

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on April 20, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

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 and Effective April 21, 2016)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on December 15, 2015, New York Transco LLC (NY Transco) requested issuance of a declaratory ruling that NY Transco will be regulated pursuant to a lightened regulatory regime under the Public Service Law (PSL), consistent with prior Commission orders (Petition).¹ NY Transco also sought determinations that PSL §68, involving the grant of a Certificate of Public Convenience and Necessity (CPCN), and PSL §69, regarding the issuance of stock, bonds, and long-term indebtedness, are not applicable to NY Transco. Alternatively, NY Transco requested issuance of a CPCN and financing approval.

¹ Although the Petition is styled as a request for a declaratory ruling, the relief sought goes beyond the scope of matters that may be addressed within such a ruling under the Commission's Rules of Procedure, contained in 16 NYCRR §8.1.

As discussed below, this Order establishes a lightened regulatory regime, subject to conditions, applicable to NY Transco. NY Transco is also authorized to enter into the financing arrangements discussed below, up to a maximum amount of \$129 million. Consistent with prior Commission orders, NY Transco will be subject to PSL §68, and therefore requires a CPCN. A hearing will be held to further consider the potential issuance of a CPCN. In contemporaneously issued orders, the Commission is addressing the requests, pursuant to PSL §70, for transfers of certain transmission facilities to NY Transco,² as well as the related partial transfers of a certificate under PSL Article VII.³ The requested transfers are conditioned upon NY Transco obtaining a CPCN.

NOTICE OF PROPOSED RULEMAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on January 13, 2016 [SAPA No. 15-E-0743SP1]. The time for submission of comments pursuant to the SAPA Notice expired on February 29, 2016. Comments were timely filed by

² See, Case 16-E-0012, Petition of New York State Electric & Gas Corporation and New York Transco LLC; see also, Case 16-E-0013, Petition of Orange and Rockland Utilities, Inc., Consolidated Edison Company of New York, Inc., and New York Transco LLC.

³ Case 16-T-0055, Joint Petition of Consolidated Edison Company of New York, Inc., New York Transco LLC, and Orange and Rockland Utilities, Inc. - Transfers of Certificate of Environmental Compatibility and Public Need.

NextEra Energy Transmission New York, Inc. (NextEra).⁴ The comments are addressed below.

BACKGROUND

NY Transco is a New York limited liability company, which is owned by affiliates of the New York investor-owned utilities (IOUs).⁵ The purpose of NY Transco is to develop and own new transmission facilities across New York State. Several transmission projects have been proposed to be owned by NY Transco that involve additions to, or modifications of, the existing transmission system in the State, including the Transmission Owner Transmission Solutions, commonly referred to as the "TOTS," which the Commission accepted as part of the Indian Point Energy Center (IPEC) Reliability Contingency Plan.⁶ These projects, which include the Ramapo to Rock Tavern transmission line, the Staten Island Unbottling project, and the Marcy South Series Compensation project, are currently being

⁴ On March 24, 2016, NY Transco filed unauthorized comments in response to NextEra. These comments will be considered part of the record because they contribute to a full and accurate record, assist in the Commission's decision making, and are not unduly prejudicial to other parties.

⁵ The IOUs include: Central Hudson Gas and Electric Corporation; Consolidated Edison Company of New York, Inc.; Orange & Rockland Utilities, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York State Electric & Gas Corporation; and, Rochester Gas and Electric Corporation. The affiliates of the IOUs that own NY Transco include: Consolidated Edison Transmission, LLC; Grid NY LLC; Iberdrola USA Networks New York Transco, LLC; and Central Hudson Electric Transmission LLC.

⁶ Case 12-E-0503, Proceeding on Motion of the Commission to Review Generation Retirement Contingency Plans, Order Accepting IPEC Reliability Contingency Plans, Establishing Cost Allocation and Recovery, and Denying Requests for Rehearing (issued November 4, 2013).

developed by certain IOUs and are expected to be placed in-service by June 2016.

In addition, NY Transco has proposed upgrades to the alternating current transmission system in order to relieve congestion in certain parts of the State (AC Upgrades Proceeding).⁷ The Commission recently referred this matter to the New York Independent System Operator, Inc. (NYISO) to solicit potential solutions, which the NYISO will then evaluate and report back to the Commission for further action, as appropriate.⁸

Initially, NY Transco will purchase the TOTS projects from the IOUs, and will complete any remaining development, construction and commissioning of the TOTS projects. NY Transco will also continue to seek Commission and NYISO authorization for the projects it has proposed in the AC Upgrades Proceeding.

On December 4, 2014, NY Transco and the IOUs filed an application with the Federal Energy Regulatory Commission (FERC) seeking to establish a formula rate for allocating and recovering, under the NYISO's Open Access Transmission Tariff (OATT), the costs of constructing the TOTS and any other transmission projects that would be developed by NY Transco.⁹ The formula rate and other matters were subsequently set for hearing, pending the outcome of settlement discussions before

⁷ Case 12-T-0502, Proceeding on Motion to Examine Alternating Current Transmission Upgrades, Order Instituting Proceeding (issued November 30, 2012).

⁸ Case 12-T-0502, et al., Proceeding on Motion to Examine Alternating Current Transmission Upgrades, Order Finding Transmission Needs Driven by Public Policy Requirements (issued December 17, 2015).

⁹ The NY Transco formula rate would not include the costs associated with the portion of the TOTS being constructed by the New York Power Authority (NYPA).

FERC.¹⁰ Following these discussions, an Offer of Partial Settlement (Settlement) was filed by the settling parties.¹¹ The Settlement was recently approved by FERC,¹² whereby the NYISO will establish a new OATT schedule, Schedule 13 - Rate Mechanism for the Recovery of the Transco Facilities Charge (TFC), for purposes of billing the charges related to the TOTS projects to load-serving entities (LSEs) in the NYISO control area, including the Companies.

THE PETITION

The Petition seeks a Commission decision that NY Transco will be regulated under a lightened regulatory regime, similar to the framework that the Commission has applied to other wholesale providers of electricity. In support of its Petition, NY Transco asserts that it will plan, develop, construct, own, and maintain interstate transmission facilities that transmit electric power in the wholesale electricity market. The rates for such facilities will be subject to FERC's jurisdiction and collected from wholesale entities by the NYISO pursuant to the new rate schedule. Further, NY Transco's transmission facilities will be under the functional and operational control of the NYISO and subject to the NYISO's tariffs. NY Transco claims that it will not have any retail

¹⁰ Docket No. ER15-572-000, New York Independent System Operator, Inc., et al., Order on Transmission Formula Rate, Return on Equity, Cost Allocation, and Transmission Incentives (issued April 2, 2015).

¹¹ Docket No. ER15-572-000, New York Independent System Operator, Inc., et al., Offer of Partial Settlement (filed November 5, 2015). The Settlement holds in abeyance the issues regarding the two transmission projects proposed in the AC Upgrades Proceeding until the Commission has had an opportunity to consider the projects further.

¹² Docket No. ER15-572-000, et al., New York Independent System Operator, Inc., et al., Letter Order (issued March 17, 2016).

customers; nor will it own local distribution facilities or adversely affect captive retail customers, competition, rates, or regulation.

NY Transco further requests a declaratory ruling that it may undertake transactions subject to PSL §§69, 69-a, and 70 without the Commission's prior approval. NY Transco requests a determination that compliance with these sections of the PSL would be satisfied by filing with the Commission, for its information, any related petitions to FERC. In the event it is determined that financing petitions must be filed with the Commission pursuant to PSL §69, NY Transco requests that the Commission grant it financing flexibility consistent with prior orders.

Transco requests that the Commission not place a dollar cap on this flexibility, but instead authorize financing up to the level of debt allowed in the capital structure granted by FERC for the TOTS projects, in addition to 12.5% of total operating and maintenance expenses for working capital and 10% for contingency. This would include pre-approval for financing up to 47% of the \$241 million estimated project costs; 47% of the \$8 million estimated for pre-commercial costs established as a regulatory asset; plus an additional 47% of the 12.5% allowance for working capital (total working capital estimated at \$0.7 million), and 47% of a 10% contingency allowance for project costs in excess of \$241 million (\$24.1 million contingency amount). The total request for financing the TOTS projects is \$129 million.

Finally, NY Transco submits that since its sole business will be the transmission of electricity in the wholesale market subject to FERC jurisdiction, and because it will not have a local service territory or exercise any retail municipal franchise, the provisions of PSL §68 should not apply

to NY Transco. If, notwithstanding the foregoing, the Commission determines that the provisions of PSL §68 are applicable, NY Transco requests that the Commission grant any necessary approvals.

COMMENTS

NextEra maintains that NY Transco's Petition seeks a blanket exemption from PSL §§69, 69-a, and 70, which is inconsistent with Commission precedent. NextEra disputes that a direct owner of electric plant, such as NY Transco intends to be, may qualify for the Wallkill presumption.¹³ Noting that transactions between NY Transco and its parent companies have the potential to raise market power concerns, it argues that granting a blanket exemption would be improper.

Further, NextEra points out that the Commission previously held, in the case of Hudson Transmission Partners, that matters regulated under PSL §§69, 69-a, and 70, are not preempted by FERC under the Federal Power Act.¹⁴ Therefore, it asserts that NY Transco could not satisfy the requirements under the PSL by merely filing with the Commission documents that have been submitted to FERC for approval.

In response to NextEra's comments, NY Transco clarifies that it does not seek a blanket exemption from PSL §§69, 69-a, and 70, and is instead requesting the reduced oversight that the Commission determined was appropriate in establishing the Wallkill presumption. It further indicates that although it seeks the Wallkill presumption, lightened regulation would not apply to the transfer of direct ownership

¹³ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

¹⁴ Case 10-E-0339, Hudson Transmission Partners, Order Providing for Lightened Rate Making Regulation (issued April 14, 2011).

of electric plant in the State. Finally, NY Transco acknowledges that the Commission's jurisdiction is not preempted by FERC, but requests that the Commission refrain from exercising its concurrent jurisdiction for the reasons set forth in the Petition.

DISCUSSION

Lightened Regulation

The Petition seeks an order approving a lightened regulatory regime whereby limited provisions of the PSL will be applied to NY Transco, consistent with previous Commission orders involving competitive wholesale generators and interstate transmission companies. Upon considering the record in this proceeding, the Commission finds that NY Transco may be lightly regulated in its ownership of the TOTS projects because NY Transco's transmission assets will be under the operational control and tariff administration of the NYISO, and will only be operated in the wholesale marketplace. The lightened regulatory regime that NY Transco requests be applied to its ownership of wholesale transmission facilities in New York is similar to that afforded to others participating in competitive electric markets.¹⁵ NY Transco will transmit electricity in interstate commerce at the wholesale level, without providing direct service to retail customers. Its petition is therefore granted, to the extent discussed below, and provided NY Transco does not exercise market power as a result of its ownership.¹⁶

¹⁵ Case 14-E-0195, Bayonne Energy Center, LLC et al., Order Modifying Lightened Ratemaking Regulation Authorizations and Approving Financing and Declaratory Ruling on a Transfer Transaction (issued August 15, 2014).

¹⁶ NY Transco is reminded that it must comply with all applicable codes of conduct and restrictions on affiliate transactions.

In the Carr Street and Wallkill Orders,¹⁷ it was concluded that new forms of electric service providers participating in wholesale electric markets would be lightly regulated. Accordingly, in interpreting the PSL, we have examined what reading best carries out the statutory intent and advances the public interest. Under this approach, PSL Article 1 applies to NY Transco because it will meet the definition of an electric corporation under PSL §2(13) upon consummating transfer of the TOTS transmission facilities from the relevant IOUs, and will be engaged in the transmission of electricity under PSL §5(1)(b). NY Transco, therefore, is subject to provisions such as PSL §§11, 19, 24, 25, and 26, that prevent electric corporations from taking actions that are contrary to the public interests.¹⁸

All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to entities engaged in wholesale service such as NY Transco. Certain provisions of Article 4 are also restricted to retail service.¹⁹

It was decided in the Carr Street and Wallkill Orders that other provisions of Article 4, including, but not limited

¹⁷ Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

¹⁸ The PSL §18-a assessment is applied against gross revenues earned on PSL-jurisdictional intrastate services. As long as NY Transco sells exclusively at wholesale in interstate markets, there are no intrastate revenues and no assessment is collected.

¹⁹ See, e.g., PSL §§66(12) (optional tariff filings); §66(21) (retail electric corporation storm plans); §67 (inspection of meters); §72 (hearings and rate proceedings); §72-a (reporting increased fuel costs); §75 (excessive charges); and, §76 (rates charged religious bodies).

to the provisions of PSL §§68, 69 and 70, would apply to wholesale generators.²⁰ Application of these provisions was deemed necessary to protect the public interest. These Article 4 provisions, however, have been implemented through our lightened regulation orders in a fashion that limits their impact in a competitive market. The Commission has done so to ensure that the scrutiny given such transactions is commensurate with the level required, in the Commission's judgment, by the public interest. Moreover, wholesale suppliers were allowed to fulfill their PSL §66(6) obligation to file an annual report by duplicating the report they were required to file under federal law. This analysis of Article 4 applies to NY Transco.

NY Transco argues that, notwithstanding our prior orders implementing a lightened regulatory regime whereby PSL §§69, 69-a, and 70 are generally applicable to entities participating in competitive markets, these sections should not be applied to NY Transco. NY Transco asks the Commission to refrain from exercising its jurisdiction under these sections of the PSL given FERC's concurrent jurisdiction.

Similar to the Commission's determinations regarding Hudson Transmission Partners' transmission facilities,²¹ we find that PSL §§69, 69-a, and 70, will be applied to NY Transco. Regarding PSL §69, approval of financing plans may be appropriately granted under lightened regulation, but the scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies that operate in a competitive

²⁰ PSL §68 provides for certification of electric plant and ensures the necessary municipal consent have been received. PSL §§69, 69-a, and 70 provide for the review of securities issuances, reorganizations, and transfers of securities or works or systems, respectively.

²¹ Case 10-E-0339, Hudson Transmission Partners, Order Providing for Lightened Rate Making Regulation (issued April 14, 2011).

environment. As a result, we need not make an in-depth analysis of proposed financing transactions. Instead, by relying on representations made in a petition, prompt regulatory action may be possible. The financing matters raised in the Petition are addressed below.

Regarding PSL §70, it was presumed in the AES Order that regulation would not "adhere to transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."²² Wholesale service providers were also advised that the potential for the exercise of market power arising out of an upstream transfer would be sufficient to defeat the presumption and trigger PSL §70 review.²³ NY Transco may avail itself of this presumption. Under PSL §§66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

Regarding PSL Article 6, several of its provisions adhere to the rendition of retail service. These provisions do not pertain to NY Transco because it will engage solely in the provision of wholesale electric transmission service. Application of PSL §115, regarding requirements for the competitive bidding of utility purchases, is discretionary and will not be imposed on wholesale service providers. In contrast, PSL §119-b, regarding the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale transmission providers.

²² Carr Street Order, p. 8; Wallkill Order, pp. 9-10.

²³ In this context, under PSL §§66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

The remaining provisions of Article 6 need not be imposed generally on wholesale transmission providers.²⁴ These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. As discussed in the Carr Street Order, however, in the event market power issues arise, they may be addressed under PSL §§110(1) and (2), which afford us jurisdiction over affiliated interests.

NY Transco reports that it is affiliated with the IOUs, which could raise potential market power implications in the New York wholesale electric markets. The Commission expects NY Transco to operate in a way that does not provide its affiliate IOUs preferential treatment, and expects the IOUs to treat all transmission developers and market participants equally with no preference to the affiliate NY Transco or any discrimination against non-affiliated transmission developers or market participants. To address this concern, NY Transco will be required to adhere to all applicable codes of conduct, affiliate transaction rules, and any other related obligations which govern the IOUs.

The potential of NY Transco to exert market power inappropriately will be further reduced by NY Transco's transmission facilities being placed under the functional and operational control of the NYISO and subject to the NYISO's tariffs, including, but not limited to, market power monitoring and mitigation measures, and provisions prohibiting anti-competitive behavior. Given that power flows over NY Transco's

²⁴ These requirements include supervision of affiliated interests under §§110(1) and (2), and approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; corporate merger and dissolution certificates under §108; contracts between affiliated interests under §110(3); and, water, gas and electric purchase contracts under §110(4).

transmission facilities will be administered by the NYISO subject to FERC-approved tariffs, the potential to exercise market power or harm the interests of captive ratepayers in New York State is mitigated. Moreover, FERC requires all transmission to be provided under open access non-discriminatory tariffs. NY Transco will turn over operational control of the transmission facilities to NYISO and transmission service over NY Transco's facilities will be provided by the NYISO under the NYISO's open access non-discriminatory tariff. Consequently, we impose the requirements of §§ 110 (1) and (2) on NY Transco only conditionally, and only to the extent a future inquiry into its relationships with affiliates becomes necessary.

As with other transmission providers that have been afforded a lightened regulatory regime, NY Transco remains subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above and in previous orders.²⁵ Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,²⁶ and to report personal injury accidents pursuant to 16 NYCRR Part 125. NY Transco will also be subject to the terms and conditions set forth in, and imposed by, any PSL Article VII Certificates transferred to it.²⁷

²⁵ See, e.g., Case 09-M-0251, Saranac Power Partners, L.P., Order Providing for Lightened Regulation of an Electric Corporation and Making Findings on Steam Corporation Regulation (issued June 19, 2009).

²⁶ Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

²⁷ Case 16-T-0055, supra.

Financing

Approval of NY Transco's financing plans is appropriate under lightened regulation. The scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies like NY Transco. As a result, we need not make an in-depth analysis of the proposed financing transactions. Instead, by relying on the representations that NY Transco makes in the Petition, prompt regulatory action is possible.

The proposed \$129 million in financing would be for a statutory purpose and be consistent with the public interest. NY Transco's proposed financing is therefore approved up to a maximum amount of \$129 million. Given that NY Transco will be regulated lightly, as discussed above, it is afforded the flexibility to modify, without our prior approval, the identity of the financing entities, payment terms, and the amount financed, so long as it does not exceed the maximum amount stated above.²⁸ Affording NY Transco this financing flexibility avoids disruption of its financing arrangements.

CPCN

Upon consummating transfer of the TOTS transmission facilities from the relevant IOUs, NY Transco will meet the definition of an electric corporation under PSL §2(13), and will therefore be subject to the Commission's jurisdiction.²⁹ 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

²⁸ See, e.g., Case 03-E-1181, Dynergy Danskammer LLC and Dynergy Roseton LLC, Order Authorizing Entry Into Credit Facility and Issuance of Secured Notes (issued November 26, 2003); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

²⁹ See, PSL §5(1)(b).

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 the construction or right, privilege or franchise sought to be approved is convenient and necessary for the public service, upon consideration of "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." In addition, a petitioner must certify that it is authorized to provide electric service and verify that it has obtained all necessary municipal consents. In order to ensure a due hearing is held prior to the potential issuance of a CPCN, Department of Public Service Staff will conduct a public statement hearing to obtain the input of any interested entities.³⁰

CONCLUSION

As discussed above, the Commission is providing for a lightened ratemaking regime applicable to NY Transco. The Commission expects that other transmission developers that engage solely in wholesale transmission activities, similar to Transco, will be accorded comparable regulatory treatment. The Commission also authorizes the proposed financing with respect to the TOTS projects up to a maximum amount, and reserves judgment on the issuance of a CPCN at this time.

³⁰ Case 15-E-0743, New York Transco LLC, Notice of Public Statement Hearing, Comment Opportunity, and Procedural Conference (issued April 15, 2016).

The Commission orders:

1. New York Transco LLC shall comply with the Public Service law in conformance with the requirements set forth in the body of this Order.

2. New York Transco LLC shall file with this Commission an unconditional acceptance to obey all the terms, conditions, and requirements of this Order. If such acceptance is not so filed within a period of 30 days from the effective date of this Order, this Order may be revoked by the Commission without further notice.

3. By accepting this Order, New York Transco LLC agrees that, for purposes of any interactions, exchanges of information, and actual transactions it enters into with any New York Investor Owned Utilities (IOUs), as identified in the body of this Order, it will be considered an affiliate of each IOU and be subject to all applicable codes of conduct, affiliate transaction rules, and any other related obligations which govern the IOUs.

4. New York Transco LLC is authorized to enter into the financing arrangements discussed in the body of this Order, up to a maximum amount of \$129 million.

5. A hearing shall be held, as discussed in the body of this Order, to further consider New York Transco LLC's request for issuance of a Certificate of Public Convenience and Necessity pursuant to Section 68 of the Public Service Law.

6. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary