STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

COMMENTS OF THE CITY OF NEW YORK ON PROPOSED COST SHARING AND RECOVERY AGREEMENT AND COST ALLOCATION MECHANISM

Dated February 8, 2022

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PRELIMINARY STATEMENT

As the State of New York takes action to achieve the greenhouse gas emissions reduction goals in the Climate Leadership and Community Protection Act ("CLCPA"),[1] it is important that customer impacts remain a paramount consideration and that a balance between customer and shareholder interests is maintained. Additionally, in considering how to implement and achieve the goals of the CLCPA, the Public Service Commission ("Commission") should not depart from long-standing principles and precedent (and the CLCPA does not require the Commission to do so). Indeed, the Commission should retain its critically important role of conducting independent reviews of utility spending proposals to ensure that they will result in just and reasonable rates, as required by Section 65(1) of the Public Service Law ("PSL").

On January 7, 2022, the State's major electric utilities and the Long Island Power Authority submitted to the Commission a proposed Cost Sharing and Recovery Agreement ("CSRA") and proposed amendments to the New York Independent System Operator, Inc.'s ("NYISO") Open Access Transmission Tariff ("OATT") related to spreading the costs of certain transmission projects across all New York customers (the "Filing"). The City of New York ("City") has concerns with the utilities' proposal and respectfully urges the Commission to require

[1] L. 2019, ch. 106.

modifications to the proposal before (or as a condition of) approving it. The City offers that the changes recommended herein will ensure the proposal is just and reasonable and in the public interest.

COMMENTS

POINT I

THE COMMISSION SHOULD NOT BE A PARTY TO THE CSRA

With no explanation, the utilities propose that the Commission would become a signatory to the CSRA and, very significantly, that the Commission would support or not oppose any rate filings made by the utilities to the Federal Energy Regulatory Commission ("FERC") that are consistent with the terms of the CSRA.[2] The City submits that any such agreement or commitment by the Commission would be a derogation of its statutory responsibilities under the Public Service Law.

It is well-established that the role of the Commission is to regulate public utilities, including setting rates that are just and reasonable.[3] Under PSL § 66(12) the Commission's obligation is to review proposed changes to rates and terms of service to ensure that they result in just and reasonable rates. Indeed, the State Legislature enacted the Public Service Law and established the Commission primarily to protect the public (*i.e.*, consumers).[4]

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2 *See* Filing, CSRA at Section 9.16.

3 *See, e.g.*, PSL § 65 and 66; *Matter of General Motors v. Pub. Serv. Commn*, 95 A.D.2d 876, 877 (3d Dept. 1983), *app. Denied* 60 N.Y.2d 557 (1983) ("In determining utility rates, the commission must reach a just and reasonable result …").

4 *See, e.g.*, *People ex rel. D. H. Co. v. Stevens*, 197 N.Y. 1, 9 (1909) ("We understand that the paramount purpose of the enactment of the Public Service Commissions Law was the protection and enforcement of the rights of the public.").

In contrast to the Commission's statutory obligations, proposed Section 9.16 of the CSRA would have the Commission agree – prior to reviewing any such rate filing and prior to making any determination as to its justness or reasonableness – that it will support or not oppose the requested rate increase in proceedings before the FERC. The Commission should not abdicate its responsibility by agreeing that rate proposals advanced by the utilities are just and reasonable before conducting any review of them. Moreover, in carrying out its statutory obligations, the Commission must retain full authority, not enter into contracts with regulated entities that limit its authority.[5]

The City is aware that the Commission has been a signatory to settlement agreements in some FERC formula rate proceedings for transmission owners operating in New York, but those matters are distinguishable from the present proposal. In none of those proceedings did the Commission support the transmission owner's initial filing, and it protested many of them. Acting through Department of Public Service Staff, the Commission engaged in an analysis of each rate filing and participated in settlement negotiations that led to changes to the initial filing. The Commission's support was therefore limited to a compromise proposal that was determined to result in just and reasonable rates.

Here, by executing the CSRA, the Commission would be obligated to support or remain silent on future rate filings to the FERC before reviewing the nature of the rate request or making any determination of whether it results in just and reasonable rates. To the City's knowledge, the Commission has never before agreed to refrain from exercising its statutory obligations in this manner, and the utilities offer no justification for the Commission to do so here. Moreover, while

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[5] *Cf. Matter of Energy Assn. v. Pub. Serv. Commn.*, 169 Misc.2d 924, 938 (Sup. Ct. Alb. Co. 1996).

the Commission directed the utilities to develop a proposed participant funding agreement and generally agreed that the costs of CLCPA-related Phase 2 local transmission projects should be spread statewide on a load share ratio, the Commission did not pre-approve any project costs or state any intention to refrain from reviewing the costs of those projects.[6]

Rather, the Commission stated that "an alternative forum for the review and approval of Phase 2 investments is needed [t]hat [] should allow the Commission to make the same kinds of determinations that it routinely makes in rate cases….Following the review of the project portfolio, the Commission would approve, modify, or reject proposed investments and determine the resulting revenue requirements, just as it would do in a rate case."[7]

For these reasons, the Commission should reject Section 9.16 of the proposed CSRA.

POINT II

THE PROPOSED RATE RECOVERY FOR PHASE 2 PROJECTS SHOULD BE REVISED

A. The Commission Could Not Enforce Its Return On Equity Determinations Under The Proposal As Presented

In the September Order, the Commission unequivocally stated that "establishing the revenue requirements and rates of return for Phase 2 projects lies squarely within the Commission's ratemaking jurisdiction and should remain so."[8] Section 3.2 of the proposed CSRA potentially undermines this holding.

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6 *See* 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 September 9, 2021) ("September Order") at 22-23.

7 *Id.* at 29-30. In a footnote, the Commission made clear that the utility filings "must be of a rate case quality consistent with the requirements described in the Phase 1 Order."

8 *Id.* at 28.

That provision makes the applicable return on equity and capital structure for a Phase 2 local transmission project ultimately subject to the FERC's jurisdiction, not the Commission's jurisdiction. While the provision contains an agreement by each regulated utility to abide by the return on equity and capital structure approved by the Commission, it makes the application of those financial factors subject to subsequent FERC review and approval. Moreover, the provision contemplates the regulated utilities actually seeking approval from the FERC for returns on equity in excess of those approved by the Commission.

Because the formula rates are solely subject to the FERC's jurisdiction, and the Commission would not be a party to Section 3.2 of the CSRA,[9] the Commission may not be able to enforce its determinations of the applicable return on equity. That is, the Commission is not a third-party beneficiary of the CSRA and therefore does not have the legal ability to enforce the commitment in Section 3.2.[10] If a Transmission Owner were to apply the return on equity approved by the FERC, even if higher than the rate authorized by the Commission, it would be within its legal rights under its filed rates, and the Commission could not challenge such action.[11]

The Commission should require more than an unenforceable provision in the CSRA to protect consumers.

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[9] The concern discussed in Point I refers solely to Section 9.16, and the proposed signature block for the Commission limits the Commission's involvement in the CSRA to Section 9.16.

[10] *See* CSRA Section 9.5, which states that there are no third-party benefits created by the CSRA.

[11] There is no reference in proposed Rate Schedule 18 of the NYISO OATT to Section 3.2 of the CSRA, or that there would be any limits on the amounts the Transmission Owners could recover, other than their formula rates (which would reflect higher returns on equity).

B. The Commission Should Retain Full Rights To Revisit Its Ratemaking Decisions

Under Section 6.1.2 of the proposed CSRA, the utilities would apply standards developed under federal law, which are typically applicable to settlements in FERC proceedings, to the terms and conditions of the CSRA. The application of those standards could make it exceedingly difficult for the Commission to revisit any decision it makes related to the Phase 2 projects.

The City understands the utilities' desire for certainty regarding their investment decisions. However, the Phase 2 local transmission projects, while intended to help achieve the goals of the CLCPA, are traditional utility infrastructure projects and the utilities have not offered any reason for the ratemaking treatment for such projects to differ from that applicable to any other Commission-jurisdictional traditional infrastructure project. Moreover, there is no New York caselaw analogue to the cases referenced in Section 6.1.2, and the Commission has always reserved the right to revisit its decisions if warranted by changed circumstances.

As discussed above and stated by the Commission in the September Order,[12] this matter involves the Commission's ratemaking jurisdiction, not the FERC's. Accordingly the standard of review applicable to this matter should be a New York standard, not a federal standard, as proposed by the utilities. The Commission should therefore reject the inclusion of Section 6.1.2.[13]

POINT III

THERE IS AN INTERNAL INCONSISTENCY IN THE PROPOSAL THAT MUST BE ADDRESSED

There is an inconsistency between the terms of the CSRA and the proposed Schedule 18 of the NYISO OATT that creates uncertainty regarding the allocation and recovery of Phase 2 local transmission costs. Section 3.4 of the CSRA provides that the New York Power Authority's

[12] September Order at 28.

[13] Similarly, the application of federal law precedent in Section 6.3 should similarly be rejected.

("NYPA") "electric load shall be treated the same as all other LSEs under Rate Schedule 18, and NYPA will be allocated costs of Approved Transmission Projects in the same manner as all other LSEs under Rate Schedule 18." However, proposed Section 6.18.1.2 of the NYISO OATT, included with the Filing, states "this Schedule shall not apply to provide cost recovery to NYPA for any transmission projects." While proposed Section 6.18.5.1 describes how the Long Island Power Authority would recover the costs allocated to it, there is no similar provision pertaining to NYPA.

Given the complete silence in the proposed revisions to the OATT regarding any cost allocation to or cost recovery by NYPA, it appears that there is no ability to implement Section 3.4 of the CSRA. The cover letter to the Filing does not describe whether or how NYPA is to recover the costs allocated to it. The City recognizes that NYPA is not subject to the Commission's jurisdiction, but the Commission should not approve a proposal that does not fully describe how the Phase 2 local transmission costs are to be allocated and recovered – and which leaves a gap in the recovery of costs by jurisdictional utilities.

CONCLUSION

In the September Order, the Commission determined that the costs of Phase 2 local transmission projects should be allocated statewide, and it directed the utilities to develop a participant funding agreement to effectuate that decision. The document proffered by the utilities goes beyond the Commission's directives, and it contains provisions that may not result in just and reasonable rates and which may deprive the Commission of its continuing authority over this matter. To prevent such an outcome, the Commission should require modifications of the CSRA as discussed herein. Additionally, the Commission should require the utilities to modify the CSRA to make clear how allocations to NYPA are to be handled.

Respectfully submitted,

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