UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Central Hudson Gas & Electric Corporation Consolidated Edison Company of New York, Inc. Niagara Mohawk Power Corporation New York State Electric & Gas Corporation Orange and Rockland Utilities, Inc. Rochester Gas and Electric Corporation Complainants	)	
v.	)	Docket No. EL21-66-001
New York Independent System Operator, Inc. Respondent	)	

REQUEST FOR REHEARING
OF WIRES

Pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure[2] of the Federal Energy Regulatory Commission ("Commission" or "FERC"), WIRES[3] hereby respectfully submits this Request for Rehearing of the Order Denying Complaint issued in the above-captioned proceeding on September 3, 2021 ("September 3 Order").[4]

[1] 16 U.S.C. § 825*l*.

[2] 18 C.F.R. § 385.713.

[3] This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

[4] *Central Hudson Gas & Elec. Corp., et al. v. New York Independent System Operator, Inc.*, 176 FERC ¶ 61,149 (2021).

I. INTRODUCTION

This proceeding involves the New York Transmission Owners' ("NYTOs")[5] complaint under section 206 of the FPA[6] against the New York Independent System Operator, Inc. ("NYISO") providing evidence of a systemic problem undermining recovery of full cost of service and seeking prospective relief in the form of a Commission order (1) that finds that the NYISO's Open Access Transmission Tariff ("OATT"), and Market Administration and Control Area Services Tariff (together, "NYISO Tariffs") are unjust and unreasonable; and (2) directs the NYISO to amend certain provisions of the NYISO Tariffs within 90 days of the Commission's order to fully implement a just and reasonable replacement rate that allows the NYTOs to self-fund certain System Upgrade Facilities and System Deliverability Upgrades (each, as defined in the OATT; together, "System Upgrades") on their transmission systems driven by generator interconnections ("TO Funding Mechanism").

On September 3, 2021, the Commission denied the NYTO's section 206 complaint. In particular, the September 3 Order rejected the complaint on the basis that the proposed tariff amendment to address the identified problem sought recovery of what it deemed to be "risks" that are separate from "costs" as contemplated by the OATT. The Commission further found that the NYTOs' evidentiary showing in support of the proposed tariff amendment was insufficient and that the circumstances were distinguishable from those in governing judicial precedent. Commissioner Danly dissented, pointing out that the majority's decision is contrary

[5] The NYTOs in this proceeding include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Niagara Mohawk Power Corporation d/b/a National Grid; New York State Electric & Gas Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

[6] 16 U.S.C. § 824e.

to Commission and judicial precedent and does not constitute reasoned decision making because it does not respond to the evidence submitted in the NYTOs' complaint.

As discussed herein, WIRES seeks rehearing of the September 3 Order. For the reasons explained below, the Commission should reconsider its decision and instead grant the NYTOs' FPA section 206 complaint and the relief requested.

II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(1) and (2), WIRES provides the following specifications of error and statement of issues, including citations to representative Commission and court precedent:

1. The Commission's decision to reject the NYTOs' filing under section 206 of the FPA to amend the NYISO OATT based upon the determination that the recovery of uncompensated risks associated with owning, operating, and maintaining interconnection customer upgrades are not "costs" is inconsistent with the plain meaning the NYISO OATT.[7]

2. The Commission erred in its determination that the NYTOs' complaint did not provide substantial evidence that the NYISO OATT contains a comparable systemic problem to that confronted by the Commission and the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") in *Ameren* and thereby failed to engage in reasoned decision-making.[8]

3. The Commission erred in finding that it is not required to provide a return to the NYTOs despite the circumstances and evidence set forth in the complaint to avoid confiscatory and otherwise unjust and unreasonable rates under Supreme Court precedent.[9]

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[7] *See ETC Tiger Pipeline, LLC*, 138 FERC ¶ 61,035, at P 40 (2012); *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 63 (1995); *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc*., 119 FERC ¶ 61,314, at P 19 (2007).

[8] *See Ameren Servs. Co. v. FERC*, 880 F.3d 571, 579-80 (D.C. Cir. 2018) ("*Ameren*"). *See also Missouri PSC v. FERC***,** 234 F.3d 36, 41 (D.C. Cir. 2000); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *Canadian Ass'n Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001).

[9] *See Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923) ("*Bluefield*").

4. The Commission erred by failing to address the ongoing and systemic problem identified by the NYTOs in their complaint.[10]

III. REQUESTS FOR REHEARING

A. The Commission should grant rehearing because it erroneously failed to apply the plain meaning of the OATT provisions and failed to follow applicable precedent that equates risks to costs for public utilities.

Section 25.5.4 of the NYISO OATT provides:

> Any Connecting or Affected Transmission Owner implementation and construction of (i) System Upgrade Facilities as identified in the Annual Transmission Baseline Assessment or Annual Transmission Reliability Assessment, or (ii) System Deliverability Upgrades as identified in the Class Year Deliverability Study, shall be in accordance with the ISO OATT, Commission-approved ISO Related Agreements, the Federal Power Act and Commission precedent, and therefore *shall be subject to the Connecting or Affected Transmission Owner's right to recover, pursuant to appropriate financial arrangements contained in agreements or Commission-approved tariffs, all reasonably incurred costs, plus a reasonable return on investment.*[11]

The plain language of this section of the OATT clearly allows a NYTO to recover its cost of service for providing wholesale transmission services, which includes prudently incurred costs and an authorized return reflecting the cost of equity for the wholesale transmission facilities committed to the services. Because System Upgrades are owned, operated, and maintained by the NYTOs to provide wholesale transmission services under the OATT, the authorized return should apply to them. As Commissioner Danly correctly points out, that governing tariff provision "is unjust and unreasonable because it recognizes that the NYTOs' 'obligation *to implement* . . . System Upgrades' entitles them to cost recovery plus a return, but it provides no

[10] *See Emera Maine v. FERC*, 854 F.3d 9, 22-25 (D.C. Cir. 2017).

[11] NYISO OATT, section 25.5.4 (emphasis added).

recovery mechanism."[12] The Commission's failure to enforce section 25.5.4 of the OATT constitutes a failure to enforce the filed rate and is arbitrary and capricious.

Rather than simply applying the plain meaning of the applicable tariff, the Commission confines the meaning of "costs" to exclude risks and finds that the incurred risks in question are already adequately compensated such that the proposed amendments to the OATT have not been shown to be just and reasonable. In reaching this outcome, the Commission contradicted the record evidence and precedent.[13] The precedent applicable here is very recent and dealt with a problem in another region directly comparable to that raised in the section 206 complaint in this proceeding. In fact, the Commission itself has recently reaffirmed in a pleading before the D.C. Circuit:

> [T]he Commission found that transmission owners do, in fact, 'have at least some uncompensated risks' when forced to operate network upgrades paid for through Generator Funding. This is consistent with the Ameren Court's finding that 'FERC's precedents do not provide compensation for several classes of risks that [transmission owners] allege will accompany construction and operation of the network upgrade facilities.' The existence of such uncompensated risk 'supports [the transmission owners'] basic contention that they are entitled to be compensated *now* for operating the upgrades.'[14]

In contrast to the above-quoted description of precedent and the current state of play with respect to transmission owner option to fund System Upgrades, the September 3 Order, adopts a constrained interpretation of costs that defies common meaning and makes them less than what

[12] September 3 Order, Danly dissent at P 6 (emphasis in original and citations omitted).

[13] *E.g.*, *Public Service Co. v. FERC*, 653 F.2d 681, 683 (D.C. Cir. 1981) ("The Court of Appeals concluded that capital derived from common stockholders is allowed to earn a specified higher rate of return consistent with the greater risk associated with that investment.").

[14] Brief of Respondent Federal Energy Regulatory Commission, *ACPA v. FERC*, D.C. Cir. Case No. 20-1453, p. 43 (May 3, 2021) (citing Remand Rehearing Order at P 32)(citing *Ameren*, 880 F.3d at 581-82)(emphasis in original)(citations omitted)(quoting Remand Order at P 31 and *Ameren*, 880 F.3d at 583, respectively).

they actually are. Investor required returns for the incurred risks of owning, operating, and maintaining wholesale transmission facilities are a cost of equity capital to the NYTOs.[15] These are capital costs that are recoverable in transmission rates.

For the reasons described above, the Commission's denial of the NYTOs' FPA section 206 complaint is inconsistent with the plain language of section 25.5.4 of the NYISO OATT entitling the NYTOs to recover costs and earn a return on property used to provide jurisdictional service. The Commission's denial is also contrary to precedent, both of its own making and that of the D.C. Circuit. On rehearing, the Commission should clarify and modify the September 3 Order and find that the cost of equity associated with owning, operating, and maintaining System Upgrades is a cost, and the authorized return for the NYTOs should apply to those System Upgrades.

B. The Commission should grant rehearing because the September 3 Order erred in determining that the NYTOs' complaint did not present substantial evidence that, and did not adequately address whether, the NYISO OATT contains the same or a similar systemic problem posed by the *Ameren* case.

The NYTOs' complaint presented substantial evidence that under the NYISO OATT, just like under the open access transmission tariff provisions in *Ameren*, the NYTOs bear costs of equity to compensate investors for risks of interconnection-driven system upgrades. The NYTOs' complaint also showed, as the Court confronted in *Ameren*, that the applicable tariff (the NYISO OATT) does not provide transmission owners an opportunity to recover those costs of equity applicable to system upgrades. This OATT problem was shown to be attributed to the absence of a transmission owner option to fund system upgrades. The NYTOs thus met their

[15] *See* Complaint, Attachment A, The Prepared Direct Testimony of Joshua C. Nowak at 13-14.

initial burden under the two-part burden of proof applicable to complaints under FPA section 206.

In the September 3 Order, however, the Commission incorrectly found that *Ameren* and associated Commission precedent on remand are distinguishable from the instant case or otherwise not binding on the Commission in this proceeding. The Commission disagreed with the NYTOs that a change to the current funding approach in the NYISO OATT is necessitated.[16] In reaching that determination, the September 3 Order disregards the initial showing by the NYTOs that now they face the same problem—a systemic problem under the OATT of under recovery of the capital cost of system upgrades—as in the *Ameren* matter. Rather than addressing the merits of the NYTOs' section 206 complaint on the initial question of whether the NYISO OATT has the same problem as in *Ameren*, the Commission sidesteps it.

Specifically, the Commission found that the *Ameren* Court never reached the merits of whether the transmission owners bore uncompensated risks because they held only that the Commission failed to adequately address the argument that they did. Under the Commission's reading, while the D.C. Circuit required the Commission to address the question, it did not rule that *Hope* requires transmission owners to earn a rate of return on all network upgrades.[17] Further, the Commission held that neither *Ameren*, nor the Commission's orders on remand of *Ameren*, require the Commission to establish a transmission owner funding mechanism where one does not exist.[18]

[16] September 3 Order at P 31.

[17] *Id.*

[18] *Id.*

In essence, despite the clear parallels between the circumstances presented in the NYTOs' complaint and the situation in *Ameren*, the September 3 Order brushes aside the *Ameren* decision as irrelevant. In doing so, the September 3 Order mischaracterizes the core finding in *Ameren* that provides guidance as to the applicability of the principles in *Hope* and *Bluefield* when utility owned facilities are excluded from ratebase based on the initial capital funding mechanism. In that sense, the dilemma presented by the transmission owners in *Ameren* is indistinguishable from the problem identified in the NYTOs' complaint. Given these circumstances, the Commission cannot rationally find on the one hand that the transmission owners in *Ameren* have uncompensated risks when forced to operate generator-funded upgrades, but on the other hand, the NYTOs do not.

The Commission's denial of the NYTOs' complaint is arbitrary and capricious and, in light of *Ameren* and the Commission's actions on remand in compliance with *Ameren*, results in discriminatory treatment of the NYTOs. The NYTOs face uncompensated risks like the transmission owners in *Ameren*, but unlike those owners—the NYTOs must remain uncompensated. The disparate treatment of transmission owners concerning the *Ameren* problem, with one set of transmission owners entitled to compensation and another denied compensation, is a very real problem that was identified for the Commission, but not addressed. The September 3 Order is arbitrary and capricious because it departs from precedent without reason.

C. The Commission should grant rehearing because the September 3 Order erred in finding that *Hope* and *Bluefield* do not require the provision of a return to the NYTOs to avoid confiscatory and otherwise unjust and unreasonable rates.

The Commission found that *Hope* and *Bluefield* do not entitle the NYTOs to earn a return on interconnection upgrades where there is no showing that: (1) current transmission rates do not

already reflect the risks of owning, operating, and maintaining the transmission system including the interconnection upgrades; and (2) the transmission owners will be unable to raise capital absent a return directly applied to interconnection upgrade capital costs.[19] The Commission further ruled that *Hope* and *Bluefield,* in concert with FPA section 206, require the NYTOs to show: (1) the existing funding approach exposes them to uncompensated risks associated with owning, operating, and maintaining interconnection upgrades; and the existing funding approach impedes the NYTOs' ability to attract future capital so as to prevent the NYTOs from operating successfully or maintaining financial integrity.[20]

In fact, the NYTOs' complaint contained uncontested facts supporting their allegations, accompanied by a 75-page affidavit along with 50 pages of supporting exhibits showing that the NYTOs bear risks by owning, operating, and maintaining interconnection-required upgrades for which they are not compensated. In these circumstances, *Ameren* holds that a transmission owner is entitled to be compensated for these risks.[21]

Finally, the Commission misreads *Hope* and *Bluefield* as requiring the NYTOs to demonstrate that their ability to attract capital is impeded to the point where they are not currently capable of successful operation or of maintaining their financial integrity. That is not the standard set by *Hope* and *Bluefield*. Rather, those cases stand for the fundamental principle that a tariff that systematically deprives a utility of its regulated return is *per se* confiscatory and unjust and unreasonable:

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[19] September 3 Order at P 32.

[20] *Id*.

[21] *Ameren*, 880 F.3d at 581 (…if Petitioners are conceptually correct that they bear these risks as owners of transmission lines, it supports their basic contention that they are entitled to be compensated *now* as owners for operating the upgrades.") (Emphasis in original).

> Rates which are not sufficient to yield a reasonable return on the value of property used at the time it is being used to render service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.[22]

Because the September 3 order leaves in place tariff provisions that constitute a deprivation of property in violation of the Fourteenth Amendment, the Commission should grant rehearing and put in place an appropriate remedy.

D. The Commission should grant rehearing because the September 3 Order fails to address the *Ameren* Court's concern about the systemic problem created when transmission owners are not permitted to initially fund transmission system elements that they will be required to own, operate, maintain, and bear responsibility for.

The NYTOs have asserted that the existing approach to funding generator interconnection driven upgrades in NYISO compels them to own and operate expansions of their transmission networks on a non-profit basis by denying them the opportunity to earn a rate of return on those transmission assets. Just as in *Ameren*, the circumstances faced by the NYTOs here "attack their very business model and thereby create a risk that new capital investment will be deterred."[23] Indeed, the D.C. Circuit has unambiguously reaffirmed the bedrock principles that "a regulated industry is entitled to a return that is sufficient to ensure that *new* capital can be attracted. . ." and that ". . . a utility's return must allow it to compete for funding in the financial markets."[24] In these circumstances, "FERC must explain how investors could be expected to

[22] *Bluefield*, 262 U.S. at 690.

[23] *Id.*

[24] *Id.* (emphasis in original and citations omitted).

underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return."[25]

In this proceeding, however, there is no need to speculate as to whether the upgrades involving no compensatory incremental return are "potentially large." The record demonstrates that they *are* large. In their response to the Commission's Deficiency letter in this proceeding, the NYTOs provided uncontroverted evidence that since 2009, they have added nearly $1 Billion in interconnection upgrades out of a total new Transmission Plant of $13.7 Billion. The record indisputably establishes that the NYISO tariff increasingly forces the NYTOs to operate as non-profits given that the rate of interconnection upgrades has increased for class years 2017 and 2019.[26] This is precisely the "serious statutory and constitutional concern[]" the Court found troubling in *Ameren*.[27]

Unfortunately, just as in *Ameren*, the Commission here side-steps the problem demonstrated in the complaint of how investors could be expected to underwrite the increasingly large non-profit segment of the NYTOs' business, with the resulting consequence of impeding the NYTOs' ability to attract capital. This negative impact on capital attraction to the transmission sector is also occurring at a critical time, as it coincides with the need for a significant increase in transmission investment to support urgent and ambitious federal and state climate efforts to reduce greenhouse gas emissions by expediting the integration and interconnection of zero emission emitting clean energy resources. Rather than taking clear and consistent steps to improve the attractiveness of future capital for the transmission sector and

[25] *Id.*

[26] *See* Response to Deficiency Letter at 17-18.

[27] *Ameren*, 880 F2d at 582 ("But if more and more of a transmission owner's business is to be owned and operated on a non-profit basis, these additions would likely deter investors and diminish the ability of the transmission grid to attract capital for future maintenance and expansion.")

solidifying the foundation needed for the grid's transformation that climate policy demands, the Commission's September 3 Order instead undermines that foundation.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, WIRES respectfully request that the Commission grant rehearing of its September 3 Order and grant the NYTOs' complaint and the relief requested.

Respectfully submitted,

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October 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 4th day of October 2021.

/s/ Larry Gasteiger
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