

**Analysis of Laws Affecting Development**  
**of**  
**The High Voltage Electric Transmission System**

**By**

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# **Analysis of Laws Affecting Development of The High Voltage Electric Transmission System**

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## **Introduction**

The power system failure and blackout of August 14, 2003 stimulated additional interest in the high voltage electricity transmission grid. Even before the causes of the blackout have been determined, legislative solutions involving the investment of many billions of dollars and federalization of electric transmission siting and development have been proposed. Following is a brief review of the basic laws now in effect which govern the development of electric transmission facilities in New York, in question and answer format. After reviewing these laws, a discussion section attempts to summarize current issues, including recent initiatives of the Federal Energy Regulatory Commission (FERC) to promote interstate regional transmission organizations (RTOs)

### **1. How Do Utilities Acquire Land, Right of Way, and Permission to Build Bulk Power Transmission Facilities?**

Utilities have long had the power of eminent domain to acquire land for electric transmission facilities. Initially, that power was granted in the Transportation Corporations Law. The process for developing new transmission facilities and obtaining regulatory permission is established in Article VII of the Public Service Law. The Power Authority of the State of New York also has power to establish new transmission lines and does so through the PSL Article 7 process.

#### **A. Transportation Corporations Law § 11**

The “broad” power of an electric company to condemn property under Transportation Corporations Law § 11 was reviewed in *LIRR v. LILCO*, 103 A.D.2d 156, 479 N.Y.S.2d 355, (App. Div. 2d Dept. 1984):

“LILCO derives its power of eminent domain from section 11 of the Transportation Corporations Law. In relevant part that section provides that:

"3-a. An electric corporation and a gas corporation shall have power and authority to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law.

"3-b. The construction, use and maintenance by an electric corporation of transmission, distribution and service lines and wires in, over or under any street, highway or public place and the construction, use and maintenance by a gas corporation [\*\*360] of transmission, distribution and service pipes, conduits, ducts or other fixtures in, over or under any trees, highway or public place, [\*\*\*13] as may be necessary for its corporate purposes, are hereby declared to be public uses and purposes.

*"Where any person or corporation other than the state, a political subdivision thereof, or a municipality is the owner of any right, title or interest in or to any street, highway or public place, or in or to the land on which the street, highway or public place is located, an electric corporation or a gas corporation is hereby authorized and empowered to acquire the right to construct, use and maintain such lines or wires and such pipes, conduits, ducts or other fixtures, in, over or under such street, highway or public place, from such owner or owners, by petition in the manner prescribed by section four hundred two of the eminent domain procedure law to the supreme court in the county in which such street, highway or public place is situated. The corporation shall file with the court a certificate of the public service commission certifying that the right sought to be acquired is necessary and in the public interest and such certificate shall be conclusive evidence as to the matters lawfully certified therein.*

"After a hearing on such petition and any answer thereto, if the [\*\*\*14] court shall find that such right to construct, use and maintain is necessary for the corporate purposes of the corporation, it shall enter its judgment adjudging that such right is necessary for the public use and that the corporation is entitled to construct, use and maintain its [\*163] lines or wires or pipes, conduits, ducts or other fixtures in, over or under such street, highway or public place and adjudging pursuant to the eminent domain procedure law the compensation to be made by the corporation to the owner or owners" (emphasis added).

**Thus, it will be seen that LILCO has broad powers of eminent domain but**

**that they do not extend to the property of the State, a political subdivision thereof, or a municipality.”**

*LIRR v. LILCO*, 103 A.D.2d 156, 479 N.Y.S.2d 355, (App. Div. 2d Dept. 1984) (bold emphasis added). As emphasized above, the “broad” power was limited by the need to obtain multiple consents of municipalities and other public entities whose land is affected by a transmission project. Article VII of the Public Service Law addresses the issue of multiple municipal approvals required under prior law, environmental impacts, and other issues of siting for electric transmission lines.

#### **B. Article VII of the Public Service Law**

Approval of major transmission projects was consolidated by Article VII of the Public Service Law, which makes the Public Service Commission the only entity whose approval is required. This remedied the fragmented authorizations made necessary under the prior law, which required municipal consents in each affected community. The law provides:

Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may require any approval, consent, permit or other condition for the construction or operation of a major facility with respect to which an application for a certificate hereunder has been issued....

Public Service Law §130. Article VII also requires the proponent of a major transmission project to consider alternative routes and to minimize environmental impacts. The principles of Article VII were discussed in *Tyminski v. Public Service Com.*, 38 N.Y.2d 156 (1974):

In 1970, the Legislature enacted article VII of the Public Service Law in order to provide an [\*\*\*29] orderly procedure which would ensure that vitally needed new public utility facilities would be built, but only after careful consideration was given to their impact on the environment, and efforts were made to minimize that impact.

In order to construct a major utility transmission facility, it is now necessary to obtain a certificate of environmental compatibility and public need from the Public Service Commission. ( Public Service Law, §§ 121, subd 1.) The commission may not grant the certificate unless it finds, among other things, that

the facility represents the minimum adverse environmental impact given the state of available technology and the nature and economics of the various alternatives. ( Public Service Law, §§ 126, subd 1, par [c].) The commission, however, need not merely approve or reject an application; it may condition the granting of a certificate upon a modification of the proposed facility. ( Public Service Law, §§ 126, subd 2.) To assist the commission in gathering the evidence necessary to rule on an application for a certification, the Legislature has [\*\*546] required that an applicant furnish a variety of information along with its application. ( Public Service Law, §§ 122, subd 1.) Thus, an applicant for a commission certificate must submit "a summary of any studies which have been made of the environmental impact of the project, and a description of such studies". ( Public Service Law, §§ 122, subd 1, par [c].)

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The Legislature specifically did not impose upon an applicant a duty to make detailed and expensive studies of every conceivable alternative. On the other hand, the Legislature did not place solely upon objectors the burden of coming forward with alternative proposals. Rather, it struck a middle ground, mandating that the applicant produce descriptions of reasonable alternatives, and an explanation of why the alternatives are unsatisfactory. This, in our view, the applicant did. We may not impose a stricter requirement, one implicitly rejected by the Legislature, simply on the ground that the [\*\*\*30] submission of impact studies on alternatives would better serve public policy. That argument is more appropriately addressed to the Legislature.

As long as the commission developed a comprehensive record, as we believe it had, on the environmental impact of the line to be certified, the statutory purpose has been fulfilled. (See Public Service Law, §§ 128, subd 1.)”

*Tyminski v. Public Service Com.*, 38 N.Y.2d 156 (1974).

### C. Public Authorities Law Article § 1007

The New York State Power Authority also has power to build transmission projects:

“Public Authorities Law § 1007. Acquisition of property

If, for **any** of the purposes hereunder, including temporary construction purposes and the making of additions or improvements, the authority shall find it **necessary or convenient for it to acquire any real property as herein defined**, whether for immediate or future use, then the authority may find and

determine that such property is required for a public use, and upon such due determination, such property shall be and shall be deemed to be required for such public use until otherwise determined by the authority and with the exceptions hereinafter specifically noted **such determination of fact shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use; but the public use in the hands or under the control of the authority shall be deemed superior to the public use in the hands of any other person, association or corporation.** If the authority is unable to agree for the acquirement of any such property, or if the owner thereof shall be incapable of disposing of the same, or if, after diligent search and inquiry, the name and residence of any such owner cannot be ascertained, or if any such property has been acquired or attempted to be acquired and title or other rights therein have been found to be invalid or defective, the authority may acquire such property by condemnation under and pursuant to the provisions of this title.

\* \* \* \*

**7. The authority may, at its option, acquire such real property within the state of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real property as is necessary for its purposes through the exercise of the right of eminent domain as provided in section twenty-one of the federal power act, as amended.**

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10. The authority may determine what real property is reasonably necessary for the construction or operation of any project authorized by this title **including transmission facilities.** If funds are made available by the authority to the state for payment of the cost and expense of the acquisition thereof, the commissioner of transportation, when requested by the authority, shall acquire such real property in the name of the state by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by section thirty of the highway law, insofar as the same may be applicable. The authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall continue, all such real property and rights in real property so acquired.

Authority of the State of New York to acquire land for transmission facilities, and because the taking is deemed to be in the name of the state, the public use of the power authority is superior to other public uses, and is not subject to municipal approvals. The Power Authority is required to follow Article VII procedures. *Atwell v. Power Authority*, 67 A.D.2d 365 (3d Dept 1979), *appeal denied* 48 N.Y.2d 610.

**2. May a New York Utility Develop New Transmission Facilities Outside its Customary Service Territory?**

There is no geographic limit on the broad power of a utility to develop transmission resources within the state. In *Orange County v. Public Service Commission*, 44 A.D.2d 103, *modified*, 37 N.Y.2d 762 (1974) the facts reflect that Consolidated Edison was building a transmission line in Orange County, outside its service territory. In that case, the PSC had proposed a route, and the Appellate Division modified the plan to require underground installation of a portion of it. The Court of Appeals reversed the Appellate Division and upheld the PSC, stating:

The scope of judicial review in these matters is very limited (Public Service Law, §§ 128). In the present context there is no occasion for judicial intervention unless the determinations made by the commission are found not to be supported by substantial evidence in the record or by information properly considered in the opinion or are found to be arbitrary, capricious or an abuse of discretion. On the record now before us there is no predicate for judicial intervention here.

*Orange County v. Public Service Commission*, 37 N.Y.2d 762 at 765 (1974).

**3. May a Utility be Required to Build Transmission Facilities Not Required to Serve Customers in its Retail Service Area?**

As indicated in *Orange County, supra*, a utility that needs transmission resources to serve its customers can build the facilities it needs outside its service area, and would make application to the PSC for a certificate under Article VII. In the context of a rate case or in a proceeding initiated by the PSC, the Commission could require utilities to plan for meeting the future transmission needs and to cooperate in the development of facilities determined to be in the public interest.

To the extent that transmission facilities are used by other utilities and not by the builder for its own customers, the builder of the lines would recover the cost from other utilities in the rates it files with the FERC.<sup>1</sup> To the extent that the facilities are used by the builder's own customers, they would pay for the portion they use in their retail rates.

Also, the Power Authority of the State of New York is authorized in its discretion to build transmission lines even if the lines are not needed to connect its own sources of supply:

The gravamen of this action is that the resolution's declared intention to use the proposed lines to transmit energy from Quebec to New York State disclosed a purpose not authorized by the Public Authorities Law.... subdivision 7 of section 1005 of the same law, which specifically authorizes PASNY "to undertake the construction of any project in one or more steps as it may find economically desirable or advantageous, and as it may agree with the appropriate Canadian and/or United States authorities" (emphasis added). Further, the third unnumbered paragraph in section 1005 of the Public Authorities Law specifically authorizes PASNY to construct and/or acquire transmission facilities which would assist in the supply of electricity to Metropolitan New York City. While some limitation is imposed by section 1005 as to PASNY's employment of power generated from acquired facilities in Metropolitan New York City and its environs, no such proscription is stated or can be inferred on PASNY's right to

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<sup>1</sup> In a controversial action, FERC has proposed asserting jurisdiction over the transmission component of retail rates for full service utility customers. *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, FERC Dkt. No. RM01-12-000, Notice of Proposed Rulemaking, 67 Fed. Reg. 55451 (August 29, 2002).

construct transmission lines anywhere in the State for the purpose of maintaining an adequate energy supply in New York City. Patently, no statutory limit is placed on the location of the energy source that shall energize constructed transmission lines.

*Atwell v. Power Authority*, 67 A.D.2d 365 (3d Dept 1979), *appeal denied* 48 N.Y.2d 610.

### Discussion

There is ample authority in New York law for the building of safe and adequate transmission facilities. If there is any lack of interest on the part of utilities in building transmission facilities, it may be attributable to a number of factors, including:

- Multi-year rate agreements that did not commit the utilities to expand or upgrade transmission facilities;<sup>2</sup>
- Allocation of assets in the utilities' holding company structures to invest in activities, such as telecom ventures, once believed to hold greater profit potential than a regulated return on transmission assets;
- Uncertainty due to FERC proposals to move control and operation of transmission assets out of the state and into the hands of larger interstate grid operators; and
- Hope that the FERC or Congress will adopt measures that would allow higher than normal rates of return on transmission assets.

Any disinclination of the New York utilities to build transmission facilities could be remedied by the PSC or the New York Power Authority. There is no need for federal intervention, federal

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<sup>2</sup>"[B]etween 1998 and 2001, NYSEG spent approximately \$190 million less on T&D [transmission and distribution] construction than was inherent in the rates agreed to by the parties and adopted by the Commission in 1998." Case 01-E-0359, *Petition of New York State Electric & Gas Corporation for Approval of its Electric Price Protection Plan, Order on Temporary Rates* (Issued January 10, 2002). <http://www.dps.state.ny.us/fileroom/doc11045.pdf>

eminent domain power, or federal incentives to invest in transmission infrastructure.