

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

)	
Proceeding on Motion of the Commission)	
to Implement Transmission Planning)	
Pursuant to the Accelerated Renewable)	Case 20-E-0197
Energy Growth and Community Benefit Act.)	
)	

**Response of the New York Transmission Owners
To Request for Rehearing of LS Power**

The New York Transmission Owners (NYTO)¹ submit this response urging the New York Public Service Commission (Commission or PSC) to reject the application of LS Power Grid New York Corporation I (LS Power) for rehearing and clarification² of the Commission’s September 9, 2021 order in this proceeding.³

¹ For purposes of this response, the NYTOs include: Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc. (Con Edison), Niagara Mohawk Power Corp. d/b/a National Grid, New York State Electric & Gas Corp. (NYSEG), Orange & Rockland Utilities, Inc., and Rochester Gas & Electric Company, each of which is subject to the jurisdiction of the Commission and the Federal Energy Regulatory Commission (FERC); and the Long Island Power Authority (LIPA) and New York Power Authority (NYPA).

² Application for Rehearing and Clarification of LS Power Grid New York Corporation I, dated October 8, 2021 (the LS Application).

³ Case 20-E-0197, *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Order On Local Transmission And Distribution Planning Process And Phase 2 Project Proposals (Issued and Effective September 9, 2021) (the Phase 2 Order).

Introduction

LS Power challenges the PSC’s proposal to establish a new mechanism to allocate costs of Local Transmission⁴ “necessary to meet the clean energy and climate goals set by the Climate Leadership and Community Protection Act (CLCPA).”⁵ LS Power makes two arguments:

First, that costs of transmission – including Local Transmission – can only be allocated under the NYISO OATT’s Order. No. 1000 processes; as such, any regional cost allocation as proposed by the Phase 2 Order “is preempted by FERC’s exclusive jurisdiction over transmission . . .”⁶

Second, that any facilities that operate over 200kV – including facilities proposed by LIPA and Con Edison – are not “Local Transmission” and the Commission should clarify this bright line.

As stated in the Commission’s Regulations: “[r]ehearing may be sought only on the grounds that the [C]ommission committed an error of law or fact or that new circumstances warrant a different determination.”⁷ LS Power does not meet this standard. LS Power points to no errors of fact or changed circumstances, and the legal errors it alleges are wrong as a matter of law and/or are procedurally barred. The LS Application must therefore be rejected.

The NYTOs urge the Commission to deny the LS Application in its entirety because:

1. The NYISO Order No. 1000 competitive solicitation and planning process does not displace alternative, voluntary, multi-transmission owner funding of transmission projects, which remains lawful and is encouraged by FERC;
2. LS Power’s attempt to limit the Commission’s ability to designate Phase 2 projects based on a 200 kV bright line is legally defective because:

⁴ The Commission defined local transmission facilities in this proceeding as “transmission line(s) and substation(s) that generally serve local load, and transmission lines which transfer power to other service territories and operate at less than 200 kV.” Case 20-E-0197, *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Order On Transmission Planning (Issued and Effective May 14, 2021) (the “May 2020 Order”) at p. 3, fn 4 (emphasis added).

⁵ Phase 2 Order at p. 1, citing CLCPA, Chapter 106 of the laws of 2019.

⁶ LS Application at p. 2, referring to the NYISO Open Access Transmission Tariff (OATT).

⁷ 16 NYCRR § 3.7.

- a. FERC permits participant funding for both local and non-local transmission projects irrespective of voltage,
 - b. LS Power contorts the Commission’s definition of local transmission, which does NOT apply a 200 kV bright line to projects “that generally serve local load,”
 - c. LS Power failed to seek rehearing of the May 2020 Order in which the Commission adopted the definition and is now barred from seeking rehearing, and
 - d. the Commission’s definition of Local Transmission to apply to proposed Phase 2 projects is reasonable and is based on the Accelerated Renewable Energy Growth and Community Benefit Act⁸ which does not contain a voltage bright line and confers broad discretion on the Commission;
3. LS Power’s claim that the Phase 2 Order violates FERC’s exclusive jurisdiction is negated by the PSC’s explicit recognition of FERC’s jurisdiction over voluntary participant funding agreements; and
 4. LS Power erroneously assumes that the NYTOs would not file FERC jurisdictional participant funding agreements for FERC’s review in advance of implementing the associated rates. LS Power fails to demonstrate that the Phase 2 Order violates FERC’s jurisdiction or that the Commission committed an error of law.

I. Background

Consistent with its statutory obligations under the Accelerated Renewables Act, the Commission convened this proceeding and issued the May 2020 Order which “required the Joint Utilities to (1) file criteria for evaluating, funding, and prioritizing the local transmission and distribution (LT&D) investments needed to meet CLCPA objectives, and (2) conduct a study of their LT&D systems identifying potential upgrades.”⁹ In response to the May 2020 Order, the Joint Utilities¹⁰ and LIPA, on November 2, 2020, filed project assessment criteria and the results of their

⁸ Chapter 58 (Part JJ) of the laws of 2020 (the Accelerated Renewables Act).

⁹ Phase 2 Order at p. 2.

¹⁰ The Joint Utilities are the NYTOs with the exception of LIPA and NYPA.

study.¹¹ The utilities grouped their proposed LT&D upgrades into two categories: Phase 1 and Phase 2 projects “based on the availability and approval of funding mechanisms.”¹²

The Commission ruled on CLCPA investment criteria and Phase 2 upgrades in the Phase 2 Order. The Commission found that “the participant funding model can efficiently accomplish the balancing necessary to achieve an equitable cost distribution throughout the State,” and directed the utilities to develop a form of agreement for Commission review.¹³ The Commission recognized that “effectuating cost recovery of a voluntary statewide participant funding agreement would require FERC’s approval.”¹⁴ The Commission also directed the utilities to apply the Commission’s guidance on investment criteria and to make subsequent Phase 2 project filings.

On October 8, 2021, LS Power filed the LS Application seeking rehearing and clarification of the Phase 2 Order. On October 19, 2021, the Commission noticed the LS Application and established January 3, 2022 as the deadline for responses.

II. Argument

A. LS Power’s Assertion that Voluntary Multi-Transmission Owner Funding of Transmission Projects Must be Displaced by the NYISO Order No. 1000 Competitive Solicitation and Planning Process Is Wrong

This Commission stated in the Phase 2 Order that voluntary participant funding arrangements are an efficient way to “accomplish the balancing necessary to achieve an equitable cost distribution throughout the State.”¹⁵ LS Power argues that “under Order No. 1000 . . . transmission upgrade costs – including Local Transmission upgrade costs – can only be allocated

¹¹ *Proceeding on Motion of the Commission to Implement Transmission Planning Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act*, Case 20-E-0197, Utility Transmission and Distribution Investment Working Group Report (November 2, 2020).

¹² Phase 2 Order at p. 2.

¹³ *Id.* at pp. 30-31.

¹⁴ *Id.* at p. 31.

¹⁵ Phase 2 Order at p. 30.

on a regional basis under the provisions of the [OATT] of the [NYISO]” and cannot be “exempted from the NYISO’s regional planning processes”¹⁶ and that under Order No. 1000, “any allocation of transmission costs to more than one transmission-owning entity is by definition a regional cost allocation subject to the requirements of Order No. 1000.”¹⁷ LS Power is incorrect.

FERC has made clear that Order No. 1000 does not prohibit developers, including the NYTOs, from using participant funding outside of the Order No. 1000 process. “Transmission developers who see particular advantages in participant funding remain free to use it on their own or jointly with others. This simply means that they would not be pursuing regional or interregional cost allocation.”¹⁸ Contrary to LS Power’s assertions, FERC explicitly recognized that voluntary participant funding agreements can be used for projects outside of the regional transmission planning process and among several parties:

However, these principles [cost allocation on a beneficiary pays basis for projects in regional plans] ***do not in any way foreclose the opportunity for a transmission developer, a group of transmission developers, or one more individual transmission customers to voluntarily assume the costs of a new transmission facility.*** Indeed, the evaluation of the potential benefits and beneficiaries of a proposed transmission facility may facilitate negotiations among such entities, potentially leading to greater use of participant funding for transmission projects not selected in the regional transmission plan for purposes of cost allocation.¹⁹

FERC also found that “a transmission developer will have the option of using participant funding or submitting its transmission project for evaluation in the regional transmission planning process

¹⁶ LS Application at pp. 1-2, 6 (referencing FERC Order No. 1000: *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011), *Order Nos. 1000-A and -B on Rehearing and Clarification*, 139 FERC ¶ 61,132; 141 FERC ¶ 61,044 (2012)).

¹⁷ LS Application at p. 5.

¹⁸ Order No. 1000 at P 724.

¹⁹ Order No. 1000-A at P 724 (emphasis added).

to be selected for regional or interregional cost allocation.”²⁰ Accordingly, a Developer is not obligated to submit a project in the regional transmission planning process.

FERC has approved multi-transmission owner funding of upgrades in New York.²¹ In a recent policy statement, FERC referenced with favor other examples of voluntary arrangements to facilitate transmission development to meet state policies in the Pennsylvania-New Jersey-Maryland Office of Interconnection and ISO-New England.²²

In the Policy Statement, FERC explicitly encouraged the use of voluntary agreements to fund transmission projects to achieve State public policy goals and acknowledged the role the states could have in the process: “we strongly encourage states to participate actively... in the identification of transmission needs driven by Public Policy Requirements...”²³ More recently, FERC affirmed the role of states in prioritizing transmission projects and the availability of voluntary agreements to enable the projects – outside of the Order No. 1000 process:

- We clarify that Voluntary Agreements are not categorically precluded by the Federal Power Act (FPA) or the Commission’s existing rules and regulations.²⁴
- Developing cost-effective and reliable transmission facilities remains a priority of this Commission. Voluntary Agreements²⁵ can further those goals by, for example, providing states with a way to prioritize, plan, and pay for transmission facilities that, for whatever reason, are not being developed pursuant to the regional transmission planning processes required by Order No. 1000.²⁶

²⁰ *Id.* at P 732.

²¹ As one case in point FERC approved a voluntary cost allocation agreement among the NYTOs and others to pay for three Transmission Owner Transmission Solutions (TOTS) projects that were developed by Con Edison, NYSEG and NYPA. See November 5, 2015 Offer of Partial Settlement in Docket No. ER15-572 and Letter Order Approving Partial Settlement, *N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,196 (2016).

²² *State Voluntary Agreements to Plan and Pay for Transmission Facilities*, 175 FERC ¶ 61,225 at P 4, n. 5 (2021) (Policy Statement).

²³ Order No. 1000 at P 688.

²⁴ Policy Statement at P. 1.

²⁵ FERC recognized that Voluntary Agreements could be among a state and one or more public utilities or just among public utilities. *Id.* at P 1.

²⁶ *Id.* at P 2 (emphasis added).

- [I]n some cases, Voluntary Agreements may allow state-prioritized transmission facilities to be planned and built more quickly than would comparable facilities that are planned through the regional transmission planning process(es).²⁷

Order No. 1000 expressly permits transmission owners to enter into voluntary agreements to share costs, “for whatever reason,” without implicating the regional transmission planning and cost allocation processes. The fact that utilities voluntarily agree to share the costs of transmission projects does not render them “regional” and forcibly subject to an ISO’s regional transmission planning process, nor does anything in Order No. 1000 say that it does.²⁸ Utilities that enter voluntary cost allocation agreements can achieve socialization of costs among the participants. This is different from Order No. 1000’s cost allocation, which does not require each participant to agree to the cost allocation. FERC has made clear both mechanisms are available and can be used to fund transmission.

Accordingly, LS Power’s claim that “any allocation of transmission costs to more than one transmission-owning entity is by definition a regional cost allocation subject to the requirements of Order No. 1000” is plainly wrong. FERC has not limited the number of parties to voluntary funding agreements and has encouraged such voluntary arrangements.

²⁷ *Id.* at P 2. The Commission is acting in response to the Accelerated Renewables Act, which directs the Commission to act with due dispatch to develop transmission plans and projects to aid in achieving CLCPA objectives. FERC recognized that voluntary funding agreements may work in tandem with state public policy to accelerate needed transmission, which is the Phase 2 Order’s precise mission.

²⁸ LS Power selectively quotes Order No. 1000-A (LS Application at p.5). Order No. 1000-A provides that to use the regional cost allocation method of a regional planning process (not participant funding), a project must be selected in that regional plan. But a Phase 2 project can proceed without using that method. As such, LS Power misreads Order No. 1000-A and erroneously imputes a prohibition on multi-Transmission Owner funding agreements.

B. LS Power’s Attempt to Limit Phase 2 Projects Based on Voltage is Legally Defective

1. Participant Funding Is Permitted for Both Local and Non-Local Transmission Projects Irrespective of Voltage

As already established, voluntary funding agreements outside of ISO regional planning processes are permitted for development of local and non-local transmission projects. Accordingly, LS Power’s attempt to “foreclose the opportunity for”²⁹ voluntary funding agreements by classifying them as “non-local” fails. FERC has plainly condoned the use of such agreements to allocate costs among public utilities irrespective of whether the facilities the agreements would fund are local transmission or bulk transmission. As discussed, FERC explicitly rejected the exact type of foreclosure LS Power attempts to impose on the Commission in this proceeding.

2. LS Power’s Revisionist Interpretation of the PSC’s Definition of Local Transmission Must be Rejected, and LS Power is Time-Barred from Seeking Rehearing

LS Power seeks “clarification” to limit the scope of projects the PSC considers in this proceeding – according to LS Power there is a bright line that transmission facilities operating above 200 kV are not “local.” In particular, LS Power claims that certain potential Phase 2 projects – namely, those proposed by LIPA and Con Edison that operate above 200 kV – are not “local,” and LS Power asks the Commission to clarify that these projects will not be eligible for cost recovery under the participant funding cost sharing mechanism that the Commission proposed.

This is not a mere clarification. It is a revisionist recast of the Commission’s determination that cannot be reconciled with the May 2020 Order. The Commission has already defined “local” as “transmission line(s) and substation(s) *that generally serve local load, and* transmission lines

²⁹ Order No. 1000-A at P 724.

which transfer power to other service territories and operate at less than 200 kV.”³⁰ The plain text of the Commission’s May 2020 Order makes clear that there are two classes of facilities. The first class consists of transmission line(s) and substation(s) that generally serve local load, and this class does not contain any voltage qualifier. The second class consists of transmission lines that transfer power to other service territories and operate at less than 200 kV. Only the second class of facilities is subject to a voltage qualifier. LS Power’s requested “clarification” contradicts the May 2020 Order.

LS Power seeks “clarification,” perhaps in tacit recognition that it requires rehearing to change the May 2020 Order’s holding, but LS Power did not timely seek rehearing of that order (wherein the Commission adopted this definition).³¹ LS Power is time-barred from challenging the definition of Local Transmission in the LS Application because the relevant order was issued on May 14, 2020. Applications for rehearing are required to be filed with the Commission within 30 days of the service of the order.³² LS Power did not seek rehearing of the May 2020 Order. Accordingly, its attempt, now, to modify the Commission’s definition of Local transmission is procedurally barred.

3. The Commission’s Definition of Local Transmission is Reasonable

The Commission’s definition of Local Transmission is consistent with, if not necessitated by, the Accelerated Renewables Act’s definition of Local Transmission Upgrades. The definition in the Act contains two prongs that LS Power ignores, each of which supports the Phase 2 projects as Local Transmission: (1) “a new transmission facility that is identified within a utility’s local transmission capital plan” and (2) “an improvement, enhancement, replacement or other

³⁰ May 2020 Order at p. 3, fn. 4.

³¹ May 2020 Order at p. 3, fn 4.

³² 16 NYCRR § 3.7.

modification to a transmission facility in a utility's service territory that facilitates achievement of the CLCPA targets." The breadth of the Act's definition grants the PSC discretion to determine what facilities should be included in utilities' local transmission capital plans. Con Edison's and LIPA's Phase 2 projects fit within the Commission's definition, and the Commission will have the opportunity to review more details on Phase 2 projects following the additional filings the Commission directed in the Phase 2 Order.³³

C. The Commission Should Reject LS Power's Claim that the Phase 2 Order Violates FERC's Exclusive Jurisdiction – The Phase 2 Order Explicitly Recognizes FERC's Jurisdiction

LS Power argues that "[a]ny Commission decision to permit New York utilities to recover the costs of such high-voltage projects through a state-wide assessment established by the Commission would clearly interfere with FERC's exclusive jurisdiction over transmission services under the FPA."³⁴ This description of the Phase 2 Order is unsupportable. LS Power has overlooked the PSC's recognition of FERC's jurisdiction:

...the Commission [PSC] believes the participant funding model can efficiently accomplish the balancing necessary to achieve an equitable cost distribution throughout the State. Thus, the next step would be development of an agreement among the utilities, and the Commission understands that *effectuating cost recovery of a voluntary statewide participant funding agreement would require FERC's approval*.³⁵

Rather than violating FERC's jurisdiction, the PSC explicitly affirmed it. The Phase 2 Order does not contemplate violating, let alone violate, FERC's jurisdiction.

³³ The details of many of the Phase 2 projects have not yet been filed with the Commission. The appropriate time and venue to consider application of the Commission's definition of Local Transmission to each specific proposed project are in response to the utilities' forthcoming Phase 2 project filings.

³⁴ LS Application at p.7.

³⁵ Phase 2 Order at p. 31 (footnote omitted, emphasis added).

Moreover, as discussed, FERC explicitly acknowledges that participant funding agreements can be among transmission-owning public utilities or utilities and states,³⁶ and that states can play a significant role in identifying and prioritizing transmission projects to meet state policies.³⁷ LS Power’s broad claims that the PSC is violating FERC’s exclusive or preemptive jurisdiction must fail because the PSC has acknowledged FERC’s role, and FERC has approved the role of state commissions in the process of prioritizing transmission to meet state policies and participant funding agreements.³⁸

To the extent that a future participant funding agreement or associated jurisdictional rate filing with FERC incorporates certain rate-related inputs that have already been vetted in a PSC proceeding, this would not violate the Federal Power Act. FERC will have an opportunity to review and accept or approve the participant funding agreement and/or such a rate before it results in recovery of costs or compensation for any FERC jurisdictional transmission facilities or services.

Once filed, FERC may exercise its jurisdiction over transmission rates by deferring to the initial judgment of a state regulator, and FERC’s election to do so does not negate FERC’s jurisdiction.³⁹ In *Con Edison*, FERC deferred to the PSC, accepting in the NYISO tariff the transmission rates and terms governing Con Edison’s service to the New York Power Authority that were initially reviewed and approved by the PSC. FERC found that “*we intend to exercise*

³⁶ Policy Statement at P 1.

³⁷ *Id.* at P 2 (“providing states with a way to prioritize, plan, and pay for transmission facilities that, for whatever reason, are not being developed pursuant to the regional transmission planning processes required by Order No. 1000.”).

³⁸ See Section III.A, above.

³⁹ *Consolidated Edison Company of New York, Inc.*, 15 FERC ¶ 61,174, at P 61,406 (1981) (*Con Edison*); see also, *Northwestern Wisconsin Electric Co.*, 65 FERC ¶ 61,302 (1993) (“We will thus assert jurisdiction over the service agreement, but we will accept the Wisconsin Commission’s rate determinations in the absence of a showing that it has abused its discretion or violated a public policy, such as the policy against undue discrimination.” *Id.* at P 7 (citing *Con Edison* and *Massachusetts Elec. Co.*, 61 FERC ¶ 61,278, pp. 62,064-5 (1992)); *Vermont Elec. Power Co.*, 44 FERC ¶ 61,189, p. (1988) (recognizing state’s “role in resolving transmission access conflicts among Vermont distribution utilities.” citing *Con Edison*).

our jurisdiction over this service, in this and future filings by Con Ed, by accepting the rate determinations of the NYPSC in the absence of a showing that the NYPSC has abused its discretion or violated a public policy, such as the policy against undue discrimination. In other words, we shall not insist that the rates be developed, in all respects, according to the ratemaking practices of this Commission, but will accept the NYPSC's rate practices and determinations in the absence of a showing of abuse as described above."⁴⁰ Accordingly, the Phase 2 Order and the process it specifies do not violate FERC's exclusive jurisdiction, and the LS Application does not withstand scrutiny.

D. LS Power Erroneously Assumes that a NYTO Would Violate the FPA

LS Power argues that the Phase 2 Order violates FERC's exclusive jurisdiction. This argument presupposes that FERC would not have the opportunity to review and act on a jurisdictional rate filing (such as a voluntary participant funding agreement) before the rate is effected. If and when the NYTOs are implementing Phase 2 projects, the NYTOs reserve the right to file any associated agreements, rates, tariff or tariff changes, subject to FERC jurisdiction with FERC for review.⁴¹ As long as any jurisdictional rates, agreements or tariffs are appropriately filed with FERC for review, there is no violation of FERC's jurisdiction.

⁴⁰ *Con Edison at p. 61,406.* (emphasis added).

⁴¹ To the extent an NYTO seeks to provide a FERC-jurisdictional service or collect a FERC jurisdictional rate, there are a variety of ways any necessary FERC filings can be made, including a NYISO or NYTO filing under Federal Power Act section 205 and/or section 206. Though the NYISO OATT does not prohibit NYTO construction of transmission projects and participant funding outside of the NYISO Order No. 1000 process, FERC recently explicitly invited interested parties to make filings with FERC to support the use of participant funding agreements: "[t]o the extent that states, public utility transmission providers, or other stakeholders believe that the relevant tariffs impose barriers to Voluntary Agreements, the Commission is open to filings to remove or otherwise address those barriers." Policy Statement at P 1, 6. FERC is receptive to participant funding agreements.

In sum, if and to the extent that further PSC actions in this proceeding facilitate or result in actual voluntary agreements to allocate and provide for recovery of costs of new transmission facilities to further state policy, whatever the voltage, whether local or not, the voluntary participant funding agreements will be subject to FERC review to the full extent of FERC's jurisdiction. To the extent any tariff or other agreement must be amended to implement any aspect of the development of transmission projects outside the Order No. 1000 process, each NYTO reserves its rights to pursue changes consistent with the Federal Power Act. LS Power's claim is nothing more than speculative anticipation that utilities will violate their obligation to file jurisdictional rates with FERC for its review. The LS Application is unfounded and should be summarily rejected.

III. Conclusion

The NYTOs urge the Commission to reject the LS Application in its entirety because: (1) the NYISO Order No. 1000 competitive solicitation and planning process does not displace voluntary, multi-transmission owner funding of transmission projects, which remains lawful; (2) LS Power's attempt to limit Phase 2 projects based on voltage is legally defective because (a) participant funding is permitted for both local and non-local transmission projects irrespective of voltage, (b) LS Power contorts the Commission's definition of local transmission, which does NOT apply a 200 kV bright line to projects "that generally serve local load," failed to seek rehearing of the May 2020 Order in which the Commission adopted the definition and is now barred from seeking rehearing and (c) the Commission adopted a reasonable definition of Local Transmission to apply to proposed Phase 2 projects; (3) LS Power's claim that the Phase 2 Order violates FERC's exclusive jurisdiction is negated by the PSC's explicit recognition of FERC's jurisdiction over voluntary participant funding agreements; and (4) LS Power erroneously

assumes that the NYTOs would not file FERC jurisdictional participant funding agreements for FERC's review in advance of implementing the associated rates. LS Power fails to demonstrate that the Phase 2 Order violates FERC's jurisdiction or that the Commission committed an error of fact or law.

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