NYISO will implement our central finding, which is that New York transmission owners (NYTOs) possess a right of first refusal over upgrades that are part of a competitively chosen transmission project whose costs will be allocated regionally. That implementation may well determine the extent to which New York consumers continue to realize the benefits of competition to build certain new transmission projects in the state.

2. I agree that NYISO's interpretation of the scope of NYTOs' right of first refusal is consistent with the cited ISO-TO agreement and section 31.6.4 of Attachment Y of the tariff. That is, NYTOs retain a right of first refusal over upgrades, even when those upgrades are part of a project selected in the regional plan for purposes of cost allocation. Section 31.6.4 states that nothing in Attachment Y "affects the right of a transmission owner to . . .build, own, and recover the costs for upgrades to the facilities it owns," and the definition of "upgrade" in that provision does not limit upgrades to local transmission facilities or to upgrades outside of projects selected for regional cost allocation.

3. That said, I am concerned about the potential implications for public policy-driven planning in NYISO's transmission planning process. While this has not been the case in all regions, the success of NYISO's competitive solicitations for public policy projects has been a bright spot in the Order No. 1000 landscape. Whether that success continues depends on how NYISO implements the tariff interpretation we provide today, a concern voiced by numerous protestors in this proceeding, including the New York Public Service Commission.

4. As the New York Commission and other parties explain, it is hard to imagine how NYISO can continue to leverage competitive forces in the planning process for consumers' benefit if NYTOs are permitted to stifle competition through their exercise of rights of first refusal over upgrades within a new transmission facility project. Order No. 1000 found that "an incumbent transmission provider's ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from

proposing new transmission projects in the regional transmission planning process,"[1] an outcome that can "undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs."[2] Protestors in this proceeding point to critical unresolved implementation details to argue NYISO's competitive process could now suffer from this exact problem. They pose questions including whether NYTOs will be permitted to: exercise a right of first refusal in the middle of or after a competitive solicitation process is complete; assume responsibility for upgrades in a regionally selected project without abiding by the winning bidder's cost containment commitment; or effectively veto proposed projects that would decommission an existing transmission facility unless the state or a court steps in to authorize the decommissioning. And the stakes are high given New York's policy of preferring transmission development in existing rights of way in which the NYTOs maintain facilities.

5. NYISO's tariff appears devoid of clarity on any of these crucial implementation details. Several parties, including the New York Commission, ask that we provide time for them to be worked out in the NYISO stakeholder process. Today's order provides that time and I will be eager to review the resulting tariff revisions.

For these reasons, I respectfully concur.

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Allison Clements
Commissioner

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 256 (2011).

[2] *Id.* P 253.