

service.⁴ Moreover, timely and well-planned investment to replace, upgrade, and expand transmission components will enhance system resilience and meet public policy needs.⁵

WIRES supports the confirmations and clarifications sought in the NYISO Petition. A transmission owner's right to upgrade its existing transmission facilities is well-grounded in Commission and judicial precedent, is universally recognized in other RTOs/ISOs, and likewise should be recognized and confirmed in New York. Granting the NYISO's request for clarification will enhance the NYISO's solicitation process under Order No. 1000⁶ and provide transmission developers more transparent information regarding the treatment of upgrades in NYISO's planning processes. In order for these planning processes to work as intended, it is critical that the Commission confirm the existence of the transmission owners' retained rights to upgrade their existing transmission facilities to remove any doubt that these rights continue to remain in effect. Doing so will allow the NYISO to best administer its planning processes and remove any uncertainty regarding who should develop, construct, own, and recover the costs for upgrades to existing facilities, reducing the potential for disputes and delays in getting needed transmission developed in NYISO.

⁴ "Much of the U.S. energy system predates the turn of the 20th century. Most electric transmission and distribution lines were constructed in the 1950s and 1960s with a 50-year life expectancy, and more than 640,000 miles of high voltage transmission lines in the lower 48 states' power grids are at full capacity. . . . Without greater attention to aging equipment, capacity bottlenecks, and increased demand, as well as increasing storm and climate impacts, Americans will likely experience longer and more frequent power interruptions."

– American Society of Civil Engineers, 2017 Infrastructure Report Card

⁵ ScottMadden, Inc, *Informing the Transmission Discussion: A Look at Renewables Integration and Resilience Issues for Power Transmission in Selected Regions of the United States* (Jan. 2020) (ScottMadden Report) at 280.

⁶ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B").

I. BACKGROUND

On August 18, 2020, the NYISO submitted the instant petition asking the Commission to issue a declaratory order confirming the following:

- The New York Transmission Owners (“NYTOs”) possess a federal right of first refusal to build, own, and recover the costs of upgrades to their existing transmission facilities that is permitted under Order 1000;
- If a NYTO exercises the right to build, own, and recover the costs of an upgrade to an existing facility, the transmission owner is categorized as the developer of the upgrade under the NYISO’s Open Access Transmission Tariff (“OATT”); and
- The NYISO’s interpretation under the OATT of the scope and treatment of upgrades regarding the retirement of existing facilities by a facility that serves a different function.

As explained herein, WIRES respectfully submits that the requested confirmations and clarifications sought in the NYISO Petition are well grounded in Commission and judicial precedent, consistent with other transmission planning regions, enhance NYISO’s Order No. 1000 solicitation process, increase transparency and improve NYISO’s ability to administer its planning process, and should be granted.

II. COMMENTS

A. The Commission Has Appropriately Preserved And Reinforced A Transmission Owner’s Right To Upgrade Its Existing Transmission Facilities

The NYISO Petition seeks clarification that the NYTOs are entitled to a right of first refusal that reserves to them the right to build, own, and recover the costs of upgrades to their existing facilities as provided under Order No. 1000 and the NYISO’s OATT. Moreover, such rights exist even if an upgrade is part of another developer’s proposed transmission solution that is selected by the NYISO for inclusion in a regional transmission plan for purposes of cost allocation.

The Commission has repeatedly and consistently confirmed the TO rights the NYISO seeks to clarify. In Order No. 1000 and its progeny, FERC preserved and reinforced a TO's right to upgrade its transmission facilities. Starting with Order No. 1000, the Commission asserted that "our reforms are not intended to affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities..."⁷ Equally important, the Commission made clear that these rights exist regardless of whether later upgrades are selected as part of a regional planning process for cost allocation. The Commission stated:

The Proposed Rule emphasized that our 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.⁸

Lest there be any doubt, the Commission emphasized that "this Final Rule does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent."⁹

The Commission subsequently confirmed its earlier finding:

The Commission did not however, require public utility transmission providers to remove a federal right of first refusal for . . . upgrades to an incumbent transmission provider's own transmission facilities . . .¹⁰

⁷ Order No. 1000 at P 226.

⁸ *Id.* at P 319.

⁹ *Id.*

¹⁰ Order No. 1000-A, P 357. Importantly, since this holding was made through the Order No. 1000 rulemaking, FERC can revise its rule and regulations only through a subsequent rulemaking. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932) (holding that the agency could not in a judicial action abrogate a rate fixed by the agency operating in its legislative role); *Shell Oil Co. v. FERC*, 664 F.2d 79, 83 (5th Cir. 1981) ("There may not be a rule for Monday, and another for Tuesday, a rule for general application, but denied outright in a specific case.").

The balance Order No. 1000 struck between “upgrades” to facilities (which are subject to the TO ROFR) and “new” facilities (which may be subject to competition) implicitly acknowledges that the interest of competition can only be advanced to the point where it interferes with incumbent utility property rights, which are protected by law. The right of a property owner includes “the right to possess, use, and dispose of it.” *United States v Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). “Property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of its property. To require ... that the owner permit another to exercise complete dominion literally adds insult to injury.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). The Commission has recently respected and enforced similar retained rights and responsibilities in RTO foundational agreements in other regions. *See e.g., PJM Interconnection, LLC*, 172 FERC ¶ 61,136 (2020) (holding that the PJM TOs retained in PJM’s foundational agreements authority over Asset Management Projects).

The Commission has approved open access tariffs throughout the country that affirmatively grant transmission owners the right to build upgrades to their existing transmission facilities. Significantly, a review of foundational agreements in several jurisdictions demonstrates that transmission owners throughout the country (at least those in RTOs/ISOs) have the sole right to upgrade their existing transmission facilities.¹¹

¹¹ *See e.g.* Midcontinent Independent System Operator Open Access Tariff, Attachment FF, Section VIII.A.2 “A Transmission Owner shall have the right to develop, own, and operate any upgrade to a transmission facility owned by the Transmission Owner, in accordance with this Tariff and the ISO Agreement”; California ISO Open Access Tariff, Section 24.5.1 “ If the transmission solution... involves an upgrade or improvement to, addition on, or a replacement of a part of an existing Participating TO facility, the Participating TO will construct and own such upgrade, improvement, addition or replacement facilities unless a Project Sponsor and the Participating TO agree to a different arrangement.”; ISO New England Open Access Tariff, Attachment K, Section 4.3(a) “The Qualified Transmission Project Sponsor is not required to procure agreements with the [Participating TO] for implementation of such upgrades as the [Participating TO] is required to implement the upgrade(s) in accordance with Schedule 3.09(a) of the Transmission Operating Agreement if the proposed solution is selected through the competitive process.”

As established in the NYISO Petition, the NYISO's foundational agreements with the NYTOs preserved these grandfathered rights in a manner similar to the rights preserved by other TOs in foundational agreements relevant to other regions, which further supports that the NYTOs had a pre-existing right to upgrade their transmission facilities when Order No. 1000 was enacted, meaning that this right is preserved and was not disturbed by the Commission's issuance of Order No. 1000.

The reservation of pre-formation Transmission Owner rights, such as the right to upgrade existing facilities, was a key consideration for the NYTOs, as well as Transmission Owners in other regions, when forming RTOs/ISOs. In most cases, these retained property and planning rights were specifically contemplated and expressly reserved by Transmission Owners in their foundational agreements. These rights were not surrendered to the RTO/ISO at the time of formation. Existing facilities and the right to upgrade such facilities are retained rights of the Transmission Owners that are grandfathered rights and were expected to remain in effect under the current RTO/ISO arrangements. It was the NYTOs' expectations that these rights would be preserved and maintained in full force and effect by the NYISO, its planning procedures and practices. It was expected that these rights would be relied upon and left undisturbed. As the NYISO states in its Petition, the "NYTOs expressly conditioned their delegation of certain responsibilities to the NYISO on," among other things, their continuing ability to "own, physically operate, modify, and maintain" their respective transmission facilities turned over to the NYISO's operational control.

Accordingly, as it is axiomatic that similarly situated entities should be treated similarly, the Commission should likewise confirm that the NYTOs' have the right to upgrade their own transmission facilities.

B. Under The NYISO’s OATT, Only A Transmission Owner May Elect To Retire Or Decommission Its Existing Transmission Facilities

NYISO requests clarification regarding “whether (i) a new transmission facility that would require the retirement or decommissioning of a NYTO’s existing transmission facility that connects to the transmission facility in a different configuration than the original facility would constitute an ‘upgrade’ that is subject to the NYTOs’ right of first refusal; and (ii) whether such a proposal requires either the agreement of the NYTO that owns the facility or an outcome of a state regulatory proceeding or court proceeding authorizing the retirement or decommissioning of the facility.”¹²

On these aspects of the NYISO Petition, the NYISO OATT is refreshingly straightforward. Specifically, section 3.10(c) of the NYISO-TO Agreement provides: “Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including 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...” Based on the plain language of the OATT, a new line proposal may not infringe upon the TOs’ existing right to decide whether to retire its own facility. Thus, any project proposed by a developer cannot require a NYTO to retire an existing transmission facility.

¹² NYISO PDO, at 20-21.

III. COMMUNICATIONS

All correspondence, communications, pleadings, and other documents related to this proceeding should be addressed to the following representative:

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IV. CONCLUSION

For the reasons set forth above, WIRES respectfully submits that the Commission should grant the NYISO's Petition and confirm the rights under the NYISO OATT of the NYTOs to build, own, and recover the costs of upgrades to their existing transmission facilities.

Respectfully submitted,

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September 17, 2020

CERTIFICATE OF SERVICE

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

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September 17, 2020