

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

New York Independent System Operator, Inc.                     )  
   )             Docket No. EL20- \_\_\_\_-000  
   )

**PETITION FOR DECLARATORY ORDER OF  
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),<sup>1</sup> the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this petition (“Petition”) requesting that the Commission issue a declaratory order to confirm that Transmission Owners in New York (“New York Transmission Owners” or “NYTOs”) possess a federal right of first refusal to build, own, and recover the costs of upgrades to their transmission facilities that is permitted under Order No. 1000.<sup>2</sup> In addition, this Petition requests that the Commission confirm the NYISO’s understanding of how this right of first refusal is to be implemented under currently effective provisions of the NYISO’s Open Access Transmission Tariff (“OATT”), and clarify specific points relating to the definition of upgrade. As demonstrated in this Petition, resolution of these tariff interpretation questions will “remove uncertainty” and avoid controversies as required by Rule 207(a)(2) and is consistent with Commission precedent.<sup>3</sup>

The NYISO’s Comprehensive System Planning Process (“CSPP”) in Attachment Y (Section 31) of the OATT establishes the rules by which the NYISO solicits, evaluates, and

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<sup>1</sup> 18 C.F.R. § 385.207 (2019).

<sup>2</sup> See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) (“Order No. 1000”), *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) (“Order No. 1000-A”), *order on reh’g and clarification*, 141 FERC ¶ 61,044 (2012) (“Order No. 1000-B”). For convenience, unless otherwise specified, references in this filing to “Order No. 1000” should be understood to encompass Order Nos. 1000, 1000-A, and 1000-B.

<sup>3</sup> Pursuant to 18 C.F.R. § 381.302, the NYISO has electronically submitted the applicable filing fee. See *Update of Annual Filing Fees*, 169 FERC ¶ 61,167 (2019).

selects solutions to address reliability, economic, and public policy driven transmission needs in New York for inclusion in the NYISO's regional transmission plans. Section 31.6.4 of the OATT states that nothing in Attachment Y affects certain existing rights of the NYTOs, including the right of a NYTO to build, own, and recover the costs of upgrades to its existing transmission facilities. This provision incorporates into the OATT the Commission's determination in Order No. 1000 that the requirement to eliminate federal rights of first refusal "does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent."<sup>4</sup> Given that the NYISO's foundational agreements reserve to the NYTOs rights inherent in the ownership of their facilities,<sup>5</sup> the NYISO interprets its agreements and OATT as providing a permissible right of first refusal for NYTOs in the CSPP to build, own, and recover the costs of upgrades to their facilities, including upgrades contained in other Developers' proposals.

Despite the NYISO's interpretation that the NYTOs have a right of first refusal related to upgrades, some stakeholders have taken the position that the NYTOs do not have such a right with respect to upgrades in another Developer's proposal or that such right is limited to local upgrades. The level of disagreement on this threshold issue has prevented meaningful stakeholder discussions on proposed enhancements to the NYISO's transmission planning processes concerning the implementation of such a right.<sup>6</sup> Questions concerning the NYTOs' rights in this area are becoming increasingly important because as needs drive the expansion of

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<sup>4</sup> Order No. 1000 at P 319.

<sup>5</sup> The Agreement Between the New York Independent System Operator and Transmission Owners ("ISO-TO Agreement"), most recently accepted for filing in *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,110 (2012) and the Amended and Restate Operating Agreement Between the New York Independent System Operator, Inc. and New York Transco LLC ("NY Transco Operating Agreement"), accepted for filing in *New York Indep. Sys. Operator Inc.*, Letter Order, Docket No. ER18-2015-000 (2018).

<sup>6</sup> Under the NYISO's shared governance system, the NYISO may only file tariff revisions under Section 205 if they have been approved by both a 58% majority of the NYISO's stakeholder Management Committee and the NYISO's independent Board of Directors.

the transmission system, proposed solutions will likely require modifications to existing facilities due to limitations on transmission development in New York.<sup>7</sup>

The NYISO, therefore, petitions the Commission to confirm first that the NYTOs have a right of first refusal to build, own, and recover the costs of upgrades to their existing transmission facilities that is permitted under Order No. 1000. This right encompasses upgrades proposed in another Developer's transmission project that is selected by the NYISO for inclusion in its regional transmission plan for purposes of cost allocation.

Second, the NYISO requests that the Commission confirm that if a NYTO exercises its right to build, own, and recover the costs of an upgrade that is included in another Developer's proposed transmission solution that was selected by the NYISO, the NYTO should be treated under existing OATT provisions as the Developer for the upgrade portion of the project, except as noted below.

Finally, the NYISO requests that the Commission clarify two specific points regarding the definition of "upgrade." The OATT includes the Order No. 1000-A definition, which distinguishes an upgrade that may be subject to a right of first refusal from an entirely new transmission facility that must be subject to competition. However, the distinction between an upgrade and an entirely new transmission facility is not always clear. This ambiguity is expected to result in disputes given the likelihood that transmission projects addressing needs in New York will involve modifications to existing transmission facilities within existing rights of way. The NYISO, therefore, requests that the Commission clarify two specific points regarding the definition of upgrade, as described in Part III.C below.

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<sup>7</sup> See Part III.A, *infra*.

As described further in Part IV below, the NYISO has either already commenced, or will soon commence, the next planning cycles of the Reliability Planning Process and Public Policy Transmission Planning Process (“Public Policy Process”).<sup>8</sup> Commission action prior to the NYISO’s solicitation of proposed solutions to address identified transmission needs in those processes will provide clarity to stakeholders and participating Developers regarding their development of transmission solutions and reduce the potential for disputes and delays in the NYISO’s transmission planning processes.

## **I. COMMUNICATIONS**

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<sup>8</sup> See generally, OATT §§ 31.2, 31.4.

<sup>9</sup> The NYISO respectfully requests waiver of 18 C.F.R. § 385.203(b)(3) to permit service on counsel in both Washington, D.C. and Richmond, VA.

## **II. BACKGROUND**

### **A. Order No. 1000 Non-Incumbent Developer Reforms**

Order No. 1000 required that transmission providers, such as the NYISO and NYTOs, eliminate provisions in their jurisdictional tariffs and agreements that establish a right of first refusal for incumbent transmission providers with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>10</sup> Order No. 1000, however, included certain exceptions to this requirement. Among these exceptions, the elimination of the right of first refusal provisions “does not remove or limit any right an incumbent may have to build, own and recover costs for upgrades to the facilities owned by an incumbent.”<sup>11</sup> In fact, the Commission noted in Order No. 1000-A that it was not “eliminating the right of an owner of a transmission facility to improve its own existing transmission facility by allowing a third-party transmission developer to, for example, propose to replace the towers or the conductors of a transmission line owned by another entity.”<sup>12</sup> Rather, the Commission focused on eliminating federal rights of first refusal over entirely new transmission facilities, stating that there should not be “a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others.”<sup>13</sup>

### **B. Reservation of NYTOs’ Rights under Section 31.6.4 of the NYISO OATT**

The CSPP establishes the rules by which the NYISO solicits, evaluates, and selects solutions to address reliability, economic, and public policy driven transmission needs in New York for inclusion in the NYISO’s regional transmission plans.<sup>14</sup> In their first Order No. 1000

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<sup>10</sup> Order No. 1000 at P 313; Order No. 1000-A at P 415.

<sup>11</sup> Order No. 1000 at P 319.

<sup>12</sup> Order No. 1000-A at P 426.

<sup>13</sup> *Id.*

<sup>14</sup> The CSPP currently contains five components: (i) a Local Transmission Planning Process by which each NYTO with a Transmission District posts and accepts comments on its Local Transmission Owner Plans for its own transmission system; (ii) a biennial Reliability Planning Process by which the NYISO identifies and addresses long-

compliance filing (“First Order No. 1000 Filing”),<sup>15</sup> the NYISO and NYTOs<sup>16</sup> added Section 31.6.4 of the OATT, which provided that nothing in the CSPP affects certain rights of the Transmission Owners.<sup>17</sup> The currently effective version of Section 31.6.4 of the OATT (entitled, “Rights of Transmission Owners”) provides, in relevant part:

Nothing in this Attachment Y affects the right of a Transmission Owner to: (1) build, own, and recover the costs for upgrades to the facilities it owns, provided that nothing in Attachment Y affects a Transmission Owner’s right to recover the costs of upgrades to its facilities except if the upgrade has been selected in the regional transmission plan for purposes of cost allocation, in which case the regional cost allocation method set forth in Attachment Y of the ISO OATT applies, unless the Transmission Owner has declined to pursue regional cost allocation; . . . For purposes of Section 31.6.4, the term “upgrade” shall refer to an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility.

The NYTOs’ ownership rights with regard to their existing transmission facilities are expressly preserved in the NYISO’s foundational agreements. These agreements establish that the NYTOs retain various rights concerning their transmission facilities as a condition for their agreement to participate in the NYISO and to turn over operational control of these facilities to the NYISO. In the Agreement Between New York Independent System Operator and Transmission Owners (“ISO-TO Agreement”), the NYTOs preserved, among other things,

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term Reliability Needs on the Bulk Power Transmission Facility; (iii) a separate Short-Term Reliability Process by which the NYISO addresses local and bulk transmission system needs driven by proposed Generator deactivations and other system changes arising within a five year period; (iv) a Congestion Analysis and Resource Integration Study (“CARIS”) that conducts an overall analysis of the economic benefits of relieving congestion and includes a process for Developers to propose projects to resolve congestion; and (v) a Public Policy Process by which the NYISO addresses any Public Policy Transmission Needs identified by the New York Public Service Commission (“NYPSC”).

<sup>15</sup> *New York Indep. Sys. Operator, Inc.*, Compliance Filing, Docket No. ER13-102-000 (October 11, 2012) (“First Order No. 1000 Filing”).

<sup>16</sup> The First Order No. 1000 Filing was jointly submitted by the NYISO and the NYTOs as transmission planners for local and bulk transmission systems in the New York Control Area. At the time of the filing, the NYTOs consisted of the original eight Member Systems—Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company d/b/a LIPA, New York Power Authority, New York State Electric & Gas Corp., Niagara Mohawk Power Corp. d/b/a National Grid, Rochester Gas & Electric Corp., and Orange & Rockland Utilities, Inc. Since that time, New York Transco, LLC has been added as a Transmission Owner for purposes of the OATT, and the NYISO will subscribe additional Transmission Owners based on transmission solutions that the NYISO has selected in its Public Policy Process.

<sup>17</sup> First Order No. 1000 Filing at p 31.

property rights incident to the ownership of the facilities that they own. In particular, Section 3.10(c) of the ISO-TO Agreement states that:

Each Transmission Owner retains all rights that it otherwise has incident to its ownership of its assets, including, without limitation, its transmission facilities including, without limitation, the right to build, acquire, sell, merge, dispose of, retire, use as security, or otherwise transfer or convey all or any part of its assets . . .

The NYTOs similarly preserved these rights in Section 17.A.3 of the Independent System Operator Agreement (“ISO Agreement”). In addition, in a separate agreement, the NYTOs conditioned their commitment to be responsible for regulated backstop solutions to address reliability needs on retaining, without modification, their rights incident to the ownership of their assets.<sup>18</sup> Such reservations of rights are not limited to the original NYTOs. They are also included in Section 3.08(c) of an existing Operating Agreement with a recently added NYTO, as well as the *pro forma* Operating Agreement that non-incumbent Transmission Owners must execute prior to energizing their transmission facilities to become a NYTO.<sup>19</sup>

**C. The NYISO’s Stakeholder Process Revealed Uncertainty Regarding the Existence of the NYTOs’ Right to Build, Own and Recover the Costs of Upgrades to Their Existing Transmission Facilities**

As a part of an effort in 2019 to continue to improve the Public Policy Process, certain NYTOs identified that Section 31.6.4 of the OATT reserved to the NYTOs the right to build, own, and recover the costs of an upgrade to their existing transmission facilities, including upgrades contained in another Developer’s proposed transmission solution that are selected by the NYISO. The NYISO and its stakeholders discussed tariff revisions and enhancements that,

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<sup>18</sup> See Agreement Between the New York Independent System Operator, Inc., and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs (“NYISO/TO Reliability Agreement”) at § 4.02, as filed with and accepted by the Commission in *New York Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372 (2004) and *New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,182 (2005).

<sup>19</sup> See New York Transco Operating Agreement; OATT § 31.11, Appendix H – Form of Operating Agreement (“*Pro Forma* Operating Agreement”), at § 3.08(c).

among other things, sought to expand existing NYISO procedures to more clearly address when and how the NYISO would assign upgrades selected in one of the NYISO's transmission planning processes to a requesting NYTO.<sup>20</sup> While the NYISO believes that the NYTOs possess this right and that such right is not limited to facilities addressing local system needs, certain stakeholders and other interested parties disagree. Stakeholder discussions revealed a fundamental difference of opinion as to whether a NYTO right of first refusal for upgrades exists. The level of disagreement on the threshold issue impeded progress on the process improvements. In the NYISO's judgment, it has been clear for some time that there was no realistic chance that tariff revisions addressing these issues could obtain the super-majority stakeholder support necessary for the NYISO to file under Section 205 of the Federal Power Act without resolution of the threshold legal issues.

On July 23, 2020, the NYISO presented its intent to file a petition for issuance of a declaratory order to stakeholders at a meeting of its Electric System Planning Working Group ("ESPWG") and Transmission Advisory Planning Subcommittee ("TPAS"). In response to stakeholder requests, the NYISO offered interested parties an opportunity to make presentations on the issue, including potential alternatives to filing this Petition. At the August 7, 2020 meeting of its ESPWG, TPAS, and Interconnection Projects Facility Study Working Group ("IPFSWG"), one stakeholder made a presentation that detailed its continuing disagreement with the NYISO's interpretation that there is a right of first refusal for upgrades. Based on the

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<sup>20</sup> See, e.g., NYISO Presentation to a Joint Electric System Planning Working Group and Transmission Planning Advisory Subcommittee, *Updated Straw Proposal to Address Upgrades in the Public Policy Transmission Planning Process* (August 20, 2019); NYISO Presentation to a Joint Electric System Planning Working Group and Transmission Planning Advisory Subcommittee, *Updated Straw Proposal to Address Upgrades in the Public Policy Transmission Planning Process* (May 21, 2019); NYISO Presentation to a Joint Electric System Planning Working Group and Transmission Planning Advisory Subcommittee, *Straw Proposal to Address Non-BPTF Upgrades in the Public Policy Transmission Planning Process and Establish a Procedure to Administer Section 31.6.4 of Attachment Y* (April 12, 2019).



presentation and other comments at the August 7, 2020 meeting, the NYISO concluded that further stakeholder discussions would not resolve the uncertainty concerning the threshold issues and that the NYISO should proceed with filing this Petition.

### **III. PETITION FOR DECLARATORY ORDER**

The NYISO requests that the Commission issue a declaratory order in response to this Petition that addresses the questions detailed below to remove uncertainty concerning the reserved rights of NYTOs for upgrades referenced in Section 31.6.4. Such order would avoid controversies with respect to projects containing upgrades proposed in the NYISO's transmission planning processes. The requested clarifications will provide for more clear and transparent transmission planning processes in New York for both the NYTOs and non-incumbent Developers. In addition, such clarity will assist the NYISO in its treatment of proposed transmission solutions to address future needs that are upgrades or contain elements that are upgrades. Finally, the determinations will minimize the potential for disputes and litigation, preserving the Commission's and the parties' resources by decisively resolving any tariff ambiguities in advance and reducing the potential for delays in the NYISO's transmission planning processes or the development of a selected project. Accordingly, resolution of the following tariff interpretation questions through the issuance of a declaratory order is consistent with Commission precedent.<sup>21</sup>

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<sup>21</sup> See 5 U.S.C. § 554(e); *Continental Oil Co. v. FPC*, 285 F.2d 527 (5th Cir. 1961); *Morgan Stanley Capital Group, Inc.*, 119 FERC ¶ 61,298, at P 17 (2007). The facts and circumstances presented by this Petition are clearly distinguishable from those in *New England Ratepayer Assoc.*, 172 FERC ¶ 61,042 (2020). In that proceeding, the Commission declined to issue a declaratory order because the petitioner did not identify a specific controversy or harm that needed to be addressed to remove uncertainty or terminate a controversy. *Id.* at P 36. By contrast, as noted above, resolving the issues identified in this petition is necessary to prevent disruption to the NYISO's ongoing transmission planning process and to avoid litigation. See, e.g., *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064 at PP 16-17 (2020) (holding that appellate court decision on the scope of FERC's authority in condemnation proceedings under the Natural Gas Act created "sufficient uncertainty" on the part of litigants in ongoing and future certificate proceedings to make it "appropriate for [the Commission] to address these issues in this [declaratory]

**A. Confirm that the NYTOs have a Right to Build, Own and Recover the Costs of Upgrades to Their Existing Transmission Facilities**

The NYISO requests that the Commission confirm that NYTOs possess a right of first refusal that is permitted under Order No. 1000 that reserves to them the right to build, own, and recover the costs of upgrades to their existing transmission facilities pursuant to the NYISO's foundational agreements and Section 31.6.4 of the OATT. This right encompasses upgrades that are included as part of another Developer's proposed transmission solution that the NYISO selects for inclusion in a regional transmission plan for purposes of cost allocation.

As detailed in Part II.B above, the NYISO's foundational agreements establish the rights and obligations of the NYISO and NYTOs underlying the formation of the NYISO and the NYTOs' participation. The NYTOs expressly conditioned their delegation of certain responsibilities to the NYISO on, among other things, their continuing to "own, physically operate, modify, and maintain" their respective transmission facilities turned over to the NYISO's operational control.<sup>22</sup> The ISO-TO Agreement and ISO Agreement provide that the NYTOs retain, among other things, property rights incident to the ownership of their respective transmission facilities.<sup>23</sup> Importantly, the specific provisions define the retained rights incident to ownership of the NYTOs' respective transmission facilities broadly—*i.e.*, "without limitation," and do not restrict the rights to a subset of transmission facilities.<sup>24</sup> Moreover, in

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order"); *Enbridge Offshore Facilities, LLC*, 116 FERC ¶ 61,001 at P 18 (2006) (determining that it was appropriate to address oil pipeline's request for a declaratory order addressing the pipeline's ability to give preference to anchor customers, even in the absence of a specific tariff filing, "[b]ecause of the importance of developing oil production in the deepwater Gulf of Mexico to the nation's economy, and the magnitude of the financial commitments previously made by Caesar and those that Enbridge will make, the Commission finds that it is appropriate to exercise its discretion to provide declaratory findings to provide certainty to Enbridge and all other interested parties").

<sup>22</sup> ISO-TO Agreement at preamble.

<sup>23</sup> See *id.* at § 3.10(c); ISO Agreement at Art. 17.A.3.

<sup>24</sup> Section 3.10 of the ISO-TO Agreement provides, in relevant part, that "[t]his Section is not intended to reduce or limit any other rights of a Transmission Owner as signatory to this Agreement or any of the ISO Related Agreements or under an ISO Tariff." Compare *PJM Interconnection, L.L.C., et al.*, 172 FERC ¶ 61,136 at PP 81-82 (2020) (discussing the exclusive rights and responsibilities retained by the PJM Transmission Owners under the

granting responsibilities to the NYISO, including the obligations related to transmission expansion activities, the ISO-TO Agreement and ISO Agreement did not place new obligations on the NYTOs to expand or modify their respective transmission systems and facilities.<sup>25</sup> Similar rights and obligations were reserved for non-incumbent NYTOs that energize facilities in New York and turn over operational control of their transmission facilities to the NYISO.<sup>26</sup>

Section 31.6.4 of the OATT preserves the aforementioned right of the NYTOs contained in the foundational agreements to build, own, and recover the costs of upgrades to their respective transmission facilities as it relates to the NYISO's transmission planning processes. The NYISO's interpretation of the NYTOs' reserved rights under its foundational agreements and Section 31.6.4 as allowing for a NYTO to exercise a right of first refusal over upgrades contained in another Developer's proposal is consistent with Order No. 1000. It is also consistent with the implementation of Order No. 1000 in other regions.<sup>27</sup> The express language of Section 31.6.4 tracks the language from Order No. 1000 concerning permitted exceptions to the required elimination of rights of first refusal. The Commission has referred to the rights referenced in Section 31.6.4 as an exception to the requirement to eliminate a right of first refusal in Commission-jurisdictional tariffs and agreements.<sup>28</sup> Moreover, the foundational agreements

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Combined Transmission Owner Agreement and finding that PJM Transmission Owners retain all rights that they have not specifically granted to PJM).

<sup>25</sup> For example, the ISO-TO Agreement provides that "[t]he responsibilities granted to the ISO . . . shall not expand or diminish the responsibilities of a Transmission Owner to modify or expand its transmission system, nor confer upon the ISO the authority to direct a Transmission Owner to modify or expand its transmission system." ISO-TO Agreement at § 3.10(e); *see also, e.g.*, ISO Agreement at Art. 18.01 ("The ISO will not have the authority to order a Transmission Owner to construct new facilities or to modify existing facilities."); NYISO/TO Reliability Agreement at § 4.02 ("expressly reserv[ing] all of its existing rights under the ISO/TO Agreement, including, but not limited to, the rights incident to ownership of its assets, including without limitation, the right to expand its transmission facilities on its own initiative or in response to an order of an appropriate regulatory authority").

<sup>26</sup> NY Transco Operating Agreement at § 3.08; *Pro Forma* Operating Agreement at § 3.08.

<sup>27</sup> Order No. 1000 at P 226 (finding that the reforms were "not intended to affect the right of incumbent transmission provider to build, own, and recover cost for upgrades to its own transmission facilities").

<sup>28</sup> *See, e.g., New York Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044 at PP 153 (finding that "the Commission accepted NYISO's proposed exceptions from the requirement to eliminate the federal right of first refusal, including an exception or local transmission projects in Section 31.6.4"); *New York Indep. Sys. Operator*,

in other regions where there is a right for incumbent Transmission Owners to build, own, and recover the cost of upgrades contain provisions that, similar to the ISO-TO Agreement and ISO Agreement, reserve the rights of incumbent transmission owners with regard to the transmission facilities they own.<sup>29</sup>

While the existence of a right of first refusal related to upgrades was not expressly discussed in the NYISO's Order No. 1000 compliance process, current circumstances have made it increasingly relevant and important. At the time of the First Order No. 1000 Filing, the NYISO evaluated the non-incumbent developer reforms in Order No. 1000 with a view towards the development of entirely new, stand-alone transmission projects in New York, rather than the potential for modifying existing NYTO facilities. Up to that point, the NYISO's experience with the development of new transmission in New York, outside of the incumbent NYTOs' upgrades to address their local needs, was largely limited to merchant transmission projects that did not seek to modify or replace existing NYTO facilities.<sup>30</sup> If regulated solutions were proposed by a NYTO or non-incumbent Developer in New York to address a reliability or economic need and market-based solutions were not available, it was the responsibility of the New York Public Service Commission ("NYPSC"), not the NYISO, to select a regulated solution. The First Order No. 1000 Filing proposed to retain this approach concerning regulated solutions.<sup>31</sup>

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*Inc.*, 143 FERC ¶ 61,059 at PP 169-170 ("find[ing] that NYISO's proposed exception to allow an incumbent Transmission Owner to build an upgrade to its own transmission facilities partially complies with Order No. 1000").

<sup>29</sup> See, e.g., PJM Consolidated Transmission Owners Agreement, Article 5; ISO-NE Transmission Operating Agreement § 3.07; MISO Transmission Owner Agreement § II.C; see also compare *PJM Interconnection, L.L.C., et al.*, 172 FERC ¶ 61,136 at PP 81-82 (2020) (discussing the exclusive rights and responsibilities retained by the PJM Transmission Owners under the Combined Transmission Owner Agreement and finding that PJM Transmission Owners retain all rights that they have not specifically granted to PJM).

<sup>30</sup> The NYISO addressed the interaction of merchant transmission projects with the existing transmission system through its Large Facility Interconnection Procedures, pursuant to which any upgrades to an NYTO's system required for the reliable interconnection of the merchant project would be constructed and owned by the impacted NYTO. See OATT § 25.5.4.

<sup>31</sup> First Order No. 1000 Filing at p 39.

The focus in the First Order No. 1000 Filing was, therefore, on the application of the Commission's exceptions to the requirement to eliminate a right of first refusal in the context of the NYISO's then-existing planning process. As a result, the First Order No. 1000 Filing stated that the OATT did not contain any right of first refusal provisions, as the NYISO's planning processes permitted any Developer to submit a proposed solution in its then-existing reliability and economic planning processes for evaluation by the NYISO and consideration for implementation by the NYPSC.<sup>32</sup> Given that focus, the First Order No. 1000 Filing also did not expressly discuss how it would apply the right of NYTOs to build, own, and recover the costs for upgrades to facilities they own that were included in proposals by other Developers.<sup>33</sup>

Subsequent to the First Order No. 1000 Filing, the CSPP evolved in two significant ways that modified the impact of the NYISO's planning processes on the NYTOs' existing transmission facilities and raised questions concerning the scope of Section 31.6.4.

First, in response to the Commission's directive in its Order No. 1000 compliance proceeding, the NYISO modified its planning process so that it, and not the NYPSC, is responsible for selecting the more efficient or cost effective transmission solution. The NYISO's planning processes use a sponsorship model pursuant to which Developers design their own solutions to address identified transmission needs, rather than bidding only to construct transmission projects already designed by the transmission provider. As a result of its planning processes and these process revisions, the subsequent Order No. 1000 compliance filing sought to clarify the NYTOs' rights referenced in Section 31.6.4 concerning upgrades to their facilities,

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<sup>32</sup> *Id.* at p 31; *see also New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 at P 168 (2013) (“As an initial matter, we find that NYISO does not have a right of first refusal designated in their existing OATT.”).

<sup>33</sup> The First Order No. 1000 Filing noted that Order No. 1000 “clarifies that the requirement to eliminate [right of first refusal] provisions is not intended to interfere with upgrades made by incumbent TOs to meet their local needs,” and stated that Section 31.6.4 was inserted to “explicitly provide that incumbent TOs have the right to make upgrades to their own facilities or use existing ROWs to meet their local system needs.” *Id.* at p 56.

including clarifying in Section 31.6.4 that a NYTO has an express right to take the actions set forth in that provision.<sup>34</sup> However, the Commission rejected the clarifications as beyond the scope of its compliance directives in the Order No. 1000 proceeding.<sup>35</sup>

Second, in practice, there is a high likelihood that proposed transmission solutions to address a transmission need in the NYISO's planning processes will be located within existing rights of way due to the unique circumstances in New York. New York's power needs are largely located in the highly-populated southeastern portion of the state, including New York City and Long Island, while generation resources that serve that demand are spread across the state. Throughout New York, there are limited rights of way to develop new transmission to deliver the generation and serve these areas due to various environmental and agricultural impact concerns. The NYPSC, which is responsible for identifying Public Policy Transmission Needs and for siting transmission projects in New York, has expressed an intent that new transmission projects be located to the extent possible in existing rights of way.<sup>36</sup> As a result of the likelihood that Developers' proposed transmission solutions will be located within existing rights of way, their projects will in many cases interface with or modify NYTOs' existing transmission facilities.

In order to continue efficiently administering its transmission planning processes, the NYISO now seeks confirmation that the NYTOs have a right of first refusal related to upgrades to their respective transmission facilities. The Commission's confirmation of the NYISO's

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<sup>34</sup> *New York Indep. Sys. Operator, Inc.*, Compliance Filing, Docket No. ER13-102-002 at p 57 (October 15, 2013).

<sup>35</sup> *New York Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044 at P 152 (2014).

<sup>36</sup> See, e.g., *In the Matter of New York Independent System Operator, Inc.'s Proposed Public Policy Transmission Needs for Consideration*, Order Addressing Public Policy Transmission Need for Western New York, PSC Case No. 14-E-0454 at p 16 (October 13, 2016) (encouraging the use of existing rights of way to the maximum extent practicable); *Proceeding on Motion of the Commission to Examine Alternating Current Transmission Upgrades, et al.*, Order Finding Transmission Needs Driven by Public Policy Requirements, PSC Case No. 12-T-0502 at Appendix B (December 17, 2015) (requiring use of existing rights of way).

understanding of its foundational agreements and OATT will remove uncertainty for both the NYTOs and non-incumbent Developers and will reduce the potential for disputes and litigation and for related disruptions and delays in the NYISO's transmission planning processes.

Accordingly, the NYISO requests that the Commission confirm that the NYTOs possess a right of first refusal that is permitted under Order No. 1000 that enables them to build, own, and recover the costs of upgrades to their existing transmission facilities pursuant to the NYISO's foundational agreements and Section 31.6.4 of the OATT, including upgrades that are part of another Developer's proposed transmission project that was selected by the NYISO in one of its transmission planning processes.

**B. Confirm that, if a NYTO Exercises its Right to Build, Own, and Recover the Costs of an Upgrade to an Existing Facility, the NYTO Is Appropriately Categorized as the Developer of the Upgrade under the NYISO OATT**

If the Commission confirms that the NYTOs have a right to build, own, and recover the cost of upgrades to their existing facilities, including upgrades proposed by another Developer that the NYISO selects for inclusion in a regional transmission plan for purposes of cost allocation, the NYISO requests that the Commission also confirm that the NYTO should be treated, to the extent applicable, under existing OATT provisions as the Developer of the upgrade portion of the selected transmission project and subject to OATT provisions relevant to the Developer of a selected transmission project. The OATT provides for the NYISO to select the more efficient or cost effective transmission project to address a transmission need, but is ambiguous concerning how the NYISO should treat a NYTO that has exercised its right of first refusal for an upgrade that is part of the selected solution. The NYISO believes that treating a NYTO in that scenario as a Developer of the upgrade is the most reasonable interpretation of the currently effective OATT provisions. The NYTO would become the project sponsor and be responsible for developing, financing, owning, operating, and maintaining the upgrade portion of

the selected project.<sup>37</sup> The NYISO is therefore not asking the Commission to modify or expand existing tariff language. Instead, it is simply asking for confirmation that the NYISO's interpretation is reasonable remove uncertainty and avoid disputes.

This confirmation will enable the NYISO to treat the NYTO as a Developer under OATT provisions applicable to Developers of a selected transmission project,<sup>38</sup> with the exception of the provisions for voluntary cost containment connected with a solution in the Public Policy Process.<sup>39</sup> Specifically, as with any other entity developing a selected transmission project, the NYTO would be required to enter into a Development Agreement for the upgrade<sup>40</sup> and seek the necessary regulatory approvals for siting, construction, and operation of the project.<sup>41</sup> Additionally, the NYTO would be eligible for the allocation and recovery of the upgrade's costs under the OATT and be required to make the necessary rate filing with the Commission, as well

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<sup>37</sup> A NYTO that exercises its right to build, own, and recover the cost of an upgrade can reasonably satisfy the definition of "Developer" because once it exercises its right, it then becomes the sponsor of a project under the CSPP. *See* OATT § 30.1.1 ("**Developer:** A person or entity, including a Transmission Owner, sponsoring or proposing a project pursuant to this Attachment Y.").

<sup>38</sup> When the upgrade is a portion of another Developer's proposal, the NYISO would only treat the NYTO as the Developer for the portion meeting the definition "upgrade" under Section 31.6.4 of the OATT and Commission precedent. The remaining portions will be developed and owned by the Developer that proposed the solution.

<sup>39</sup> In February 2020, the Commission accepted NYISO's Section 205 tariff filing to establish procedures providing for consideration of voluntary cost containment commitments in proposed transmission projects submitted in its Public Policy Transmission Planning Process. *New York Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,098 (2020). If a Transmission Owner elects to build an upgrade contained in another Developer's project for which that Developer made a voluntary cost containment commitment, there is no mechanism in the existing tariff to subject the Transmission Owner to the other Developer's cost containment commitment for a project that includes that upgrade. As the NYISO explained in its Section 205 filing, the NYISO proposed "to consider the cost containment treatment for such upgrades in future stakeholder discussions." *New York Indep. Sys. Operator, Inc.*, Proposed Tariff Regarding Cost Containment in the Public Policy Transmission Planning Process, Docket No. ER20-617-000 at p 5 (December 17, 2019). Accordingly, proposals to address cost containment for upgrades may be addressed in future NYISO stakeholder discussions.

<sup>40</sup> OATT § 31.4.12.2 ("As soon as reasonably practicable following the ISO's selection of the proposed project, the ISO shall tender to the Developer that proposed the selected Public Policy Transmission Project a draft Development Agreement with draft appendices completed by the ISO to the extent practicable for review and completion by the Developer."); *see also* OATT § 31.2.8.1.6 (provisions in the Reliability Planning Process for a Responsible Transmission Owner, Transmission Owner, or Other Developer related to entering into a Development Agreement for the triggered solution).

<sup>41</sup> OATT § 31.4.12.1 ("Upon its selection of a Public Policy Transmission Project, the ISO will inform the Developer that it should submit the selected Public Policy Transmission Project to the appropriate governmental agency(ies) and/or authority(ies) to begin the necessary approval process to the site, construct, and operate the project"); *see also* OATT §§ 31.2.8.1.2, 31.2.8.1.3, 31.2.8.1.4, 31.2.8.1.8.



as abide by the cost allocation provisions for the specific type of transmission need.<sup>42</sup> The NYISO's interpretation of its OATT is consistent with other regions that assign to the incumbent transmission owner the components of a selected project for which there is a reserved right.<sup>43</sup> Treating a NYTO that exercises its permitted right of first refusal with respect to an upgrade the same as a non-incumbent Developer is consistent with Order No. 1000 and non-discriminatory.

**C. Clarify the Scope and Treatment of Upgrades Regarding the Retirement of Existing Facilities by a Facility that Serves a Different Function**

The NYISO requests that the Commission clarify whether a new transmission facility that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility would constitute an "upgrade" under Section 31.6.4 of the OATT and Order No. 1000. In the event that such a facility should be treated as an entirely new transmission facility, the NYISO also seeks clarification on whether the proposal to retire or decommission an existing transmission facility in another Developer's transmission solution would require either the agreement of the NYTO that owns the facilities or a state regulatory or court ruling authorizing the retirement or decommissioning of the facility.

Section 31.6.4 of the OATT defines an "upgrade" as "an improvement to, addition to, or replacement of a part of an existing transmission facility and shall not refer to an entirely new transmission facility." This definition mirrors the Commission's definition of upgrade set forth

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<sup>42</sup> OATT § 31.5.1.7 ("Any entity, whether a Responsible Transmission Owner, Other Developer, or Transmission Owner, shall be eligible for cost allocation and cost recovery as set forth in Section 31.5 of Attachment Y and Rate Schedule 10 of the ISO OATT for any transmission project proposed to satisfy an identified Reliability Need, regulated economic transmission project, or Public Policy Transmission Project that is determined by the ISO to be eligible under Sections 31.2, 31.3, or 31.4, as applicable.").

<sup>43</sup> See, e.g., PJM Operating Agreement, Schedule 6, Section 1.5.8(1); FRCC Regional Transmission Planning Process, FRCC-MS-PL-018, Section 7.2 (July 1, 2020); see also *PJM Interconnection, LLC*, 168 FERC ¶ 61,121 at PP 17-25 (2019) (requiring that a Transmission Owner that accepts its designation as a Designated Entity execute a Designated Entity Agreement).

in Order No. 1000-A.<sup>44</sup> Order No. 1000 provides limited guidance concerning what types of projects would and would not constitute upgrades, generally referencing tower change outs and reconductoring.<sup>45</sup> However, the distinction in the definition between an upgrade and an entirely new transmission facility is not always clear in scenarios where a Developer proposes to retire or decommission a NYTO's existing facility.

Most public utility transmission providers, like the NYISO, solely incorporated the Order No. 1000-A definition of upgrades in their jurisdictional tariffs or agreements. An exception was the Midcontinent Independent System Operator, Inc. ("MISO"), which established in its transmission planning requirements in Attachment FF of its OATT extensive criteria and principles by which it will determine whether a project constitutes an upgrade.<sup>46</sup> The Commission approved the MISO's criteria and principles as compliant with Order No. 1000.<sup>47</sup> The NYISO has used the MISO's criteria and principles and the Commission's discussion of such requirements as guidance in discussing with stakeholders whether project elements proposed in its planning processes should be categorized as upgrades or entirely new transmission facilities. However, given the numerous potential project scenarios, the Commission's guidance and MISO's criteria and principles do not address all possible fact patterns, including proposals that the NYISO has encountered and will likely encounter.

As described above, Developers in New York are likely to include in their proposed solutions transmission facilities within existing rights of way. Such projects will likely interface with, replace, or displace NYTOs' existing transmission facilities. In many cases, it will be clear

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<sup>44</sup> Order No. 1000-A at P 426. The Commission directed the NYISO to insert the definition of "upgrade" consistent with the definition from Order No. 1000-A. *See New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 at P 172; *New York Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044 at P 151.

<sup>45</sup> Order No. 1000 at P 319.

<sup>46</sup> MISO OATT, Att. FF Section VIII.A.2.

<sup>47</sup> *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 147 FERC ¶ 61,127 (2014); *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 142 FERC ¶ 61,215 (2013).

given the nature of a modification or expansion that it is an upgrade or an entirely new transmission facility. For example, the NYISO has discussed with its stakeholders a handful of potential scenarios that are likely to be encountered in New York, which scenarios are contained in Attachment A to this Petition. The NYISO used existing Commission precedent and MISO's criteria in interpreting whether such scenarios satisfied the definition of upgrade. The existing guidance is sufficient for the NYISO to make that determination for many of the scenarios considered.

However, the distinction between an upgrade and an entirely new transmission facility will not be as clear in circumstances where non-incumbent Developers propose to retire or decommission NYTOs' existing transmission facilities. The Commission has found that replacing elements of an existing transmission facility with new elements that perform the same or an improved function satisfy the definition of upgrade. For instance, the Commission accepted MISO's criteria that classify as upgrades certain specified expansions, replacements, or modifications to existing facilities, such as (i) increasing the nominal operating voltage of the transmission line that results in a complete replacement of a transmission line<sup>48</sup> or (ii) relocation of a line to accommodate a transmission project due to a requirement or request.<sup>49</sup>

Commission precedent does not appear to clearly address the scenario in which a Developer is proposing to retire or remove an existing transmission facility to build a new transmission line that connects to the transmission system in a different configuration than the original facility. For example, a Developer proposes to remove an existing 115 kV transmission line to allow for a new 345 kV transmission line to take its place in the existing right of way.

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<sup>48</sup> See MISO OATT, Att. FF Section VII.A.2.1(b); *see also* *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 147 FERC ¶ 61,127 at P 203 (*citing* *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 142 FERC ¶ 61,215 at P 226).

<sup>49</sup> See MISO OATT, Att. FF Sections VIII.A.2.1(e).

The new 345 kV transmission line, however, would connect to the transmission system in a different configuration (*i.e.*, connects to different buses and/or substations), resulting in a different power flow, and the former line would no longer exist. Under this situation, it seems that the new 345 kV line should be classified as a new transmission facility rather than as an upgrade because it performs different transmission functions on the bulk power system than what the original 115 kV line that performed.

If the new transmission line in this case was to be determined to be an entirely new transmission facility and not an upgrade, it would raise a number of issues that are not addressed in the OATT. Based on the Commission's precedent on MISO's criteria for relocation of existing transmission facilities to an alternative right of way or an alternative position on the same right of way,<sup>50</sup> it is not clear under the NYISO OATT whether the retirement or decommissioning would be subject to the mutual consent of the NYTO that owns the facility or an outcome of a state regulatory proceeding or court proceeding. Neither the definition of "upgrade" in Order No. 1000 or Section 31.6.4 of the OATT nor the Commission's orders on MISO's criteria and principles appear to directly address this situation.

Accordingly, the NYISO requests that the Commission remove the uncertainty and preempt disputes by clarifying whether: (i) a new transmission facility that would require the retirement or decommissioning of a NYTO's existing transmission facility and that connects to the transmission system in a different configuration than the original facility would constitute an "upgrade" that is subject to the NYTOs' right of first refusal; and (ii) whether such a proposal requires either the agreement of the NYTO that owns the facility or an outcome of a state

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<sup>50</sup> See *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 147 FERC ¶ 61,127 at P 199 (addressing MISO's criteria set forth in MISO OATT, Att. FF Sections VIII.A.2.1[e]).

regulatory proceeding or court proceeding authorizing the retirement or decommissioning of the facility.

#### **IV. REQUEST FOR PROMPT COMMISSION ACTION**

An order on this Petition prior to the NYISO's solicitation for solutions to an identified transmission need in one of its upcoming transmission planning processes would be very beneficial to the NYISO, its stakeholders, and Developers. The NYISO has commenced a new cycle in its Public Policy Process by soliciting potential transmission needs on August 3, 2020. Proposals are due on October 2, 2020, and will then be submitted to the NYPSC to identify any Public Policy Transmission Needs to be addressed in the Public Policy Process. The NYISO has also commenced its 2020-2021 Reliability Planning Process to identify Reliability Needs on the New York system. The 2020 Reliability Needs Assessment will be completed this fall, and the NYISO will solicit transmission solutions later this year, if necessary to address any identified Reliability Needs.

The issuance of a declaratory order that resolves the issues raised by this Petition prior to the NYISO's solicitation for solutions in these upcoming transmission planning processes would provide important clarity and transparency to stakeholders and participating Developers and would reduce the potential for delays and disputes in the transmission planning processes. The resolution of these issues would also help to avoid litigation before the Commission concerning transmission upgrade issues.

## V. CONCLUSION

For the foregoing reasons, the New York Independent System Operator, Inc. respectfully requests that the Commission's issuance of a declaratory order granting the relief requested herein.

Respectfully submitted,

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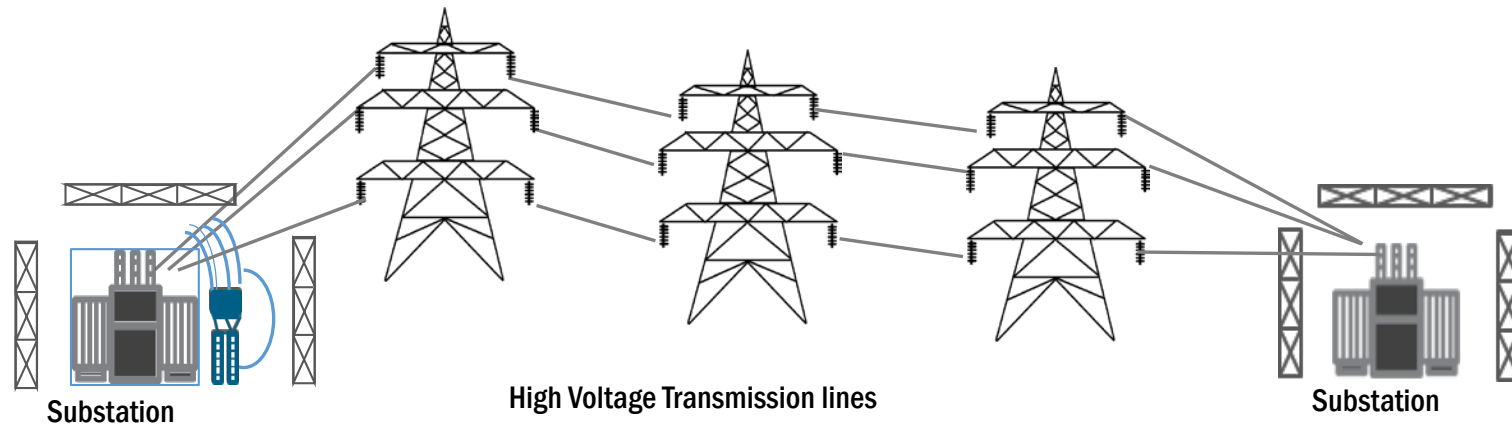
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## Attachment A

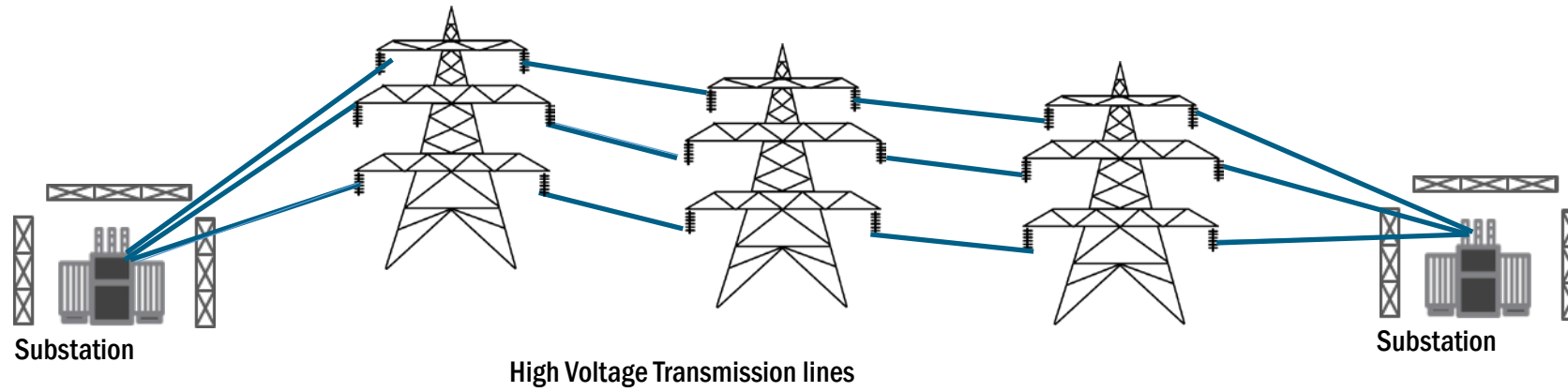
**Example 1:** Increase the rating of a 345 kV line by replacing an existing wavetrapp



**Upgrade, as it is an improvement to an existing transmission facility or a replacement of a part of an existing transmission facility**

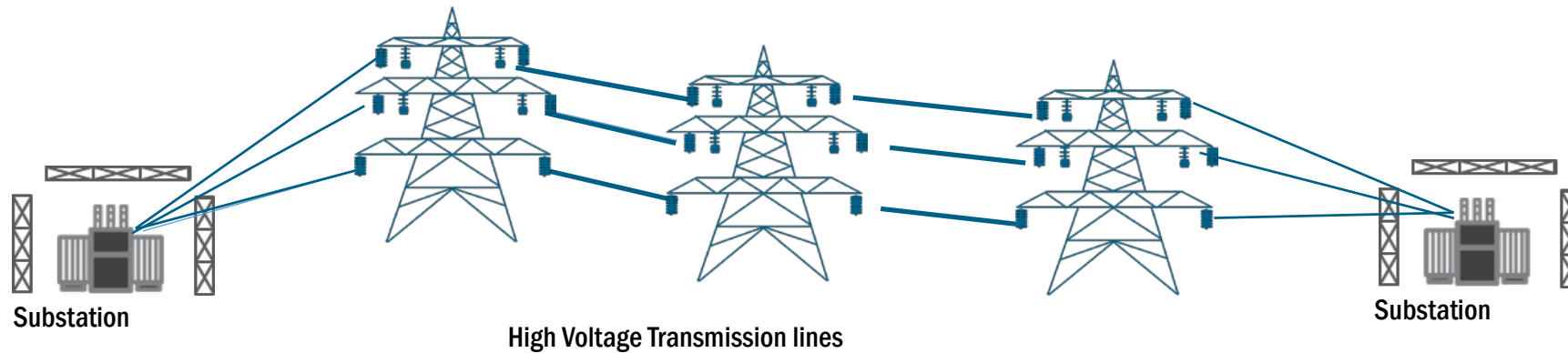


**Example 2:** Reconductor an existing 230 kV transmission line with a 345 kV conductor on the existing structures with same substations



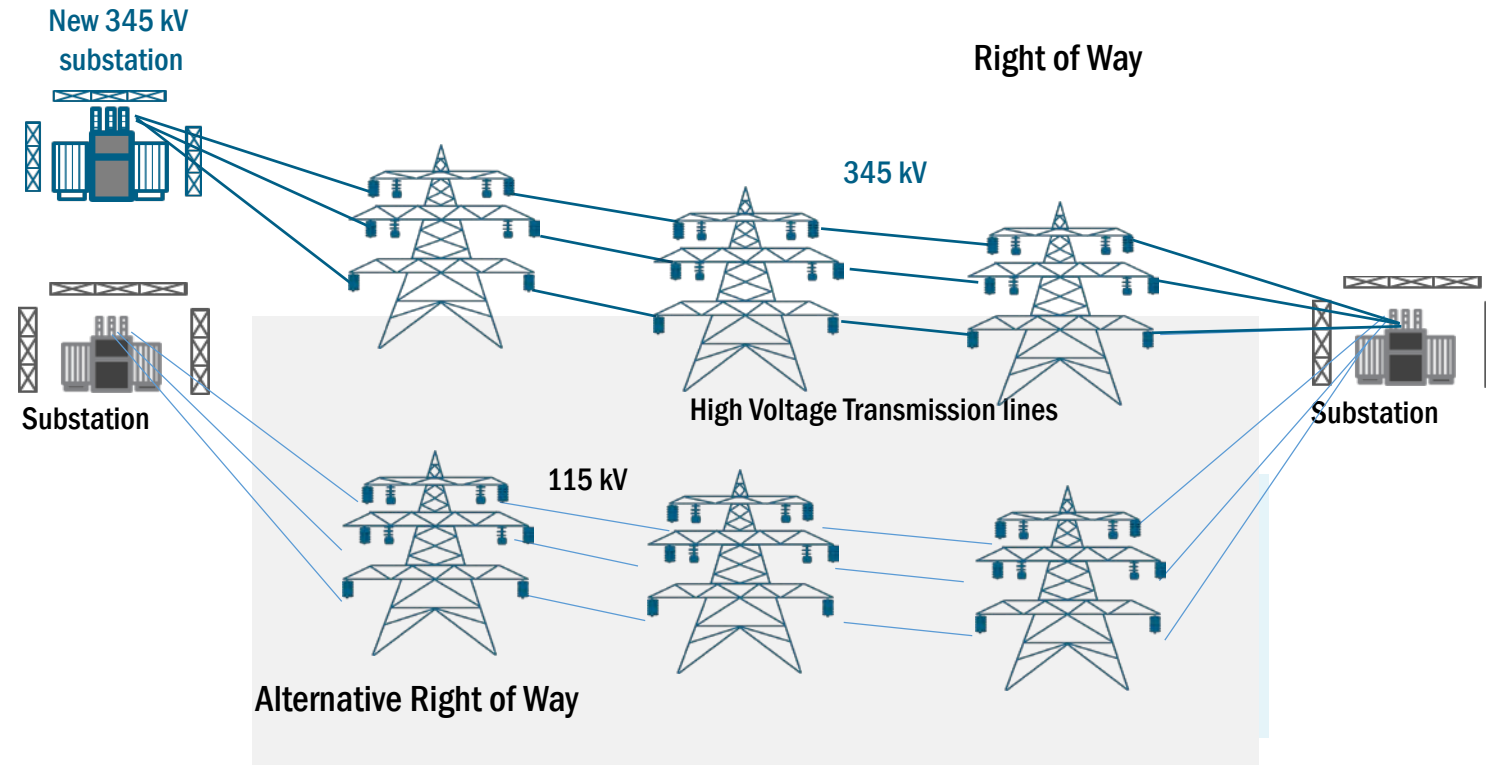
**Upgrade, as this is an improvement to an existing transmission facility by increasing the nominal voltage**

**Example 3:** Replace an existing 115 kV transmission line with a 230 kV transmission line by removing the existing 115 kV line and rebuilding a 230 kV line on new structures, new insulators, etc. in the same right-of-way with same substations



**Upgrade, as this is an improvement to an existing transmission facility by increasing the nominal voltage**

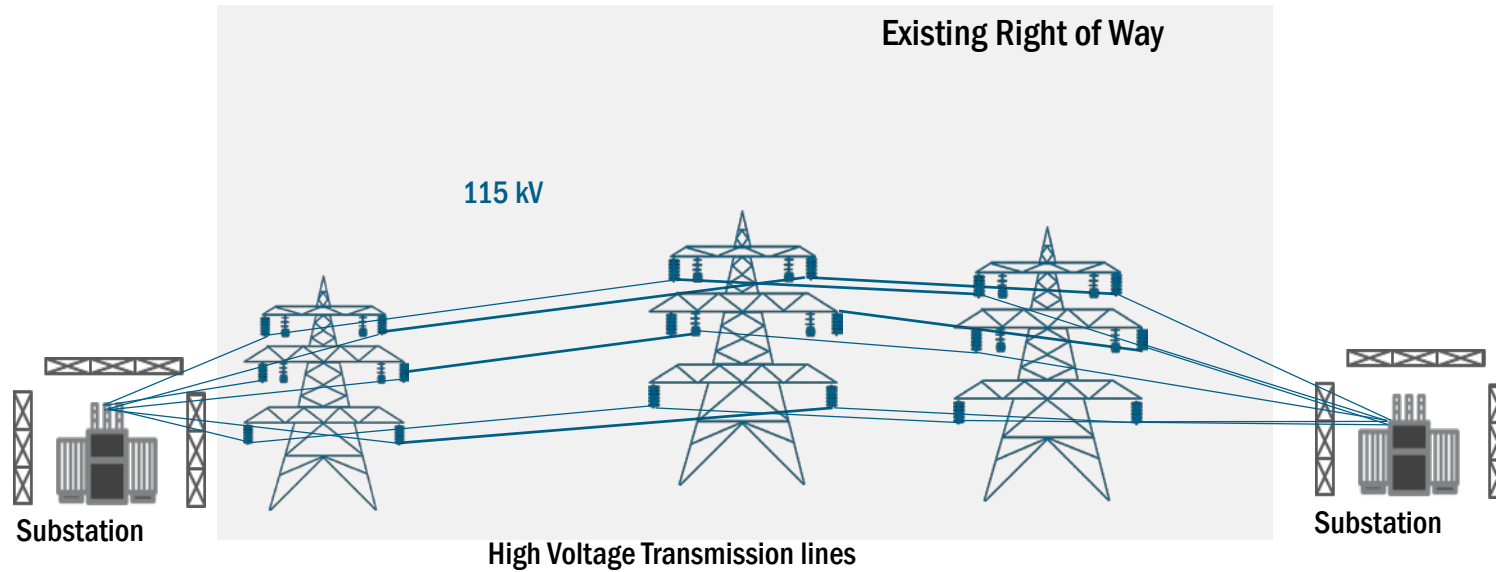
**Example 4:** Relocate an existing 115 kV transmission line to alternative right-of-way (ROW) in order to accommodate a new 345 kV transmission line originating from a new substation



**New Facility = new 345 kV line, towers, and substation, and Developer will need to negotiate with TO for ROW use**

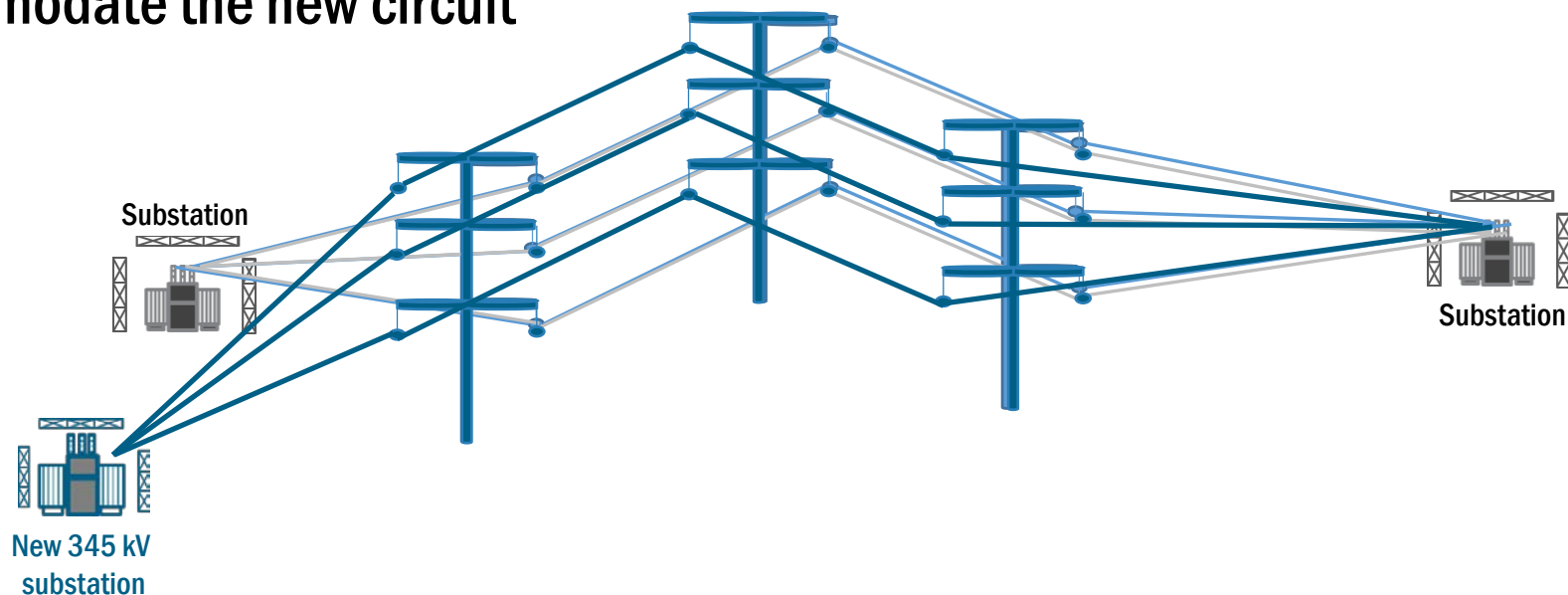
**Upgrade = relocated 115 kV as well as any added ROW to accommodate facility**

**Example 5:** Build a new 115 kV transmission line and new structures in an existing ROW



**New Facility, and Developer will need to negotiate with TO for ROW use**

**Example 6:** Co-locate a new 345 kV circuit originating from a new substation on an existing single-circuit transmission line with structures that cannot be expanded to accommodate the new circuit

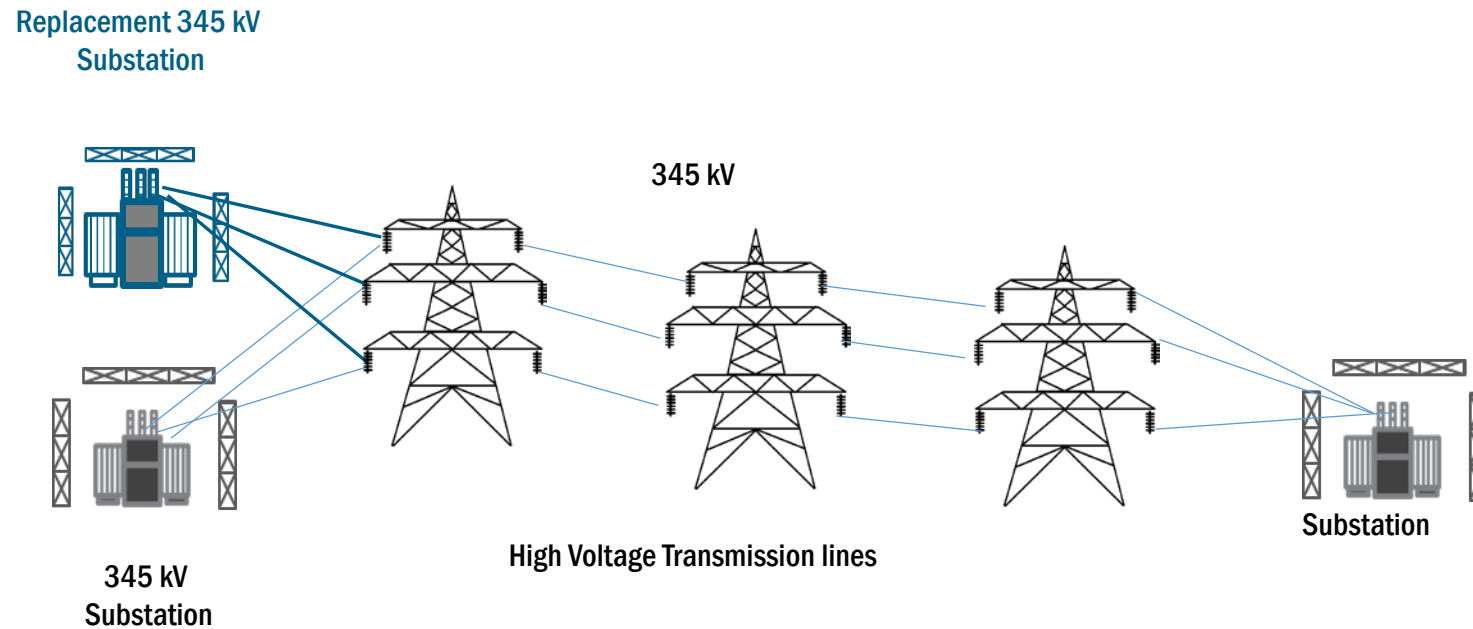


**Upgrade =** decommissioning of the existing structures and building the new structures, transmission line and insulators for existing circuit, associated protective relay schemes for existing circuit, shield wires, and additional ROW

**New Facility =** transmission line and insulators for new circuit and associated protective relay schemes for new circuit, as well as the new 345 kV substation

**\*Note:** would require co-location agreement

**Example 7:** Relocate an existing substation to accommodate a proposed project by building a new 345 kV substation near the existing substation and routing all transmission circuits from the existing substation into the replacement substation and removing the existing substation



**Upgrade = relocated 345 kV substation and removal of existing substation**