

ATTACHMENT 2

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

LS Power Grid New York Corporation I)

Docket No. ER20-716-001

**EXPLANATORY STATEMENT IN SUPPORT OF
OFFER OF SETTLEMENT**

LS Power Grid New York Corporation I (“LSPGNY”) submits this Explanatory Statement pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §385.602, in support of the Offer of Settlement (“Settlement”). The Settlement reflects and implements negotiations between LSPGNY, the parties to the above-captioned proceeding (with LSPGNY, collectively the “Parties” and each individually a “Party”) and Commission Trial Staff (“Staff”). The Settlement will resolve completely all issues raised in connection with this proceeding.

The Settlement provides as follows:

I. PROCEDURAL BACKGROUND

Section I of the Settlement provides the procedural background of this proceeding. Paragraph 1.1 describes LSPGNY, which is a non-incumbent transmission developer, and its selection, together with the New York Power Authority (“NYPA”), by the New York Independent System Operator, Inc. (“NYISO”) to develop, own, and operate the Marcy to New Scotland Project (the “Project”) known as Segment A of the broader transmission project known as the AC Transmission Project.

Section I(A) outlines the LSPGNY rate filings. Paragraph 1.2 addresses LSPGNY’s petition in EL19-30-000 seeking Commission authorization for certain transmission rate

incentives for the Project. The Commission granted the requested incentive rate treatment on May 16, 2019.¹

Paragraphs 1.3 and 1.4 address the transmission formula rate template and formula rate implementation protocols filed by NYISO on behalf of LSPGNY on December 31, 2019 (“Formula Rate Filing”). Paragraph 1.3 notes that the Formula Rate Filing contained a request by LSPGNY for certain incentive rate treatment, included a 10% base return on equity (“ROE”), use of LSPGNY’s actual capital structure subject to a cap of 53% equity, and depreciation rates based on those of an affiliate. Paragraph 1.3 also notes that the Formula Rate Filing incorporated the 80/20 Cost Containment required as part of the Public Policy Transmission Project proposal submission. Paragraph 1.4 notes that the Formula Rate Filing also sought incentive rates for capitalization of certain costs and authorization for the establishment of a regulatory asset, use of a hypothetical capital structure until the Project achieves commercial operation, a 50 basis point (“bp”) adder to LSPGNY’s ROE for participation in a regional transmission organization (“RTO”), subject to the resulting ROE being within the zone of reasonableness, a 50 bp adder to LSPGNY’s ROE for the risks and challenges of the Project and, if applicable upon Project in-service, a performance-based rate.

Paragraphs 1.5 and 1.6 address the interventions, protests and comments filed with regard to the LSPGNY filing, as well as noting the Commission Staff’s deficiency letter, and LSPGNY’s response. Specifically, Paragraph 1.5 notes that the New York Public Service Commission, the City of New York, and Municipal Electric Utilities Association of New York each filed comments or protests to the Formula Rate Filing. LSPGNY filed an answer to the comments and protests. Paragraph 1.6 addresses the February 27, 2020, Commission Staff letter

¹ *LS Power Grid New York, LLC, et al.*, 167 FERC ¶ 61,139 (2019).

requesting additional information on the Formula Rate Template and Formula Rate Protocols and LSPGNY's response.

Section I(B) addresses the Commission's May 26, 2020 Order on LSPGNY's Formula Rate Filing ("Formula Rate Order"). Paragraph 1.7 describes the Commission acceptance for filing of LSPGNY's Formula Rate Filing, suspension for a nominal period, effective as of May 27, 2020, subject to refund and the establishment of hearing and settlement judge procedures.² Paragraph 1.7 also identifies the issues the Commission set for hearing and settlement judge procedures in the Formula Rate Order.

Paragraph 1.8 recounts the LSPGNY requested incentives granted by the Commission in the Formula Rate Order, including

(1) authorization to create a regulatory asset to capitalize certain costs that would not otherwise be capitalized (Regulatory Asset Incentive), (2) authorization to use a hypothetical capital structure, consisting of 47% debt and 53% equity, until the project achieves full commercial operation (Hypothetical Capital Structure Incentive), (3) a 50 basis-point return on equity (ROE) adder for participating in a regional transmission organization (RTO) or independent system operator (ISO) (the RTO-Participation Incentive), and (4) a 50 basis-point ROE adder to reflect the significant risks and challenges associated with the development of its portion of a transmission project (the ROE Risk Adder).³

Section I(C) addresses requests for rehearing and judicial review. Paragraph 1.9 notes the NYPSC request for rehearing of the Formula Rate Order. Paragraph 1.10 recounts that on July 27, 2020, the Commission issued a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration. Paragraph 1.11 recounts that the NYPSC filed, in the United States Court of Appeals for the District of Columbia, a Petition for Review of the

² *New York Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,159 (2020) ("Formula Rate Order").

³ *Id.* at P 2.

Formula Rate Order and the denial of its rehearing by operation of law.⁴ Paragraph 1.12 notes that, on September 24, 2020, the Commission issued an Order Addressing Arguments Raised on Rehearing, modifying the discussion in the Formula Rate Order, but reaching the same result.⁵ Paragraph 1.13 notes that the NYPSC filed a second Petition for Review with the United States Court of Appeals for the District of Columbia on November 23, 2020, and on November 25, 2020, the two Petitions were consolidated.⁶ Paragraph 1.14 notes that LSPGNY intervened in the consolidated cases on December 15, 2020.

Section I(D) addresses settlement judge procedures following the Commission’s Formula Rate Order. Subsequent to the May 26, 2020 Order, Judge Andrew Satten was appointed as settlement judge to preside over the settlement proceedings. Paragraph 1.15 recounts the settlement and technical conferences. Paragraph 1.16 identifies the dates on which settlement proposals were exchanged.

II. SCOPE AND BENEFITS OF SETTLEMENT

Section II addresses the scope and benefits of the Settlement. Section II(A) addresses the scope of the Settlement. Paragraph 2.1 notes that the Docket No. ER20-716-000 proceeding involves the rates, terms and conditions for service under the LSPGNY Formula Rate and Formula Rate Protocols to be collected under the NYISO Tariff and addresses certain rate incentive treatment sought by LSPGNY. Paragraph 2.1 also notes that the Settlement resolves all issues among the Parties regarding LSPGNY’s filings under Federal Power Act (“FPA”) Sections 205 and 219, including any requests for rehearing or Petitions for Review. Section 2.2

⁴ *New York Public Service Comm’n. v. Federal Energy Regulatory Comm’n*, Case No. 20-1386.

⁵ *New York Independent System Operator, Inc.*, 172 FERC ¶ 61,266 (2020).

⁶ *New York Public Service Comm’n v. Federal Energy Regulatory Comm’n*, Case No. 20-1464.

notes that the above-named participants either support or do not oppose the terms, conditions, and stipulations of the Settlement.

Section II(B) addresses the benefits of the Settlement. Paragraph 2.3 notes the critical public policy transmission needs identified by the NYPSC that are addressed by the AC Transmission Projects, including the Segment A Project. Paragraph 2.3 quotes the myriad of benefits identified by the NYPSC related to the AC Transmission Projects collectively. Paragraph 2.3 also recounts that the NYISO determined that under its baseline case, the selected AC Transmission Projects collectively would provide, over the 20-year study period, \$2.576 billion in Demand Congestion Change in 2018 dollars. AC Transmission Public Policy Transmission Plan Report (dated April 8, 2019) at p. 76. The NYISO further determined that under its Clean Energy Standard plus Retirements Scenario, the AC Transmission Projects collectively would provide, over the same 20-year study period, \$9.633 billion in Demand Congestion Change in 2018 dollars. *Id.*

III. TERMS OF SETTLEMENT

Section III provides the Terms of Settlement and is broken down into settlement Sections relating to each of the critical issues. Section III(A) (Paragraph 3.1) sets forth the Definitions.

Section III (B)(1) (Paragraph 3.2) notes the Base ROE shall be 9.65%, and shall continue in effect, unless or until modified by the Commission pursuant to FPA Sections 205 or 206 and is subject to the Moratorium outlined in Paragraph 3.15.

Section III(B)(2) (Paragraph 3.3) confirms that for the Project, a 100 bp adder to the Base ROE will apply to Project Costs incurred up to the Cost Cap, Unforeseeable Costs (that are more than five (5) percent of the Cost Cap), Third Party Costs and Project Development Costs. Paragraph 3.3 also notes that the 100 bp consists of a 50 bp incentive adder to account for

benefits to customers, including congestion relief, and a 50 bp incentive adder for risks and challenges in developing the AC Transmission Projects.

Section III(B)(3) (Paragraph 3.4) provides that LSPGNY's Hypothetical Capital Structure shall apply during construction and that after all facilities are placed in service the lesser of LSPGNY's actual capital structure or 52% equity, shall be used in the formula rate. Paragraph 3.4 further notes that this provision will apply to the Project unless or until modified by the Commission pursuant to Section 205 or 206 of the FPA and subject to the Moratorium outlined in Paragraph 3.15. Paragraph 3.4 also provides that all actual costs incurred based upon long-term debt outstanding shall be recoverable through the formula rate.

Section III(B)(4) (Paragraph 3.5) sets forth the settlement regarding depreciation rates. Paragraph 3.5 also confirms that the depreciation rates will stay in effect for a period of at least six years after the Project commences commercial operation, and thereafter until changed pursuant to an FPA Section 205 or 206 filing.

Section III(B)(5) (Paragraph 3.6) notes that a Cost Cap shall apply to LSPGNY's Segment A Project, based on the sum of \$316,500,000 plus Allowance for Funds Used During Construction ("AFUDC"). Paragraph 3.6 also confirms that all prudently incurred costs below the Cost Cap are fully recoverable, including with respect to the Base ROE, ROE Incentive Adders, depreciation, and debt costs. Paragraph 3.6 (1) addresses Prudently Incurred Actual Project Costs above the Cost Cap. Paragraph 3.6 (1) provides that (a) 20% of such costs that are subject to the Cost Containment Mechanism will not earn any ROE, but LSPGNY will be allowed to recover the associated depreciation and debt cost, and (b) 80% of such costs that are subject to the Cost Containment Mechanism will not earn any ROE Incentive Adders on the

equity portion of such costs, but LSPGNY will be allowed to earn the Base ROE, associated depreciation and debt cost.

Paragraph 3.6 (2) addresses the Additional ROE Adder for Actual Project Costs Below the Cost Cap. Paragraph 3.6 (2) provides that LSPGNY may utilize an additional ROE adder when the actual Project Costs are below the Adjusted Cost Cap, which is comprised of the sum of \$261,000,000 plus AFUDC.

Paragraph 3.6 (3) sets forth the additional ROE adder LSPGNY will receive when the Project Costs, inclusive of Unforeseeable Costs in an amount up to 5% of the Cost Cap, are less than the Adjusted Cost Cap.

Section III(B)(6) (Paragraph 3.7) provides that the cost allocation for LSPGNY's portion of the Project shall be calculated in accordance with NYISO's Open Access Transmission Tariff Section 31.8.2. Paragraph 3.7 also sets forth the zonal cost allocations as determined by the NYISO, which is applicable to the Segment A Project. Paragraph 3.7 notes that cost allocations for other transmission projects developed or acquired by LSPGNY will be determined separately.

Section III(B)(7) (Paragraph 3.8) addresses the recovery of certain payments made to National Grid. Specifically, LSPGNY will reflect such costs in Account 303 with a depreciation rate of 6.67% (15 years).

Sections III(B)(8)-(9) (Paragraphs 3.9-3.10) confirm that as part of the Settlement LSPGNY has made changes to both the Formula Rate Template (Paragraph 3.9) and Formula Rate Protocols (Paragraph 3.10) with clean and marked versions of both being attached to the Settlement as Attachments A-D respectively.

Paragraph 3.11 notes that NYISO selected LSPGNY and NYPA to jointly develop and construct the Segment A Project; however LSPGNY and NYPA will not jointly own any Project assets, so the project capital and operating costs will be recovered through separate and distinct transmission formula rates filed by LSPGNY and NYPA. Paragraph 3.12 confirms that duplicative recovery of the Project Costs will not be permitted and there shall be full transparency in annual formula rate updates regarding the division of assets and cost responsibility between LSPGNY and NYPA. Paragraph 3.11 also provides that within six months of placing the entire Segment A project in service, LSPGNY will provide an informational workpaper identifying the final assets owned by LSPGNY and NYPA respectively, the total ratebase of the assets, details including accounting entries of any transfers of assets that may have occurred between the parties that changed the ownership of any assets, the amount of any costs greater than the Cost Cap or less than the Adjusted Cost Cap, as the case may be, and details on the operations and maintenance costs incurred to date. Paragraph 3.11 further provides that every year as part of LSPGNY's annual True-Up Adjustment as set for in the Formula Rate Protocols, LSPGNY will clearly identify payments, if any, to NYPA for operations and maintenance in its annual True-Up Adjustment. Paragraph 3.11 also notes that to the extent there is any mark-up in the operations and maintenance costs incurred by NYPA and charged to LSPGNY, LSPGNY shall justify the mark-up as an appropriate expense to be recovered from ratepayers.

Paragraph 3.12 confirms that LSPGNY will provide updates of Unforeseeable Costs as part of project cost updates in its annual informational filing through construction, including information demonstrating how such costs were determined to be Unforeseeable Costs. Paragraph 3.12 further provides that to the extent that there are Third Party Costs arising under

clause (iii) of the definition of Third Party Costs, LSPGNY will provide information on such costs as part of project cost updates in its annual informational filing through construction, including information demonstrating how such costs were determined.

Section III(C) (Paragraph 3.13) confirms that nothing in the Settlement modifies the incentives granted by the Commission other than as specifically addressed in the Settlement.

Section III(D) (Paragraph 3.14) provides for a five-year moratorium commences on the final Commercial Operation Date of the Project, during which moratorium period no Party shall submit a filing under FPA Sections 205 or 206 to seek changes in the financial matters addressed in the Settlement or the Formula Rate Template or Formula Rate Protocols. Paragraph 3.15 also provides that no more than a 100 bp ROE adder shall be sought for the life of the Project and that the depreciation rates shall not be changed for six years.

Section III(E) (Paragraph 3.15) requires that LSPGNY make a compliance filing of clean copies of the Formula Rate Template and Formula Rate Protocols within 30 days of the effective date or revised effective date of the settlement and the NYPSC shall submit a dismissal of its Petitions for Review in Case Nos. 20-1386 and 20-1464.

IV. LIST OF DOCUMENTS

Section IV (Paragraphs 4.1-4.2) includes the list of documents accompanying the Settlement and that the Settlement controls to the extent that there are any discrepancies between the Settlement and any other documents.

V. RESERVATIONS

Section V (Paragraphs 5.1-5.8) sets forth a number of reservations regarding the Settlement. Paragraph 5.1 notes that approval or acceptance by the Commission shall not constitute a determination by the Commission as to the merits of any allegations or contentions

and no Party shall be deemed to have made an admission that any allegation or contention made by any other Party or contained in these proceedings is true or valid or untrue or invalid.

Paragraph 5.2 reiterates Commission Rule 602 limitations on the parties' discussions leading to the Settlement.

Paragraph 5.3 provides that, should the Commission fail to issue an order approving or accepting this Settlement in its entirety and without material change or condition that any Party deems to be unacceptable, this Settlement shall be deemed withdrawn.

Paragraph 5.4 provides that the Settlement relates only to the specific matters referred to in the Settlement and shall not establish or constitute the adoption of any ratemaking principle binding on the Parties in the future, nor shall any Party be deemed to have approved, accepted, agreed, or consented for purposes other than this proceeding to any specific ratemaking methodology or principle, accounting treatment, or level of expense or revenue.

Paragraph 5.5 reflects the importance of the terms of the Settlement, providing that the Settlement is contingent on no Party seeking additional terms and conditions and the Commission approving the Settlement without condition or modification. If either contingency is not fulfilled, then the Settlement: (i) shall not be binding on any Party; (ii) the Parties shall not be obliged to negotiate further, other than to discuss in good faith whether any condition(s) or modification(s) required by the Commission is (are) acceptable to them; (iii) all Parties shall be deemed to have reserved all their respective rights and remedies with respect to the issues in this proceeding; and (iv) this Settlement shall not be part of the record in this or any other proceeding, and all discussions and negotiations thereon shall be privileged.

Paragraph 5.6 addresses the standard of review for the Settlement. To the extent there is a unilateral change proposed to the Settlement by a Party, or during the Moratorium set forth in

Paragraph 3.14 a Party proposed change in the rates set forth in this Settlement, the standard of review shall be the “public interest” standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)(“Mobile”); *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)(“Sierra”); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 (2008); and *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 558 U.S. 165 (2010). The standard of review for any changes proposed by a non-Party, or the Commission acting *sua sponte*, or, with respect to the rates set for in this Settlement a Party following the Moratorium, shall be the just and reasonable standard of review. *Devon Power LLC*, 134 FERC ¶ 61,208 at P 10 (2011), reh’g denied, 137 FERC ¶ 61,073 (2011), review dismissed in part and denied in part sub nom. *New England Power Generators Ass’n v. FERC*, 707 F.3d 364 (D.C. Cir. 2012).

Paragraph 5.7 provides that except as otherwise expressly stated in the Settlement, nothing in Settlement or the attached documents shall impair, diminish, or restrain the rights of and Party or the Commission under Sections 205 and 206 of the FPA. Paragraph 5.7 further provides that it is the intent of the Parties that no element of this Settlement or the attached documents constitutes a “settled practice” as that term was interpreted in *Pub. Serv. Comm’n of New York v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980).

Paragraph 5.8 provides that, except as provided in Paragraphs 3.1-3.12 and 3.15 of the Settlement and, to the extent not reflected in the Settlement and/or the LSPGNY Developer Agreement, nothing shall be construed as affecting LSPGNY’s right to submit revised tariff records or to apply to revise its Formula Rate on a prospective basis, or to make any other application or request, or to oppose any filing made or action taken pursuant to FPA Section 206. Paragraph 5.8 further provides that except as provided by the Moratorium in Paragraph 3.14,

nothing contained in the Settlement shall be construed as affecting the right of the Commission, or any other Party to make an application of any type to the Commission to modify prospectively LSPGNY's Formula Rate, or to oppose any filing made by LSPGNY.

VI. EFFECTIVE DATE

Paragraph 6.1 establishes the effective date of the Settlement as upon a final order of the Commission approving this Settlement without condition or modification, or, if approved with condition or modification, the date that such condition(s) or modification(s) is (are) accepted, or not opposed, by the Parties. Paragraph 6.1 further provides any Commission order shall be deemed final as of the date that rehearing is denied by the Commission, or if rehearing is not sought, the day following the date by which any request for rehearing would have been statutorily required.

Paragraph 6.2 provides that in the event of a Commission order requiring a modification or condition to the Settlement, a Party may provide written notice to the other Parties within ten (10) business days of the Commission order that the required modification or condition is unacceptable, in which case the Settlement shall be of no force and effect, unless within an additional fifteen (15) business days the Parties agree in writing to modifications consistent with the modification and/or condition imposed by Commission order that are acceptable to all Parties and are approved in a final Commission order no longer subject to rehearing (the "Revised Effective Date"). If no Party provides written notice that Commission mandated modifications are unacceptable, all Parties shall be deemed to have accepted the Settlement as modified and/or conditioned by the Commission order.

VII. MISCELLANEOUS

Paragraph 7.1 provides that the Settlement provisions are not severable and the Settlement is an integrated package in which none of the Settlement terms is agreed to without each of the others.

Paragraph 7.2 disclaims representations and warranties among the Parties other than as explicitly reflected in the Settlement and provides that the Settlement constitutes the full and complete offer of settlement with respect to the subject matter reflected therein and supersedes all prior negotiations, understandings, and agreements, whether written or oral, between the Parties with respect to the subject matter thereof.

Paragraph 7.3 provides standard language that titles and headings within the Settlement are for reference and convenience purposes only, are not to be construed or taken into account in interpreting the Settlement, and do not qualify, modify, or explain the effects of the Settlement.

Paragraph 7.4 provides that the Settlement is binding upon and for the benefit of the Parties and their successors and assigns.

VIII. OFFER OF SETTLEMENT

Paragraph 8.1 provides that the Settlement is subject to the condition that the Commission's order approving or accepting the Settlement, (i) shall constitute the requisite approval of any waivers of any regulations as may be deemed necessary to permit the implementation of the provisions of this Settlement by its terms; (ii) finds specifically that this Settlement is in the public interest and that the rates submitted with this Settlement are accepted for filing and are made effective as provided in this Settlement; and (iii) accepts this Settlement and its components, without condition or modification unacceptable to any Party.

Paragraph 8.2 reflects LSPGNY's request for Commission approval of the Settlement, without condition or modification, as fair and reasonable and in the public interest.