

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 18-E-0765 - Petition of NextEra Energy Transmission New York, Inc. for an Order Granting Certificate of Public Convenience and Necessity Pursuant to Section 68 of the Public Service Law.

ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY

Issued and Effective: February 11, 2021

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 11, 2021

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Diane X. Burman
James S. Alesi
Tracey A. Edwards
John B. Howard

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BY THE COMMISSION:

INTRODUCTION

NextEra Energy Transmission New York, Inc. (NEETNY) filed a petition on December 14, 2018, along with supplements filed on January 11, February 8, and March 8, 2019, seeking a Certificate of Public Convenience and Necessity (CPCN) under Public Service Law (PSL) §68 (the Petition). The Petition requests a CPCN in connection with its development of an approximately 20-mile 345 kilovolt (kV) electric transmission facility located in the Town of Royalton, Niagara County, and the Towns of Alden, Newstead, Lancaster, and Elma in Erie County (referred to as the Empire State Line (ESL) Project).

By this Order, the Public Service Commission (Commission) considers the evidentiary record compiled in this proceeding, including testimony and hearings before the

Administrative Law Judge (ALJ) that resulted in the ALJ's Recommended Decision and post-hearing briefs addressing the applicability of the Commission's Vertical Market Power (VMP) Policy Statement.¹ As discussed below, the Commission finds that the record and applicable law and policy support granting a CPCN to NEETNY along with conditions necessary to mitigate any potential exercise of market power.

BACKGROUND

In July 2015, the Commission found that a "Public Policy Requirement," as defined under the New York Independent System Operator, Inc.'s (NYISO) federally approved tariff,² was driving a need for new electric transmission facilities to relieve persistent congestion in Western New York.³ The Commission's July 2015 Order resulted in the NYISO's solicitation of solutions to the identified "Public Policy Transmission Need" for Western New York and selection of NEETNY's ESL Project as the most efficient and cost-effective solution to address the identified need.

On August 10, 2018, NEETNY filed an application for a Certificate of Environmental Compatibility and Public Need (CECPN), pursuant to Article VII of the PSL, to construct and

¹ Cases 96-E-0900 et al., Electric Rate Restructuring, Statement of Policy Regarding Vertical Market Power (issued July 17, 1998), Appendix I (VMP Policy Statement).

² The NYISO's Open Access Transmission Tariff (OATT) approved by the Federal Energy Regulatory Commission (FERC) includes a Public Policy Transmission Planning Process (PPTP) prescribed under Attachment Y, §31.4, et seq.

³ See Case 14-E-0454, Public Policy Transmission Needs, Order Addressing Public Policy Requirements for Transmission Planning Purposes (issued July 20, 2015) and Order Addressing Public Policy Transmission Need for Western New York (issued October 13, 2016).

operate the ESL Project. On June 16, 2020, the Commission granted a CECPN for the ESL Project, consisting of an approximately 20-mile 345 kV transmission line located in an existing New York State Electric and Gas Corporation (NYSEG) utility corridor; a new 345 kV switchyard, the Dysinger Switchyard, in Niagara County with an emergency-rated phase angle regulator (PAR); and, a second new switchyard, the East Stolle Switchyard, in Erie County.⁴ The ESL Project Order indicated that NEETNY must also obtain a CPCN pursuant to PSL §68.

On December 14, 2018, NEETNY filed the Petition seeking a CPCN, including authorization to exercise the required consents from the proper municipal authorities, namely the Road Use and Crossing Agreements to occupy and traverse roads under the municipal control of the Towns of Newstead, Royalton, Elma, and Lancaster (collectively, the Towns). At a prehearing conference, the parties indicated that the only issues they intended to litigate were related to market power issues and their impact on ESL Project ownership. As further described in the Recommended Decision, NEETNY's affiliates, in combination, own, operate, and plan to operate approximately 1,300 megawatts (MW) of generation located throughout New York.⁵

⁴ See Case 18-T-0499, NextEra Energy Transmission New York, Inc. - Electric Transmission Siting, Order Granting Certificate of Environmental Compatibility and Public Need (issued June 16, 2020) (ESL Project Order).

⁵ NEETNY has identified affiliate generation facilities that are currently operating or for which it has an executed contract with a third party totaling 656.8 MW in NYISO energy zones A, C, F, and K. Its affiliates have proposed generation facilities totaling 651.5 MW located in NYISO energy zones A, B, C, E, F, and K. The facilities are solar, wind and storage.

Pursuant to the schedule adopted in the proceeding,⁶ testimony was filed by NEETNY and Department of Public Service Trial Staff (Staff),⁷ and an evidentiary hearing was held on January 15, 2020. The evidentiary record includes 534 pages of hearing transcripts and 33 exhibits. Staff and NEETNY filed initial post-hearing briefs on February 21, 2020, and reply briefs on March 13, 2020.

The Secretary issued a Recommended Decision of the assigned ALJ on October 2, 2020. A Notice of Schedule for Filing Exceptions and a Notice Seeking Comment on Recommended Decision were issued by the Secretary the same day. Staff and NEETNY filed exceptions to the Recommended Decision on October 22, 2020, and briefs opposing exceptions on November 6, 2020. No public comments were received regarding the Recommended Decision.

THE VERTICAL MARKET POWER POLICY STATEMENT

The Commission's VMP Policy Statement indicates that VMP "occurs when an entity that has market power in one stage of the production process leverages that power to gain advantage in a different stage of the production process."⁸ Where a transmission and distribution (T&D) company is a corporate

⁶ See Ruling Adopting Schedule and Confirming Party Status (issued May 24, 2019), Ruling Adopting Revised Schedule (issued August 2, 2019), Ruling Revising Schedule (October 2, 2019) and Ruling Revising Schedule (issued December 4, 2019).

⁷ NEETNY filed supplemental testimony and exhibits on August 16, 2019; Staff submitted testimony and exhibits on September 20, 2019; and NEETNY submitted rebuttal testimony and exhibits on October 18, 2019, and filed corrections on October 21, 2019. Staff filed revised and corrected testimony on November 29, 2019, and December 18, 2019. NEETNY filed sur-rebuttal testimony and exhibits December 20, 2019.

⁸ VMP Policy Statement, p. 1.

affiliate of a company that owns generation, the T&D company may be able to adversely influence prices in that affiliated generator's market to the benefit of the combined operation.

The Commission provided two examples of situations in which vertical market power could be exercised: (1) where an affiliate generator is located in the same market as the T&D company and the T&D company is able to increase barriers to the entrance of competing generators by delaying or imposing unrealistic interconnection requirements for the purpose of raising prices in the region, thereby benefitting its generator affiliate; and (2) where an affiliate generator is on the high-cost side of a transmission constraint and the T&D company has the ability to influence the constraint. In this second example, the T&D company would thereby be incentivized to maintain the transmission constraint to keep the generator's market price high.

The Commission created a rebuttable presumption that "ownership of generation by a T&D company affiliate would unacceptably exacerbate the potential for vertical market power."⁹ To overcome the presumption, the T&D company affiliate "would have to demonstrate that vertical market power could not be exercised because the circumstances do not give the T&D company an opportunity to exercise market power, or because reasonable means exist to mitigate market power."¹⁰ In the alternative, the Commission stated that the T&D company could "demonstrate that substantial ratepayer benefits, together with mitigation measures, warrant overcoming the presumption."¹¹ The Commission provided three examples of market-power mitigation:

⁹ Ibid., p. 2.

¹⁰ Id.

¹¹ Id.

limiting the degree of control over the constraining transmission interface held by the T&D utility; a pledge by the T&D utility to pursue transmission projects recommended by the Commission or by the NYISO, together with a proposal that would neutralize profit-maximizing incentives on generation that is within the market power control area pending the completion of all reasonable efforts by the T&D company to complete recommended transmission projects; and, an agreement by the T&D company to participate in a binding arbitration in the event of a dispute over a new generator's interconnection requirements in the T&D utility's territory.¹²

RECOMMENDED DECISION AND EXCEPTIONS

Recommended Decision

The ALJ recommended that the Commission issue a CPCN to NEETNY finding that NEETNY had satisfied the requirements of PSL §68 and that NEETNY had overcome the presumption in the VMP Policy Statement. With regard to PSL §68, the ALJ concurred with the parties' contention that NEETNY had satisfied the requirements of PSL §68 and its implementing regulations and demonstrated: its economic wherewithal to construct and operate the ESL Project and to finance improvements; together with its affiliates, it has the technical expertise to render safe, adequate and reliable service; and, that it has secured the appropriate municipal road crossing approvals.

With regard to VMP and the public interest, the ALJ found that NEETNY had the potential to exert vertical market power if it were permitted to own and operate the ESL Project and its affiliates own and operate generation in the State. However, the ALJ concluded that NEETNY had established that

¹² Id.

there would be substantial benefits to ratepayers associated with NEETNY's ESL Project and that sufficient mitigation measures could be imposed to warrant overcoming the presumption in the VMP Policy Statement.

In evaluating the benefits of the ESL Project, the ALJ recommended that the Commission consider all the benefits of the facility as described by the NYISO, and declined to adopt Staff's position that only the incremental benefits over other transmission options that did not pose VMP concerns evaluated by NYISO and the Commission in the Western New York PPTP should be considered. The ALJ also rejected Staff's position that the benefits of the ESL Project should be evaluated comparative to other projects in the competitive process on the basis of CO₂ emissions, reasoning that the Commission and NYISO chose to evaluate the projects on a holistic basis rather than isolating one criterion. The ALJ opined that there is no set bar regarding the amount of ratepayer benefits that must be present to overcome the VMP presumption and that the Commission has evaluated each case on a stand-alone basis.

The ALJ concluded that NEETNY's opportunity to exercise VMP could be effectively mitigated by several factors when taken together. She stated that, under the circumstances of this case, the following were sufficient to mitigate NEETNY's opportunity to exercise VMP risk: oversight by the NYISO and FERC regarding market monitoring; the FERC-based tariff that would be administered by the NYISO; oversight of NYISO and FERC in the administration of the interconnection process; and NEETNY's adherence to several Codes of Conduct and annual reporting it would file with the Commission. Nevertheless, the Recommended Decision also suggested other forms of mitigation that may be imposed by the Commission in the event that it found additional safeguards necessary, including: those measures the

Commission imposed in the Iberdrola Order;¹³ additional reporting requirements of affiliates; a tailored approach like the one imposed by the Commission in the Consolidated Edison Company of New York, Inc. (Con Edison)/Orange & Rockland Utilities, Inc. (O&R) Order;¹⁴ annual reporting of unplanned outages; and/or requiring internal auditing of compliance with corporate Codes of Conduct to be filed with the Commission.

Having found substantial ratepayer benefits and adequate mitigation to limit the exercise of VMP, the ALJ did not recommend requiring divestiture of either the ESL Project or NEETNY-affiliated generation in New York, the structural solution to VMP that Staff advanced. In making the recommendation, the ALJ also stated she believed it relevant to consider the Commission's other policy goals and obligations, including the State's renewable energy goals. The ALJ opined that fostering a regulatory environment to encourage skilled entities to participate in meeting New York's goals would be important, but not to the exclusion of protecting ratepayers.

Lastly, the Recommended Decision rejected NEETNY's arguments that if the Commission did not support overcoming the presumption in the VMP Policy Statement, it would be contrary to

¹³ Case 07-M-0906, Joint Petition of Iberdrola, S.A., Energy East Corporation, RGS Energy Group, Inc., Green Acquisition Capital, Inc., New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for Approval of the Acquisition of Energy East Corporation by Iberdrola, S.A., Order Authorizing Acquisition Subject to Conditions (issued January 6, 2009) (Iberdrola Order).

¹⁴ See Case 10-E-0497, Joint Petition of Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Consolidated Edison Solution, Inc. and Consolidated Edison Development, Inc., Regarding the Development of Renewable Energy Projects owned by the CEI Affiliates, Declaratory Ruling on the Development of Renewable Generation Facilities and Order Establishing Filing Requirements (issued February 23, 2011)(Con Edison/O&R Order).

FERC policy or precedent, or raise constitutional claims. The ALJ concluded that the Commission has the requisite authority and discretion to protect ratepayers as it deems appropriate.

Exceptions

Briefs on and opposing exceptions were filed by Staff and NEETNY. Both parties reiterate arguments raised before the ALJ and detailed descriptions of the various arguments are also described in the Recommended Decision. NEETNY takes limited exception to the Recommended Decision whereas Staff takes issue with various aspects of it.

Potential to Exercise Market Power

NEETNY contends that the ALJ erred in finding that there is a potential for NEETNY to exercise market power. NEETNY opines that it "neither possesses market power nor will it have any incentive to attempt to exercise it."¹⁵ NEETNY states that its production cost analyses found that the overall impact of the ESL Project on energy revenues of its affiliate, NextEra Energy Resources (NEER), on a present value basis, totals approximately \$2.7 million over 11 years. It states that this represents less than 0.4% of NEER's projected generation energy revenues in the NYISO market. NEETNY maintains that this represents a de minimis impact and is an insufficient incentive to attempt to exercise market power. It further argues that NEER affiliates will potentially own "approximately only 3% of the total generation in New York, the vast majority of which is intermittent."¹⁶ Consequently, NEETNY says, "neither NEETNY nor its affiliates will have the ability to extract any meaningful profits from the operation of the Project and, consequently lack market power."

¹⁵ NEETNY Brief on Exceptions, p. 4.

¹⁶ NEETNY Brief on Exceptions, p. 4.

NEETNY references the Con Edison/O&R Order and asserts that the Commission found the VMP Policy Statement presumption was overcome where generation capacity was limited compared to the amount delivered in the utilities' service territories; the generation was renewable with a low capacity factor; and, the amount earned from selling generation would have limited impact on the economic viability of each project.¹⁷ NEETNY avers that similar circumstances are present in the instant case where its affiliates will potentially represent 3% of total generation in New York, the generation will operate at low capacity factors and the amount earned from selling generation will have a small impact on the economic viability or profitability of the projects. It further argues that there is less incentive under the circumstances presented here where NEETNY will own only one 20-mile transmission line and the majority of NEER's generation resources are located far from the ESL Project.¹⁸

In its brief opposing exceptions, Staff argues that the Recommended Decision properly found that NEETNY has the opportunity to exercise market power and urges the Commission to reject NEETNY's argument. According to Staff, NEETNY is proposing to replace the Commission's "opportunity-to-exercise VMP test with a meaningful-profit VMP test."¹⁹ Staff argues that NEETNY has overlooked significant portions of the Con Edison/O&R Order that discuss the need to mitigate VMP opportunities and the significant benefits that the generation projects would produce for ratepayers. Staff urges that, rather than rely on

¹⁷ NEETNY Brief on Exceptions, pp. 5-7.

¹⁸ NEETNY Brief on Exceptions, p. 6.

¹⁹ Staff Brief Opposing Exceptions, p. 2.

the Con Edison/O&R Order from 2011, the Commission should consider the 2017 Ravenswood Order as analogous to NEETNY.²⁰

Staff opines that NEETNY has not explained why it would lack an incentive merely because of the proposed value impact alone. It also rejects NEETNY's estimation of the ESL Project's financial impact on affiliate generators. Staff reiterates its testimonial position that the analysis is flawed because it fails to take into consideration unplanned outages and underestimates congestion conditions. Lastly, Staff observes that NEETNY's opportunities and incentives to exercise VMP will expand with every new affiliated generation or transmission project constructed in New York.

Ratepayer Benefits

Staff contends that the Recommended Decision erred in recommending that the Commission find the relevant ratepayer benefits of the ESL Project are the total value of the ESL Project as identified by the NYISO. Staff maintains that ratepayers would receive the benefits of the ESL Project identified by the NYISO regardless of which entity owns and operates the facility. It states that NEETNY failed to establish that its development of the ESL Project depended on its ownership and operation of the facility and that NEETNY never asserted that it would abandon development if the Commission prohibits it from owning or operating the transmission line after the in-service date. Rather, Staff offers that "NEETNY was affirmatively seeking opportunities to develop transmission upgrades that it would never own or

²⁰ Case 17-E-0016, Petition of TC Ravenswood, LLC, TC Ravenswood Services Corp. and Helix Generation for Expedited Approval of a Transfer and Financing Pursuant to Lightened Regulation, Order Approving Transfer Subject to Acceptance of Conditions and Making Other Findings (issued April 19, 2017) (Ravenswood Order).

operate.”²¹ Staff further argues that, because NEETNY failed to establish that ratepayers would receive any incremental benefits from its operation of the ESL Project compared to another operator, “there is no record basis for attributing any ratepayer benefits that would offset the benefits of a structural divestiture solution that eliminates VMP risk.”²²

Staff also contends that the Recommended Decision erred by substituting “the NYISO’s analysis, without alteration, for the Commission’s independent legislatively obligated analysis pursuant to PSL [§]68.”²³ It argues that the Commission can evaluate benefits as it sees fit in the PSL §68 process because the analysis serves a different purpose. Staff opines that proper evaluation of transmission solution benefits would consider the incremental benefits to ratepayers of the ESL Project above other proposals made in the competitive transmission solution process that proposed no VMP risk. Staff asserts that when the ESL Project is compared to the other project proposals by a developer that does not pose VMP concerns, the benefits of the ESL Project would be approximately \$40 million. In its view, this would not present significant enough ratepayer benefits to overcome the VMP Policy Statement presumption. Staff also avers that the ALJ erred in excluding consideration of the “negative externalities imposed by CO₂ emissions”.²⁴ Staff opines that the ESL Project reduced CO₂ emissions less than other competing projects and that it is relevant to consider the cost of carbon in considering ratepayer benefits. Staff urges the Commission to continue its policy of

²¹ Staff Brief on Exceptions, p. 14 citing tr. 425-429; exhibit 204.

²² Staff Brief on Exceptions, p. 15.

²³ Staff Brief on Exceptions, pp. 16-17.

²⁴ Staff Brief on Exceptions, p. 16.

applying the social cost of carbon and contends that, were the comparative benefits and CO₂ emissions appropriately considered, the Commission would find that the ESL Project would produce minimal or no benefits to ratepayers.

NEETNY finds no error in the benefits described in the Recommended Decision. NEETNY asserts that there is no record evidence to challenge the validity of the process utilized by the NYISO in selecting the ESL Project or the benefits attributed to it therein. NEETNY states that the Commission should reject Staff's assertion that NEETNY is not the only company that can provide a transmission solution to address the public policy need, reiterating that its selection in the competitive process was to the exclusion of all other projects. NEETNY therefore insists that a comparative analysis is improper and characterizes Staff's proposal as overly focused on selective metrics that diminish the benefits of the ESL Project. It states that inconsistent comparisons of projects across certain metrics would yield a significantly different evaluation of production cost benefits and the costs of carbon. It argues that the ESL Project will provide ratepayers with the benefits identified by the NYISO, as well as create a more robust regional transmission system and other non-quantifiable system benefits.

Mitigation and Divestiture

Staff states that the Recommended Decision erred in recommending a behavioral remedy to mitigate VMP, rather than establishing divestiture as a structural solution. Staff argues that NEETNY should not be treated similarly to the New York

Transco (NY Transco) Order²⁵ because NY Transco's affiliates "unambiguously fall within the scope of the Commission's most robust regulatory oversight."²⁶ It recommends that the Commission instead apply the same treatment to NEETNY as it employed for the petitioner in the Ravenswood Order and require divestiture. Staff states that NYISO and FERC oversight is uncertain; that reliance on a Code of Conduct is folly because the Commission could not enforce its terms; and that the ALJ's recommendation to impose mitigation is more costly and less effective than Staff's divestiture solution. Staff instead recommends that the Commission require one of the following: divestiture of the ESL Project by the time it is placed in service; divestiture of affiliated generation assets delivering electricity into New York by the time the ESL Project is placed in service; or that NEETNY record the ESL Project as an investment on its books and records as an intangible asset while turning over ownership and control to an unaffiliated entity. Staff further recommends the Commission impose similar conditions as were ordered in the Ravenswood Order to assure compliance, including requiring a bond and NEETNY's unconditional acceptance of the CPCN's conditions.

NEETNY contends that the Recommended Decision properly concluded that there is adequate mitigation of VMP risk. In its Brief Opposing Exceptions, NEETNY contends that, in the first instance, it does not have market power or any rational basis to exercise it. It also insists that there are significant and material safeguards in place to further deter the exercise of

²⁵ Case 15-E-0743, Petition of New York Transco LLC for an Order Providing for Lightened Regulation, Order Providing for Lightened Rate Making Regulation and Approving Financing (issued April 21, 2016) (NY Transco Order).

²⁶ Staff Brief on Exceptions, p. 19.

VMP; namely, independent operational control of the ESL Project by the NYISO; FERC, NYISO and Commission oversight; and, adherence to multiple codes of conduct.

NEETNY opines that the Recommended Decision properly concluded that NEETNY is similarly situated to New York Transco LLC (NY Transco) and distinguishable from the petitioners in the Ravenswood Order for the reasons explained therein. It reiterates its testimonial positions that: the ESL Project will be effectively under the NYISO's control; it will be required to maintain the line in accordance with good utility practice and coordinate with the NYISO and local transmission owners; it will be subject to the Commission's oversight with regards to vegetation management; and, the interconnection process is open to competition and under the oversight of NYISO and FERC.

NEETNY declares that it would be inequitable to treat NEETNY dissimilarly to NY Transco and other in-state investor-owned utilities. NEETNY states that the Commission previously held that it "expects that other transmission developers that engage solely in wholesale transmission activities, similar to [NY] Transco, will be accorded comparable regulatory treatment."²⁷ With regards to Staff's argument that NEETNY should not be treated similar to NY Transco because NY Transco's affiliated investor-owned utilities are more rigorously regulated by the Commission, NEETNY insists the argument should be rejected. NEETNY observes that the Commission granted NY Transco a lightened regulatory regime and therefore is not subject to rigorous regulation as Staff suggests. Moreover, it avers, NY Transco is a separate legal entity from its upstream owners. In NEETNY's view, Staff fails to explain how the Commission's regulatory authority over NY Transco's upstream

²⁷ NEETNY Brief Opposing Exceptions, p. 27 quoting NY Transco Order, p. 15.

owners protects New York ratepayers from potential anti-competitive behavior or "how such oversight would help the Commission "prevent, catch, or remedy exercises of market power" by New York Transco or its affiliates."²⁸ It further argues that the Commission, in finding that NY Transco's potential to exercise market power was mitigated, did not rely on its oversight of NY Transco's upstream owners as a basis for its finding -- it relied on FERC and NYISO oversight and Codes of Conduct.

As it previously argued, NEETNY states that the circumstances in the present case are distinguishable from the facts in the Ravenswood Order for the reasons stated in the Recommended Decision. In addition, NEETNY claims that the record reflects a de minimis effect on prices at the locations of its affiliate-owned generation, whereas in the Ravenswood proceeding locational marginal prices were not analyzed.

NEETNY also submits that Staff's position that oversight by NYISO and FERC is uncertain is contrary to Commission precedent and record evidence. It remarks that the Recommended Decision properly concluded that such oversight is robust and reiterates that NYISO, FERC, and the Commission all have the authority to impose significant penalties that act as a deterrent.

NEETNY also rejects Staff's contention that codes of conduct may not be an effective means of mitigation, stating that the Commission may maintain significant oversight of NEETNY and require specific compliance filings to address any concerns it may have regarding the operation of the ESL Project including: requiring specific compliance with applicable codes

²⁸ NEETNY Brief Opposing Exceptions, p. 28.

of conduct and the filing of outage schedules, outage reports, and maintenance reports.

Clean Energy Goals

Staff submits that the Recommended Decision erred because it suggests vertical integration may be necessary for reaching renewable policy goals. It avers that it is unnecessary and without record support that ratepayers "must trade away protections from harmful market manipulations in order to receive the benefits of cleaner energy."²⁹ Staff again submits that if NEETNY were permitted to own and operate the ESL Project while its affiliates own and operate generation, its opportunities to exercise VMP will only expand as NEETNY's affiliates expand their portfolio of generation in New York.

NEETNY opines that Staff's position that NEETNY has had sufficient incentive to design, develop, and construct the ESL Project, even if required to divest, is flawed and may have a negative impact on investments in transmission or generation in New York. NEETNY states that a major incentive for developers to develop, build, and operate competitive transmission projects is to earn a rate of return over the life of the project commensurate with the risk of development. According to NEETNY, other benefits include the opportunity to further enhance the assets over time and also, through transmission ownership, an opportunity to participate "in working groups to help shape policy and direction of transmission operations and development in New York State."³⁰ The unique perspective that NEETNY offers, it says, would benefit the State. NEETNY asserts that divestment would send the wrong message to developers by limiting participation to

²⁹ Staff Brief on Exceptions, p. 21.

³⁰ NEETNY Brief Opposing Exceptions, p. 32.

only transmission or generation. It also contends that the approach suggested by Staff would undermine the goals of the Climate Leadership and Community Protection Act by dissuading NEETNY's affiliates from investing in renewable energy resources in New York, alleging such actions could have a "chilling impact on other similarly situated developers of renewable resources."³¹

LEGAL AUTHORITY

PSL §68 requires an electric corporation to obtain a CPCN prior to "construction of ... electric plant ... [or the] exercise of any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised..." The Commission is authorized to grant a CPCN to an electric corporation pursuant to PSL §68, "whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is convenient and necessary for the public service." In making that determination, the Commission must consider "the economic feasibility of the corporation, the corporation's ability to finance improvements of ... electric plant, render safe, adequate and reliable service, and provide just and reasonable rates, and whether issuance of a certificate is in the public interest." A petitioner must also file a copy of the charter of the corporation together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

DISCUSSION

In view of the record developed in this proceeding, the Commission concurs with the ALJ's recommendation that we

³¹ NEETNY Brief Opposing Exceptions, p. 33.

grant NEETNY a CPCN and find that the VMP Policy Statement presumption is overcome in the circumstances presented. However, while we agree with this outcome, we do not adopt the rationale presented in the Recommended Decision.

We find, after due hearing, that NEETNY has satisfied the legal and regulatory requirements of PSL §68 and its implementing regulations. In particular, the initial Petition filed on December 14, 2018, includes a copy of NEETNY's Certificate of Incorporation, as verified by the Secretary of State of New York. In addition, the Petition includes the appropriate road crossing approvals executed by the Towns to demonstrate that those municipal consents have been given. The supplement to the Petition filed on March 8, 2019, further includes verified statements from both NEETNY's President and Secretary attesting that the company has received the necessary municipal consents from the proper authorities. We find that NEETNY's exercise of the Towns' road use agreements for the purpose of constructing the ESL Project is convenient and necessary for the public service.

In addition, the record demonstrates that NEETNY is feasible from an economic perspective and capable of financing the construction and maintenance of the ESL Project, as well as undertaking improvements. NEETNY will rely upon upstream corporate affiliates for financial backing, NextEra Energy, Inc. (NextEra Energy) and NextEra Energy Capital Holdings, Inc. The record reflects that NextEra Energy has significant assets and equity available to fund the ESL Project and that it maintains strong investment-grade credit ratings.

NEETNY has also demonstrated that, with its affiliates, it has the technical expertise to render safe, adequate, and reliable service. NEETNY will rely upon NextEra Energy's resources and personnel that have significant

experience in developing, permitting, constructing, owning and operating transmission systems. Moreover, the ESL Project will receive cost-based rates established by FERC and recovered through the NYISO tariff, thus ensuring the provision of just and reasonable rates.

In determining that the issuance of a CPCN is consistent with the public interest, we have considered the potential for NEETNY to exercise market power. As discussed above, NEETNY's affiliates operate or propose to operate 1,300 MW of generation throughout New York. Thus, the Commission's VMP Policy Statement necessitates that we evaluate whether NEETNY's ownership of the ESL Project will pose VMP risk and, if so, whether NEETNY can adequately rebut the presumption that would otherwise require some form of structural remedy.

Issues of market power remain just as relevant today as they were when the Commission issued the VMP Policy Statement in 1998. The Commission must ensure that entities that have market power in one stage of the production process are not provided unchecked opportunity to leverage that power to gain an advantage in a different stage of the production process. While certain aspects of the market necessarily have changed over the course of time, we must remain vigilant to scrutinize any transactions that may allow such an opportunity to arise. The VMP Policy Statement, the presumption, and the standard for assessing whether the presumption may be overcome continue to be relevant and important to ensure that market power is not exercised to the detriment of ratepayers.

The VMP Policy Statement identified two examples in which vertical power could be exercised: the first describing a situation in which a T&D company could increase barriers to the entrance of competing generators by delaying or imposing unrealistic interconnection requirements to raise prices

regionally and benefit generator affiliates; and the second describing a circumstance where the T&D company could influence a transmission constraint to maintain a high market price for a specific generator.

Based upon the record before us, we find that NEETNY will have the opportunity to exercise market power for the reasons expressed by the ALJ in the Recommended Decision. We agree with the finding in the Recommended Decision that employees of NEETNY will have some opportunity to influence the maintenance and operation of the ESL Project. Moreover, although NEETNY contends that no opportunity to exercise market power exists because it lacks sufficient financial motivation to take such action, as noted by Staff, lack of sufficient motivation is different than having no opportunity, and NEETNY's acknowledgment that some amount of compensation, even if de minimis, could be realized is an admission that the company could take actions that exploit a VMP opportunity. Thus, NEETNY's production cost study is evidence that the opportunity to exercise that power nonetheless exists. Accordingly, NEETNY must demonstrate either that reasonable means exist to mitigate market power risk or that substantial ratepayer benefits, together with mitigation measures, warrant overcoming the presumption.

In contemplating what level of benefits and mitigation may be required in the instant case, it is relevant to consider the extent to which NEETNY has the opportunity to exercise market power. NEETNY has urged us to consider that: the production cost analysis it conducted using the General Electric Power Systems Multi-Area Production Cost Simulation (MAPS) software is evidence of the limited overall impact of the ESL Project on energy revenues of NEER; that NEETNY's generation affiliates represent a minimal amount of the total generation in

New York and is intermittent; and that the company's ability to exercise market power is extremely limited given that the ESL Project is one 20-mile transmission line and that the majority of its affiliate generators are located far from the ESL Project. While these arguments are not persuasive for the proposition that NEETNY has no opportunity to exercise market power, they are relevant and instructive in gauging the magnitude of the risk and in evaluating appropriate mitigation and benefits we expect to see in light of that risk.

In reviewing the record here, we find NEETNY's production cost study instructive in viewing the scale of risk presented. We have previously relied upon production cost studies using the MAPS software for transmission planning and to evaluate transmission scenarios and their relative impacts on Locational Based Marginal Prices (LBMPs) in NYISO energy zones.³² While such production cost studies may, as DPS Staff asserts, have some limitations in modeling and calculating congestion impacts of unplanned outages and may understate congestion, MAPS is an industry recognized electric system modeling tool that provides reasonable results on a host of output metrics (e.g., LBMPs, congestion, and emissions) to measure the effects of adding or removing transmission and generation sources to an electric system. Given that, we find these studies to be useful in providing a relative estimation of potential impacts to LBMPs. Here, NEETNY's study evaluated the price impacts to energy zones in which NEETNY's affiliate generators are, or would be, located between 2022 and 2032, both with and without the addition of the ESL Project. Though NEETNY acknowledged

³² See, e.g., Case 10-T-0139, Champlain Hudson Power Express, Inc. - Article VII, Order Granting Certificate of Environmental Compatibility and Public Need (issued April 18, 2013), p. 39.

that the ESL Project will increase prices at some NEER nodes and decrease prices at others, overall its analysis assesses the impact on affiliate generator net revenues on a present value basis as decreasing approximately \$2.7 million over the entire 11-year period.³³

Given NEETNY's use of conservative study parameters, its results convincingly demonstrate that, in a hypothetical situation where the ESL Project is built but is out of service for eleven consecutive years, NEETNY's affiliates would only stand to gain \$2.7 million. The comparison of revenues with and without the ESL Project provides a reasonable estimation of the magnitude of harm ratepayers could experience over the ESL Project's first eleven years in service should market power be exercised for a prolonged period of time and, in our view, the potential harm to ratepayers is limited in view of a minimal benefit to NEETNY and its affiliates.

In addition, the existing and proposed generating facilities of NEETNY's affiliates are all renewable and energy storage facilities with low capacity factors. While not eliminating the ability of NEETNY to coordinate unplanned outages to take advantage of VMP opportunities, it constrains its ability and opportunities to act, providing a form of mitigation that would not exist for a generator with a high capacity factor.

Finally, the size of a T&D company's system and the number and locations of affiliate generators may also inform the extent to which a T&D company has the opportunity to exercise market power. In the instant case, NEETNY's ESL Project is a relatively short transmission line with no distribution system or ability to serve end-use customers. The majority of NEETNY's

³³ Tr. 122, 125, 130 and 162.

affiliate generation facilities are located a significant distance from the ESL Project. There is one planned 280 MW solar generation facility and one proposed 100 MW storage facility located in zone A, where the ESL Project is located. The remaining generation facilities are located in zones B, D, E, F and K. With the majority of the affiliated generation facilities outside of the energy zone for the ESL Project, NEETNY's opportunity to exercise market power by creating a transmission constraint to the benefit of its affiliates is limited. Taken together, we find that NEETNY's opportunity to exercise market power is limited.

We further find that the benefits associated with the ESL Project along with the mitigation we will require are reasonable and sufficiently rebut the VMP Policy Statement presumption. The ALJ opined that the proper measure of the benefits of the ESL Project to ratepayers are all of those identified by the NYISO in selecting the project to address the energy constraint in Western New York, reasoning that the project had been selected to the exclusion of other projects. The NYISO found that the ESL Project will enable transmission of approximately 2,700 MW of renewable energy from the Niagara hydroelectric plant and 1,000 MW of additional imports from Ontario; reduce New York Control Area (NYCA) Demand congestion by \$582 million; provide production cost benefits of \$274 million; reduce CO₂ emissions by approximately 7.4 million tons; and improve reliability and system operability.

By contrast, DPS Staff took the position that, under the VMP Policy Statement standard of review, it is improper to examine the ESL Project benefits as a whole and instead only the incremental benefits of the project are relevant. In this respect, Staff compared the benefits of the ESL Project to the benefits of transmission solutions posing no VMP risk that were

not selected through the NYISO solicitation process. Staff stated that such a comparison would yield a benefit of approximately \$40 million, which in its view, is not significant enough to overcome the VMP Policy Statement presumption. Staff also suggested that we discount any benefit and apply the social cost of carbon in evaluating the comparative benefits of the ESL Project against another that would not raise VMP risk. Staff suggested that any comparative benefit would be reduced such that ratepayers would only experience a minimal or no benefit.

We find that it is important to evaluate both the overall and incremental benefits of a transmission project in evaluating whether the presumption against VMP can be overcome. It is unquestionable that the overall benefits of the ESL Project to the State are significant from any metric. The Commission previously determined after an extensive technical analysis and public process that there are existing transmission needs driven by Public Policy Requirements to relieve congestion in Western New York and increase transmission capability in an amount sufficient to ensure the full output from the 2,700 MW Niagara hydroelectric generating facility owned and operated by the New York Power Authority and to increase the level of energy imports from Ontario across the Niagara tie lines.³⁴ As noted, the NYISO determined that the ESL Project had numerous benefits under several metrics, including that it would reduce NYCA Demand congestion by \$582 million, provide production cost benefits of \$274 million, reduce CO₂ emissions by approximately 7.4 million tons, and improve reliability and system operability. As the Commission previously recognized, competition is the central feature of this process and is

³⁴ Case 14-E-0454, Proposed Public Policy Transmission Needs, Order Addressing Public Policy Requirements for Transmission Planning Purposes (issued July 20, 2015).

critical to ensuring that the proposal selected represents the most cost-effective or efficient project available. The overall benefits of the ESL Project illustrate the importance of maintaining a healthy competitive process.³⁵

We also find the incremental benefits to ratepayers to be significant, particularly in light of the minimal risk to ratepayers associated with NEETNY maintaining ownership of the ESL Project. As explained in the October 17, 2017 NYISO Report, the NYISO evaluated the proposed solutions to the Western New York transmission constraint based on each project's performance under the selection metrics established in the OATT, as well as the specific criteria previously identified by the Commission.³⁶ We recognize that other projects proposed in the NYISO competitive process could have produced some of the same benefits as the ESL Project, while avoiding market power risk entirely. In selecting the ESL Project over other proposals, however, the NYISO determined that the ESL Project "is the more efficient or cost-effective transmission solution to address the Western NY Need based on its total performance across the selection criteria and scenarios."³⁷ Indeed, from an incremental perspective, DPS Staff determined that the ESL Project provides \$40 million worth of benefits.

³⁵ Of note, the NYISO ranked NEETNY's two project proposals above all others. The selected project is that referenced herein that includes a PAR, while the other proposal excluded the PAR.

³⁶ "Western New York Public Policy Transmission Planning Reports" NYISO Final Report, October 17, 2017, p. ii and Case 14-E-0454, Public Policy Transmission Needs, Order Addressing Public Policy Transmission Need for Western New York (issued October 13, 2016), p. 15.

³⁷ "Western New York Public Policy Transmission Planning Reports" NYISO Final Report, October 17, 2017, p. ii.

We agree with the ALJ that there are reasonable means of mitigating the minimal vertical market power risk posed by NEETNY's ownership of the ESL Project while its affiliates own generation in New York. As we identified above, we find NEETNY's opportunity to exercise market power is somewhat limited in the first instance in light of the minimal profit NEETNY and its affiliates could extract by exercising market power, the intermittent and generally low capacity factors of the generation and storage facilities owned by NEETNY's affiliates, and the geographical location of the affiliate generators compared to the ESL Project, which is not a robust transmission and distribution network, but rather a single 20-mile transmission facility. In addition, NEETNY has agreed that the NYISO will have operational control over the ESL Project. The ALJ recommended that NYISO and FERC oversight, combined with applicable FERC, NextEra, and NEETNY codes of conduct are sufficient to mitigate NEETNY's ability to exercise market power and recommended other mitigation that we could apply if we disagreed with that assessment. We find that the measures proposed by the ALJ will reduce VMP risk, but direct further mitigation.

Based upon the presentation in the record, we find that NYISO and FERC oversight will mitigate, to a large extent, our concerns regarding NEETNY's ability to exercise market power. Both the NYISO and FERC have programs of market monitoring that act as a deterrent to transmission companies that might consider exercising market power. While FERC may impose penalties to remedy an abuse, the Commission also has significant penalty authority under the Public Service Law that should act as a deterrent. We also find convincing that, because the transmission line will be operated by the NYISO subject to FERC-approved tariffs, the potential for harm to

captive ratepayers is mitigated. We recognize that NEETNY does not own or operate any distribution lines and, therefore, will not be directly serving any end-users. We also recognize that the NEETNY's opportunity to discriminate against competing generators seeking to interconnect with the ESL Project is mitigated by FERC and NYISO oversight in the administration of the interconnection process.

We agree that the codes of conduct that NEETNY would adhere to would somewhat mitigate our concerns about its exercise of market power. NEETNY will be subject to codes of conduct of FERC, NextEra and NEETNY, that would govern the behavior of NEETNY employees and further reduce the potential abuse of vertical market power. NEETNY would require extensive employee training, establish practices regarding affiliate transactions, and require adherence to an established process if a competitor alleges NEETNY has violated its code. NEETNY would also file annual reports with the Commission summarizing any transactions between NEETNY and its affiliates.

However, while these measures would provide some safeguards to mitigate VMP risk, we find that there are additional mitigation measures available to further reduce the risk of market power. First, we will require NEETNY to notify us within five days if there are any changes to the codes of conduct such that we may assess whether additional measures may be required to ensure that these codes of conduct continue to be satisfactory in dissuading NEETNY from exercising market power. Second, as NEETNY has already agreed, it must maintain the line in keeping with good utility practice. Third, we will require NEETNY to file biannual reports identifying any additional generation, energy storage, or supply side projects that it or its affiliates plan to develop within the NYCA. Any reports identifying such projects shall be accompanied by a production

cost study, comparable to the one offered by NEETNY in this proceeding, so that we can evaluate whether the new facilities would pose unacceptable VMP risk. Fourth, once the ESL project becomes operational, NEETNY is directed to file a report of any forced or unforced outages, the reasons for such outages, and the length of the outages. Such report must be filed within five days of the outage. Finally, NEETNY is advised that it will be required to demonstrate compliance with PSL §68(1) and to obtain a CPCN in relation to the construction or operation of any additional electric plant. Any future filing under PSL §68(1) must be accompanied by an analysis of the overall and incremental benefits of the electric plant discussed herein.

For the above reasons, we find that in this instance the VMP Policy Statement presumption has been overcome due to the limited opportunity to exercise market power, the substantial benefits of the ESL Project, and the available means to mitigate NEETNY's exercise of market power. Consequently, we will not impose conditions similar to those that we imposed in the Ravenswood Order finding that they are distinguishable from the circumstances before us in this proceeding.

In the Ravenswood Order, the Commission approved the sale of the Ravenswood generating facility to Helix Generation, LLC (Helix) and required a structural solution to divest assets based on the unique circumstances. There, a significant potential VMP risk was presented because Helix sought to own 2,400 MW of generation while two of its affiliates had pending proposals before the NYISO in the competitive PPTP process to develop transmission facilities and relieve persistent congestion, one of which was directly upstream of the Ravenswood facility. In applying the VMP Policy Statement presumption, the Commission found that "[r]atepayers will not receive substantial benefits from the sale of a merchant generation facility, and

the Petition does not describe any efficiency gains that might arise from the Proposed Transactions.”³⁸ The Commission found that the presumption was not overcome in those circumstances because the change in ownership of the Ravenswood facility posed a risk to ratepayers but they would have received no significant benefit for the assumption of that risk. Nevertheless, in recognition that significant system and ratepayer benefits would accrue from finding the most efficient and cost-effective solution, rather than require the affiliates to immediately withdraw from the PPTP process, the Commission authorized Ravenswood’s affiliates to continue to participate in the PPTP process so long as they agreed prospectively to divest either the Ravenswood facility or the transmission facility and to adhere to certain mitigation measures if one of the projects was ultimately selected by the NYISO. The Ravenswood Order, therefore, presented several distinguishing features, including: 1) a significant amount of fossil-fueled generating capacity at the Ravenswood facility, with a notably higher capacity factor than an intermittent renewable generating facility; 2) the location of the Ravenswood facility in the New York City transmission constrained region, which regularly produces significantly higher LBMPs than in unconstrained regions; and, (3) the potential development of a major transmission facility that would directly impact those transmission constraints into New York City.

Finally, we concur with the ALJ’s assessment that there is no need to conduct a separate environmental review pursuant to the State Environmental Quality Review Act (SEQRA) for the reasons provided for in the Recommended Decision.³⁹ A

³⁸ Ravenswood Order, p. 26.

³⁹ Recommended Decision, pp. 41-42.

comprehensive environmental review of the construction and operation of the ESL Project was conducted pursuant to PSL Article VII. The grant of a PSL Article VII Certificate is a Type II action exempt from review pursuant to SEQRA. The record in the PSL Article VII proceeding includes extensive information regarding potential environmental impacts and the CECPN addresses the environmental impacts and provides protective measures tailored to avoid, minimize, and mitigate environmental impacts. Our grant of a CPCN for the purposes of exercising consent to use municipal property is an activity undertaken in relation to the PSL Article VII Certificate and is not by itself an action subject to the requirements of SEQRA.

CONCLUSION

The Commission finds that NEETNY has satisfied the requirements for issuance of a CPCN pursuant to PSL §68. In considering whether this action is within the public interest, the Commission finds that the VMP Policy Statement presumption has been overcome where we find a low risk to ratepayers of improper VMP abuse, which can be further reduced with reasonable mitigation measures to ensure that any opportunity to exercise VMP does not go unchecked; and the ESL Project will have significant benefits for ratepayers.

The Commission orders:

1. NextEra Energy Transmission New York, Inc.'s request for issuance of a Certificate of Public Convenience and Necessity, authorizing the construction and ownership of the Empire State Line Project pursuant to Section 68 of the Public Service Law, is granted as discussed in the body of this Order.

2. NextEra Energy Transmission New York, Inc. shall address market power issues by providing operational control of

the Empire State Line Project to the New York Independent System Operator, Inc. as part of placing the Project in service and joining the New York Independent System Operator, Inc., as discussed in the body of this Order.

3. NextEra Energy Transmission New York, Inc. shall file any substantive changes to the applicable codes of conduct referenced in the body of this Order with the Secretary within five days of the change becoming effective.

4. NextEra Energy Transmission New York, Inc. shall maintain the Empire State Line Project in accordance with good utility practices.

5. NextEra Energy Transmission New York, Inc. (NEETNY) shall file biannual reports, commencing with the commercial operation date of the Empire State Line Project, outlining affiliate ownership of electric generation and transmission assets. The reports shall identify every direct and indirect affiliated entity, whether upstream or downstream of NEETNY, that holds any active or passive interest in any electric plant, as defined in Public Service Law §2(12), located in the New York Independent System Operator, Inc., PJM Interconnection LLC, ISO New England Inc., Hydro Québec Service Area, and/or Independent Electricity System Operator markets. The reports shall specify the nature and level of interest held by each entity and shall describe each generation or transmission asset. The reports shall further identify every electric generation or transmission project currently under development in the aforementioned markets by any affiliated entity. For the purposes of the report, a project under development includes any project for which studies, analyses, and/or reports have been prepared for internal corporate review, even if no regulatory approvals have been requested.

6. NextEra Energy Transmission New York, Inc. shall file biannual reports, commencing with the commercial operation date of the Empire State Line Project, regarding forced and unforced outages of the Empire State Line Project that identify the number and dates of any outages, length of outages, reasons for the outages, solutions undertaken, and the impact on affiliate generator pricing.

7. NextEra Energy Transmission New York, Inc. (NEETNY) shall file biannual reports, commencing with the commercial operation date of the Empire State Line Project, identifying any additional generation, energy storage, or supply side projects that it or its affiliates plan to develop within the New York Control Area. Any reports identifying such projects shall be accompanied by a production cost analysis measuring the impact the Empire State Line Project would have on locational based marginal prices at pricing nodes in energy zones where NEETNY affiliates propose generation facilities. The study shall project price impacts for a prospective decade period and specifically address the impact of the Empire State Line Project on affiliate generator net revenues.

8. NextEra Energy Transmission New York, Inc. shall file, within 30 days of the issuance of this Order, a filing unconditionally accepting the conditions set forth in this Order and committing to abstain from any exercise of vertical market power in the operation of the Empire State Line Project. The company shall unequivocally recognize that any exercise of vertical market power by NextEra Energy Transmission New York, Inc. may lead to the Commission's revocation of the Certificate of Public Convenience and Necessity for the company and/or subject the company to any financial penalties permitted by the Public Service Law.

9. In the Secretary's sole discretion, the deadlines set forth in this order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

10. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary