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February 12, 2014

Hon. Kathleen H. Burgess  
Secretary to the Commission  
New York State Public Service Commission  
Empire State Plaza  
Agency Building 3  
Albany, NY 12223-1350

BY ELECTRONIC FILING

**CASE 13-E-0488 - Proceeding on Motion to Examine Alternating Current  
Transmission Upgrades**

Dear Secretary Burgess:

Please accept the attached comments for electronic filing.

Sincerely,

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**BEFORE THE STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**In the Matter of Alternating Current Transmission            )**  
**Upgrades – Comparative Proceeding                                )       Case 13-E-0488**

**COMMENTS OF NORTH AMERICA TRANSMISSION, LLC AND NORTH AMERICA  
TRANSMISSION CORPORATION IN RESPONSE TO JANUARY 17, 2014 NOTICE**

North America Transmission, LLC and North America Transmission Corporation (together “North America”) hereby submit these Comments in response to the January 17, 2014 Notice Regarding Alternating Current Transmission Upgrade Process (the “Notice”).

**I.       Introduction**

The Notice states that the Commission is considering whether modifications are needed to this proceeding in light of policy objectives designed to avoid landowner and environmental impacts.<sup>1</sup> North America understands that this policy objective relates to the Governor’s 2014 State of the State announcement of an expedited siting process for transmission upgrades within existing State-owned or utility rights-of-way (ROW).<sup>2</sup> Any changes in this proceeding to meet this new policy objective should be implemented in a manner that preserves the benefits of competition.

**II.       Comments**

**1.   Benefits of Competition**

The Commission has recognized that the appearance of independent transmission developers creates an opportunity for consumers to reap the benefits of an enhanced AC

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<sup>1</sup> Public Service Commission, Case No. 13-E-0488, In the Matter of Alternating Current Transmission Upgrades – Comparative Proceeding, Notice Regarding Alternating Current Transmission Upgrade Process, January 17, 2014 (hereinafter “the Notice”).

<sup>2</sup> State of the State Address, January 8, 2014 at 63.

transmission system at a cost reflecting effective competition.<sup>3</sup> Indeed, this proceeding establishes New York State as a leader in transmission competition, recognizing the advantage competition can bring in reduced costs and other benefits. These benefits have been recognized in other jurisdictions where competitive transmission processes have been conducted or are in process such as Texas,<sup>4</sup> Ontario,<sup>5</sup> and Alberta.<sup>6</sup> In many ways transmission competition follows the path of electricity generation competition in the 1990s, which gave rise to the independent power producer industry. The Commission should resist viewing the policy objectives of competition as being in conflict with the policies seeking to minimize land owner and environmental impacts. The Commission need not and should not sacrifice one to achieve the other.

## **2. Alternatives Entirely Within State-Owned or Existing Utility Rights-of-Way**

North America, like other project sponsors in this proceeding, developed its transmission upgrade proposal based on the policies set forth in the New York Energy Highway Blueprint. They called for “upgrades of existing lines and the building of new lines following existing rights-of-way”.<sup>7</sup> More recently, the Governor has proposed a policy initiative to expedite

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<sup>3</sup> Public Service Commission, Case No. 12-T-0502, Proceeding on Motion of Commission to Examine Alternating Current Transmission Upgrades, Order Establishing Procedures for Joint Review Under Article VII of the Public Service Law and Approving Rule Changes, April 22, 2013 at 16.

<sup>4</sup> Public Utility Commission of Texas Docket 35665 - Commission Staff's Petition For Commission Selection Of Entities Responsible For Transmission Improvements Necessary To Deliver Renewable Energy From Competitive Renewable Energy Zones.

<sup>5</sup> Ontario Energy Board Case EB-2011-0140 IN THE MATTER OF a Board-initiated proceeding to designate an electricity transmitter to undertake development work for a new electricity transmission line between Northeast and Northwest Ontario: the East-West Tie Line.

<sup>6</sup> Alberta Utilities Commission Proceeding ID 1449 - Independent System Operator AESO Competitive Process Application.

<sup>7</sup> New York Energy Highway Blueprint at 38, 41-42.

projects entirely within existing State-owned or utility ROW.<sup>8</sup> If this fundamental policy shift (i.e., from one encouraging new lines *following* existing rights-of-way, to one expediting projects *entirely within* existing transmission corridors), is applied to this proceeding, care should be taken to preserve the benefits of competition. Otherwise, the new “within ROW” policy inescapably favors the incumbent transmission owners (who own and control those existing transmission corridors) to the detriment of the independent, non-incumbent transmission developers whose participation in the process (and the PSC proceeding) is essential to the realization of an enhanced AC transmission system at a cost reflecting effective competition. North America believes that pending proposals under consideration in the AC upgrade proceeding should have the opportunity of revision to meet the newly stated policy to expedite projects within existing transmission corridors.

The ability to obtain an Article VII certificate for construction of an upgrade in an existing utility ROW has been brought to light in this proceeding in the filings of Boundless Energy.<sup>9</sup> The incumbent transmission owners (TOs) oppose Boundless Energy’s proposal to build within the TOs’ ROW, or to sponsor projects involving an upgrade to the TOs’ existing facilities. The non-incumbent, independent transmission developers are competitors to the TOs in this proceeding. Participation of the independent developers is what creates competition and the promise of its benefits to customers. North America suggests allowing competition while respecting the rights of incumbent transmission owners for property that they hold for the public

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<sup>8</sup> 2014 State of the State Address, at 63. The Governor proposes a 10 month fast-track Article VII process for upgrades which satisfy these conditions. While such a fast-track process may or may not apply to this proceeding, North America believes the policy objectives may be applied in any event.

<sup>9</sup> Public Service Commission, Case No. 13-E-0488, In The Matter of Alternating Current Transmission Upgrades Comparative Proceeding; Case No 13-T-0461, Application of Boundless Energy NE, Ruling Concerning Possible Deficiency in the Application of Boundless Energy NE, December 20, 2013.

benefit.

### **3. Reconciling Competition and Use of Existing ROWs**

Competition among proposals which consist of upgrades of existing facilities or new facilities in existing State-owned and utility ROWs can be preserved. The Commission is authorized to approve or deny applications to construct and operate major electric transmission facilities as set forth in Article VII of the Public Service Law (“PSL”) and upon approval, issue a Certificate of Environmental Compatibility and Public Need (the “Certificate”). *See generally* PSL §§ 120-130. The acquisition of property rights needed for a transmission facility, whether through negotiation with property owners or through eminent domain, is separate and distinct from the Article VII process. As the Commission has recognized in prior proceedings, “[t]he Commission first determines the need for, and the location of, transmission facilities. A successful Article VII applicant may then [negotiate with property owners or] bring an eminent domain proceeding in state Supreme Court, using our Article VII decision to satisfy the EDPL’s public purpose and need requirements. Thus, our Article VII findings pursuant to the PSL merely serve as prerequisite to exercising eminent domain” or negotiation with private property owners.<sup>10</sup> Accordingly, there is no impediment to the Commission issuing an Article VII certificate to a non-incumbent for a transmission project located within a right-of-way owned or controlled by an incumbent transmission owner so long as the Commission can make the necessary findings with respect to the location and need for the project.<sup>11</sup> Indeed, Administrative

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<sup>10</sup> Public Service Commission, Case No. 07-T-1492, Petition of New York Regional Interconnect Inc. for Declaratory Ruling that Section 11(7) of Transportation Corporations Law Either Does Not Apply to NYRI or NYRI’s Project or that Statute is Unconstitutional, Order Dismissing Petition for Declaratory Ruling and Declaratory Ruling that Commission Lacks Authority to Determine Applicability and Constitutionality of Transportation Corporations Law, February 15, 2008.

<sup>11</sup> Whether such facilities, proposed for location within a right-of-way owned or controlled by an incumbent transmission owner, represent an interference with the facilities of the incumbent is a question routinely dealt

Law Judge Prestemon recognized this in his ruling dated December 20, 2013 in this proceeding with respect to the most recent proposal by Boundless Energy.<sup>12</sup>

North America is concerned, however, that relying on eminent domain rights for a non-incumbent may result in extensive litigation in order to obtain a final determination on the issue, which would negatively impact the schedule for constructing facilities in this proceeding. North America suggests a much simpler and time sensitive solution: the Commission should set a deadline after the end of the proceeding for the project sponsor of the application found to most be in the public interest and any affected transmission owner to negotiate and execute any necessary agreements. This is consistent with North America's proposal of a possible Transmission Use Agreement or other similar joint project agreement to implement its proposal.<sup>13</sup> The actual negotiation necessary during such period could be limited, as the parties will identify and describe their proposals and what is required during the proceeding, and the Commission will be able to weigh in as necessary. In the event a non-incumbent proposal is found to be in the public interest, any resistance from the incumbent utility would be directly contrary to the public interest. To facilitate the process, the Commission could act as mediator in such a negotiation if it desires. In any event, by taking such a path, the Commission would be

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with in Article VII applications and proceedings, albeit using different terminology. The Commission's rules at 16 NYCRR §88.4, require the applicant to show the relation of its proposal to existing facilities and the interconnected network. The applicant is required to indicate specific benefits with respect to reliability and economy to the interconnected network. These application requirements have as part of their statutory underpinning, PSL §126. That section requires findings 1) that such facilities conform to a long range plan for expansion of the electric power grid of the electric systems serving the State and the interconnected utility systems, which will serve the interests of electric system economy and reliability and 2) that the facility will serve the public interest, convenience and necessity.

<sup>12</sup> Public Service Commission, Case No. 13-E-0488, In The Matter of Alternating Current Transmission Upgrades Comparative Proceeding; Case No 13-T-0461, Application of Boundless Energy NE, Ruling Concerning Possible Deficiency In The Application Of Boundless Energy NE, December 20, 2013 at 6.

<sup>13</sup> Public Service Commission, Case 12-T-0502, Proceeding on Motion of Commission to Examine Alternating Current Transmission Upgrades, Comments Of North America Transmission, LLC Addressing Cost Allocation, Cost Recovery, And Risk Sharing, August 26, 2013, at 4-6

able to eliminate the uncertainty about the ability for non-incumbents to use existing utility ROWs, and allow for competition to continue which is in the public interest and consistent with the original proceeding. This approach can be applied to preserve competition in this proceeding or to apply competition in a new process in which transmission line upgrades are implemented in existing transmission line ROWs. North America's affiliate LS Power has experience with similar circumstances in the early days of competition in electricity generation.

#### **4. Precedent in Other Jurisdictions**

This proceeding, in which competition is being introduced to the Commission's Article VII process, has many parallels to when competition was first introduced to electric generation. In two such cases where LS Power successfully participated, the competitive process was administered by a state utility commission, with the final result being an order from such commission for the incumbent utility to execute a power purchase agreement to enable the proposal which best served the public interest. In Minnesota, LS Power's bid was found to be the least cost, that is, less than the utility's avoided cost of a self-build proposal, and the Minnesota Public Utilities Commission approved the resulting Power Purchase Agreement.<sup>14</sup> In Wisconsin, the Public Service Commission selected the LS Power proposal and directed the utility to negotiate an agreement in good faith.<sup>15</sup> If the parties were unable to reach agreement, they were required to file testimony supporting their good faith negotiating efforts, and could be prohibited from future competitions if they were found to not have negotiated in good faith. There are many parallels here, particularly that new entrants may need an agreement with the

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<sup>14</sup> Minnesota Public Utilities Commission Docket E-002/C-92-899 Order Finding Contract Price Terms Appropriate, February 16, 1995

<sup>15</sup> Wisconsin Public Service Commission Docket No. 6630-CE-187 as described in Chairman's statement in NARUC Bulletin No. 39-1993, p. 19, attached.

incumbent competitor in order to accomplish the project that best serves the public interests. North America believes this precedent can be instructive as the Commission considers moving forward in a way that preserves competition and minimizes environmental impacts through use of existing State-owned and utility ROWs.

### **5. Cost Recovery and Early Screening**

North America previously submitted comments regarding cost recovery, cost allocation, and early screening.<sup>16</sup> We urge the Commission to act on those comments in order to advance this proceeding, allow for competition, reduce public confusion, avoid unnecessary expenditure of resources by proponents, the public, and the State, and ensure costs are allocated commiserate with benefits of the AC Transmission Upgrades..

### **III. Conclusion**

North America encourages the Commission to continue with this proceeding as described above, to achieve the benefits of the proposed transmission upgrades and associated congestion relief, at the least cost through a competitive process that minimizes landowner and environmental impact.

Respectfully submitted,

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<sup>16</sup> Comments of North America Transmission, LLC Addressing Cost Allocation, Cost Recovery, and Risk Sharing dated August 26, 2013 and Reply Comments of North America Transmission, LLC Addressing Cost Allocation, Cost Recovery and Risk Sharing