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FILING COVER SHEET

- 1. NAME OF APPLICANT: Northeast Transmission Development, LLC
- 2. TYPE OF FILING:
 - RATE CHANGE
 - FUEL ADJUSTMENT
 - ADMINISTRATIVE
 - CPCN
 - NEW SERVICE OFFERING
 - OTHER - DESCRIBE Petition for Declaratory Order

IF A TELECOMMUNICATIONS FILING, WHAT TYPE OF SERVICE IS IMPACTED?

BASIC COMPETITIVE DISCRETIONARY

- 3. PROPOSED EFFECTIVE DATE: 9/9/14

IS EXPEDITED TREATMENT REQUESTED? YES NO

- 4. SHORT SUMMARY OF FILING: Petition for Declaratory Order Confirming that Delaware Law Does Not Prohibit Non-Incumbent Transmission Developers from Siting, Constructing and Owning Transmission Facilities in Delaware

- 5. DOES THIS FILING RELATE TO OTHER DOCKETS: YES NO

IF YES, LIST DOCKET(S) NO(S): _____

- 6. IS PUBLIC NOTICE REQUIRED? YES NO
- IF YES, PLEASE ATTACH COPY OF PROPOSED PUBLIC NOTICE.

- 7. APPLICANT'S CONTACT PERSON:
 - NAME: Sharon K. Segner
 - TITLE: Vice President
 - PHONE: (636) 484-0379
 - FAX: (636) 532-2250
 - EMAIL: ssegner@LSPower.com
 - WEBSITE (IF APPLICABLE) _____

- 8. DID YOU PROVIDE A COMPLETE COPY OF THE FILING TO THE PUBLIC ADVOCATE?
YES NO IF YES, WHEN? _____

- 9. FILING FEE ENCLOSED: AMOUNT: \$ 100

NOTE: House Bill 681, enacted into law 7/13/98, authorizes the Commission to recover the cost of time spent by in-house staff to process all filings initiated after the date of enactment. You may be required to reimburse the Commission for staff time.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE RECEIVED

IN THE MATTER OF PETITION OF) 2014 AUG 29 PM 1 17
NORTHEAST TRANSMISSION)
DEVELOPMENT, LLC FOR) PSC DOCKET NO. 14-150
EXPEDITED DECLARATORY ORDER)

PETITION FOR EXPEDITED DECLARATORY ORDER

Pursuant the Rules of Practice and Procedure of the Delaware Public Service Commission (“Commission”),¹ Northeast Transmission Development, LLC (“Northeast Transmission Development” or “Petitioner”) requests, on an expedited basis, a Declaratory Order from the Commission confirming that Delaware law does not restrict the ability of Northeast Transmission Development from siting, constructing and owning new interstate, non-retail transmission in Delaware, subject to Northeast Transmission Development obtaining any necessary approvals. Northeast Transmission Development requests that the Commission approve this Expedited Declaratory Order at its upcoming September 9, 2014 Commission Meeting. In support of this Petition, Northeast Transmission Development presents the following:

1. The Petitioner is Northeast Transmission Development, LLC. All communications should be addressed to the Petitioner at the following address, to the attention of:

Sharon K. Segner
Vice President
LS Power Development, LLC
400 Chesterfield Center, Suite 110
St. Louis, MO 63017
Tel: (636) 484-0379
Fax: (636) 532-2250
ssegner@lspower.com

¹ Title 26 Delaware Administrative Code, 1001 Rules of Practice and Procedure of the Delaware Public Service Commission.

2. Counsel for the Petitioner is:

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3. Northeast Transmission Development is an affiliate of LSP Transmission Holdings, LLC and a member of the LS Power Group.² Northeast Transmission Development is focused on developing, constructing and owning transmission projects in Eastern PJM. Northeast Transmission Development seeks this Declaratory Order as the finalist sponsor of a proposed interstate, non-retail transmission project³ in the PJM Interconnection, L.L.C. (“PJM”)⁴ Artificial Island RFP. The project has no retail customers in Delaware and is regional in nature.

² LSP Transmission Holdings, LLC, through operating affiliates such as Northeast Transmission Development, focuses on cost of service and merchant transmission development throughout the United States and Canada. Affiliate Cross Texas Transmission is a Public Utility in Texas and a participant in the Public Utility Commission of Texas Competitive Renewable Energy Zone (“CREZ”) transmission procurement process, constructing 240 miles of double-circuit 345 kV. Based on values reported to the Public Utility Commission of Texas in April 2014, Cross Texas Transmission’s actual construction costs were the lowest on a cost per mile basis of any of the transmission project sponsors in the CREZ process. LS Power’s ON-Line Project in Nevada (75% percent owned by LS Power affiliates) represents a \$550 million, 230 mile 500 kV project for which LS Power successfully oversaw the development and construction process. In addition, LS Power developed and currently owns White Oak Solar Energy, LLC, a 10-megawatt solar facility known as Dover SUN Park. Dover SUN Park delivers solar power to the distribution grid, with the City of Dover, Delaware Municipal Electric Corporation, Delmarva Power, and the Delaware Sustainable Energy Utility purchasing the renewable energy credits associated with the facility. Delaware Governor Jack Markell and Dover Mayor Carleton Carey dedicated the commercial operation of the solar facility on August 17, 2011; this project represents the first utility-scale solar power plant on the Delmarva Peninsula. See the following press release for more information on the White Oak Solar Project:
<http://www.lspower.com/News/newsArticle081711.htm;>

³ On June 28, 2013 Northeast Transmission Development submitted Proposal P2013_1-5A to construct a new 230 kV transmission line from the Salem station in New Jersey to a new station in Delaware connecting the existing Cedar Creek - Red Lion 230 kV and Cartanza-Red Lion 230 kV transmission lines. Proposal P2013_1-5A is a regional, interstate transmission project that requires various approvals in both the State of Delaware and New Jersey. A copy of the public, redacted proposal can be found at <http://www.pjm.com/~media/planning/rtep-dev/expand-plan-process/ferc-order-1000/rtep-proposal-windows/ls-power-redacted-public-version-230kv.ashx>. PJM notified LS Power on July 15, 2013 that it found that LS Power and its subsidiary companies satisfied the pre-qualification requirements for Designated Entity status as defined in Section 1.5.8(a) of the PJM Amended and Restated Operating Agreement (“PJM OA”). As the Designated Entity under the PJM tariff, Northeast

4. On August 12, 2014, PJM issued the following mandate to finalists:

it has been brought to PJM's attention that the State of Delaware public utility regulations may restrict the ability of a developer to site and construct new transmission if the Proposer does not currently have a service territory established in the area of their project. Therefore, PJM requests that all Proposers who have submitted projects that require construction within the state of Delaware, provide a detailed response, including legal references, as well as confirmation from the Delaware Public Service Commission or the Office of the Delaware Attorney General regarding Proposer's legal ability to site and construct transmission in the state of Delaware consistent with its project proposal.⁵

PJM requires finalists to respond by September 12, 2014.⁶

5. Although the need for the instant Petition was necessitated by the existing transmission project evaluation process at PJM, the confirmation requested implicates all future efforts to bring competitive pressures to PJM's regional transmission planning and selection process to the extent that transmission proposals touch upon Delaware.⁷ And while Northeast Transmission Development does not believe that there is any ambiguity regarding its right to build and own interstate transmission located, in whole or in part, in Delaware, and has provided PJM its legal analysis to that effect, because PJM requested that finalists provide Delaware Commission or Attorney General confirmation by September 12, 2014, Northeast Transmission Development initiates this Petition requesting a Declaratory Order, in the form attached, confirming that there is no such prohibition.

Transmission Development would be assigned the project by PJM, sign the Designated Entity agreement and develop, own, and construct Proposal P2013_1-5A.

⁴ PJM was established under the Delaware Limited Liability Company Act.

⁵ August 12, 2014 PJM Letter to Finalists at 2, attached as Exhibit 1. Four of the five projects referenced require construction in Delaware.

⁶ *Id.*

⁷ Title 26 Delaware Administrative Code, 3008 Rules to Implement the Renewable Energy Portfolio Standard section 1.1, defines PJM as "the regional transmission organization (RTO) that coordinates the movement of wholesale electricity in the PJM region, or its successors at law."

6. Northeast Transmission Development acknowledges that nothing in this Petition is intended to pre-judge any future Delaware filing requirements, including the certificate of public convenience and necessity proceeding required to become a Public Utility in Delaware, in the event that PJM awards Northeast Transmission Development the project at issue. It is the clear intent of Northeast Transmission Development to file an application for Public Utility status when appropriate. Likewise, granting the requested relief does not commit the Commission to support a particular regional cost allocation for the project. All rights to protest the cost allocation PJM proposes to the Federal Energy Regulatory Commission (“FERC”) remain unrestricted. Rather, this Petition seeks only confirmation that neither Delaware statutes nor prior Commission rulings bar Nonincumbent Developers⁸ such as Northeast Transmission Development from constructing and owning an interstate transmission project in Delaware. Were the Commission to deny this request, the competitive pressures and cost containment commitments that Northeast Transmission Development has offered in PJM’s regional planning process would be denied to Delaware rate-payers, and only existing incumbent transmission owners would be permitted to build transmission

⁸ Nonincumbent Developers are defined in the PJM Amended and Restated Operating Agreement (“PJM OA”) in Section 1.5.8. It is important for the Commission to be aware that PJM is not able to assign projects to Nonincumbent Developers that have not been met its financial and technical Pre-Qualification criteria. Section 1.5.8(a) of the PJM Tariff outlines that Pre-Qualification applications shall contain the following information: (i) name and address of the entity; (ii) technical and engineering qualifications of the entity or its affiliate, partner or parent company; (iii) the demonstrated experience of the entity or its affiliate, partner, or parent company to develop, construct, maintain, and operate transmission facilities, including a list or other evidence of transmission facilities the entity, its affiliate, partner or parent company previously developed, constructed, maintained or operated; (iv) the previous record of the entity or its affiliate, partner, or parent company regarding construction, maintenance, or operation of transmission facilities, both inside and outside of the PJM region; (v) the capability of the entity or its affiliate, partner, or parent company to adhere to standardized construction, maintenance and operating practices; (vi) the financial statements of the entity or its affiliate, partner, or parent company for the recent fiscal quarter, as well as the most recent three fiscal years, or the period of existence of the entity, if shorter, or such other evidence demonstrating an entity’s or its affiliate’s, partner’s, or parent company’s current and expected financial capability acceptable to the Office of the Interconnection; (vii) a commitment by the entity to execute the Consolidated Transmission Owners Agreement, if the entity becomes a Designated Entity; (viii) evidence demonstrating the ability of the entity or its affiliate, partner, or parent company to address and timely remedy failure of the facilities; (ix) a description of the experience of the entity or its affiliate, partner or parent company in acquiring rights of way; and (x) such other supporting information that the Office of Interconnection requires to make the pre-qualification determinations consistent with this Section 1.5.8(a).

projects in Delaware.⁹ As discussed below, Northeast Transmission Development believes strongly that such a determination would be wrong as a matter of law and wrong as a matter of public policy.

7. In order to provide context to this Petition for Expedited Declaratory Order, this Petition recounts the history of certain federal transmission regulations, PJM's response to the regulations and PJM's first foray into selection of competitively acquired transmission solutions. Notwithstanding the substantial historical background, the issue before the Commission on this Petition is very simple: does Delaware law provide an exclusive right to own interstate transmission to "public utilities providing retail electric service" in territories established under 26 Delaware Code Section 203B? Northeast Transmission Development respectfully asserts that Delaware law provides no such exclusive right as it relates to the construction and ownership of interstate transmission. Further, because this issue is purely a matter of the Commission's application of Delaware law, involving no factual dispute, the Commission need not engage in fact finding or lengthy deliberations to grant the requested relief. For this reason Northeast Transmission Development respectfully requests that the Commission act on this Petition for Expedited Declaratory Order at the Commission's open meeting scheduled for September 9, 2014, so that Northeast Transmission Development can meet the deadline of September 12, 2014 PJM imposed on finalists.

Background

8. The issues giving rise to the instant Petition derive from the concurrent jurisdiction between FERC and state commissions in the area of electric service. As a general matter, FERC

⁹ It is important to note that if PJM determines that a project such as the one sponsored by Northeast Transmission Development is the best project to address the identified need, the project will be selected for inclusion in the regional plan regardless of the project sponsor. If it is determined that only incumbent transmission owners can build in Delaware, the project but will be assigned to the incumbent transmission owner(s) without the cost control and cost cap commitments made by Northeast Transmission Development. *See* Northeast Transmission Development's letter to the PJM Board of Managers where the construction cost cap commitment was memorialized. <http://www.pjm.com/~media/about-pjm/who-we-are/public-disclosures/20140709-northeast-transmission-development-llc-letter-regarding-artificial-island-project-selection.ashx>.

addresses “wholesale” issues while state commissions, including the Commission, address “retail” matters. The nature and scope of the overlap between federal and state jurisdiction as it relates to electric transmission varies state by state depending on the level of transmission siting and construction regulation, if any, a particular state may have.

9. The Commission recognizes this concurrent jurisdiction on its website under the “Electricity” section where it states:

Role of the Commission

In 1999, the General Assembly passed legislation restructuring the electric industry in Delaware. Prior to restructuring, the generation, transmission, and distribution of electric power by investor-owned utilities was fully regulated by the PSC. With restructuring, the generation of electric power became deregulated, *leaving only distribution services under the regulatory control of the PSC*. The pricing of electric transmission is regulated by the Federal Energy Regulatory Commission (FERC).¹⁰

As discussed below, this concurrent jurisdiction directly leads to the question before the Commission in this Petition, as PJM has undertaken a competitive procurement for interstate transmission under rules approved by FERC, but has raised a question of the potential impact of Delaware law on its decision.

Federal Energy Regulatory Commission Order No. 1000

10. In July 2011, the Federal Energy Regulatory Commission issued its order on Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, otherwise known as Order No. 1000.¹¹ The need for Order No. 1000 arose through the

¹⁰ <http://depsec.delaware.gov/electric.shtml> [emphasis added]. The regulatory control of distribution, including the designation of service territories, was needed to ensure that rate-payers did not end up paying for duplicative services. Because transmission development in PJM is regionally planned, the concern about duplicative services is not an issue as PJM will designate only the transmission needed to address reliability, economic and public policy needs.

¹¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) (“Order No.1000”); *order on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) (“Order No.1000A”), *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)

transformation of the electric transmission system from transmission built largely to address the need of a single, vertically integrated utility to move its own generation to its customers, to an interconnected, interstate transmission system operated on a regional basis, often by a single regional transmission operator. As the electric transmission system has evolved, so has FERC's oversight of that system. Order No. 1000 was the latest in a line of Orders that have transformed the planning for, and the operation of, the interstate transmission system, including orders that led to the creation of PJM.¹²

11. Order No. 1000 required that companies engaged in interstate transmission ownership or operation, like all PJM transmission owners including Delmarva Power and PJM itself, amend their federal tariffs and agreements to accomplish certain goals. Specifically, FERC held

this Final Rule: (1) requires that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan; (2) requires that each public utility transmission provider amend its OATT to describe procedures that provide for the consideration of transmission needs driven by public policy requirements in the local and regional transmission planning processes; (3) *removes from Commission-approved tariffs and agreements a federal right of first refusal for certain new transmission facilities*; and (4) improves coordination between neighboring transmission planning regions for new interregional transmission facilities.¹³

FERC explained that it was requiring the removal of federal rights of first refusal because:

leaving federal rights of first refusal in place for these facilities would allow practices that have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to

("Order No. 1000B") *affirmed sub nom., S.C. Pub. Serv. Auth. v. FERC*, 2014 U.S. App. LEXIS 15674 (D.C. Cir. Aug. 15, 2014).

¹² See, Order No. 1000 at PP 15-21 (recounting FERC's prior Orders on transmission access and planning).

¹³ Order No. 1000 Commission Summary [emphasis added]. A right of first refusal is a generic reference to any tariff or contractual provision that requires that an incumbent transmission owner be provided the first opportunity to build new transmission needed within its existing transmission footprint. Through these provisions, incumbent transmission owners divided up among themselves billions in new transmission infrastructure. See, Order No. 1000 at P 44 referencing the Edison Electric Institute ("EEI") statement that between 2001 and 2009 its members built over \$55 billion in new transmission facilities. An EEI commissioned study further reported that \$298 billion in new transmission would be needed between 2010 and 2030. *Id.*

regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.¹⁴

Under Order No. 1000, with few exceptions not relevant here, only the solution judged more efficient or cost-effective is eligible for regional cost allocation.

12. Given the removal of federal rights of first refusal, Order No. 1000 initiated a number of reforms related to the competitive procurement of transmission solutions to resolve reliability, economic or public policy needs. Among the filing requirements were requirements that each region develop rules for the financial and technical qualification of prospective developers, as well as rules for the evaluation and selection of transmission solutions and developers eligible to receive regional cost allocation for projects determined to be more efficient or cost-effective.

13. The reforms envisioned by Order No. 1000 were welcomed by a wide array of market participants, including many state commissions and the Federal Trade Commission.¹⁵ A significant group of market participants, many of them incumbent transmission owners, however opposed these reforms and appealed Order No. 1000 to the United States Court of Appeals for the District of Columbia Circuit.¹⁶ Among those appealing the right of first refusal provisions in the Order were PJM incumbent transmission owners Exelon Corporation, Baltimore Gas & Electric Company, PSEG Companies and FirstEnergy Companies. On August 15, 2014 the D.C. Circuit

¹⁴ Order No. 1000 at P 7.

¹⁵ A full list of the supporters, and their comments, is provided as Exhibit 2 to this Petition. State authorities in PJM and Northeast that are on record supporting new entrants and the removal of the federal right of first refusal include: New Jersey Board of Public Utilities, Public Utilities Commission of Ohio, Pennsylvania Public Utility Commission, Connecticut Department of Public Utility Control, Rhode Island Public Utilities Commission, Illinois Commerce Commission, Massachusetts Department of Public Utilities, Massachusetts Department of Energy Resources, and New England States Committee on Electricity. ELCON, American Chemistry Council, and other large industrials also supported FERC from a consumer standpoint, in addition to state consumer advocacy groups in Ohio and West Virginia.

¹⁶ The 45 Petitioners for Review of Order No. 1000 filed their individual petitions in a variety of federal Circuit Courts of Appeal but the petitions were all consolidated before the D.C. Circuit.

unanimously upheld Order No. 1000 in its entirety. On the issue of rights of first refusal, the D.C. Circuit held that “the Commission had authority under Section 206 to require removal of federal rights of first refusal provisions upon determining they were unjust and unreasonable practices affecting rates, and that determination was supported by substantial evidence and was not arbitrary or capricious”¹⁷

14. Although Order No. 1000 required the removal of federal rights of first refusal, the Order also made clear the limits on its scope. For example, Order No. 1000 holds that “[n]othing in this Final Rule requires that a facility in a regional transmission plan or selected in a regional transmission plan for purposes of cost allocation be built, nor does it give any entity permission to build a facility [and] nothing in this Final Rule relieves any developer from having to obtain all approvals required to build such facility.”¹⁸ Of relevance to this Petition, Order No. 1000 further specifically provided that

there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions. Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. It does not follow that the Commission has no authority to remove such restrictions in the tariffs or agreements subject to its jurisdiction.¹⁹

It is in this context that PJM has inquired of the finalist project proponents whether Delaware law prohibits their construction and ownership of transmission facilities in the state.

¹⁷ *S.C. Pub. Serv. Auth. v. FERC*, 2014 U.S. App. LEXIS 15674 *8 (D.C. Cir. Aug. 15, 2014).

¹⁸ Order No. 1000 at P 66.

¹⁹ Order No. 1000 at P 287.

PJM's Order No. 1000 Compliance Filings

15. To comply with the Federal Energy Regulatory Commission directives, in October 2012, PJM and the incumbent transmission owners in the PJM region made initial compliance filings with FERC. Although there was debate as to whether a federal right of first refusal ever existed in the PJM tariffs and agreements, the Commission determined that it need not reach that determination, as Order No. 1000 requires the removal of any such right if it in fact ever existed.²⁰ FERC accepted parts of PJM's original compliance filing and rejected other parts. Through two additional compliance filings, one of which remains pending at FERC, PJM has refined its process which allows Nonincumbent Developers to compete for the majority of new interstate transmission needed in PJM to address reliability needs, economic, and public policy objectives. It was just such a regional reliability need that led to the Artificial Island proposal window discussed below.

PJM's Artificial Island Process

16. On April 29, 2013 PJM issued its PJM RTEP – Artificial Island Area Proposal Window Problem Statement & Requirements Document (“Artificial Island RFP”). The Artificial Island RFP states:

PJM seeks technical solution alternatives (hereinafter referred to as “Proposals”) to improve PJM Operational Performance in the Artificial Island area under a range of anticipated system conditions and to eliminate potential planning criteria (PJM, NERC, RFC, and Local Transmission Owner criteria) violations in the Artificial Island area.

The Artificial Island request for proposals produced the results that FERC contemplated when it initiated the rulemaking that led to Order No. 1000. PJM's request resulted in 26 proposed projects, or combinations of projects, from 8 qualified developers, both incumbent transmission owners and Nonincumbent Developers like Northeast Transmission Development. The projects

²⁰ *PJM Interconnection, L.L.C., et al.*, 142 FERC ¶ 61,214 (2013) (“Initial Compliance Order”).

ranged from Northeast Transmission Development's 230 kV, 5.6 mile project to an incumbent transmission owner 500 kV proposal of approximately 75 miles. The initial cost estimates were for less than \$120 million to well over \$1 billion.

17. PJM reviewed various proposals over the course of 2013 and early 2014, narrowing the 26 proposals down to those proposals that PJM determined were more efficient or cost-effective. The four proposals that PJM's evaluation process determined were the more efficient or cost-effective represented just two sets of similar projects, each with two different sponsors. In evaluating the proposals, PJM made certain assumptions regarding the costs of the respective proposals, significantly raising Northeast Transmission Development's original cost estimate for the 230 kV projects substantially above what Northeast Transmission Development thought appropriate, while materially lowering the cost estimate of the 500 kV proposals. Northeast Transmission Development informed PJM that the significant reduction in the cost estimate for the 500 kV projects was unsupported, as was the significant rise in the cost estimate PJM assigned to Northeast Transmission Development's proposal. In part based on an assumption that the costs of the 500 kV and 230 kV projects were similar, PJM indicated its intent to select a 500 kV project to address the identified need and assign the project to an incumbent developer.

18. To provide the PJM Board of Managers certainty regarding the appropriate cost to use for evaluation of the Northeast Transmission Development proposal, Northeast Transmission Development addressed the situation to the PJM Board of Managers by offering a construction cost cap on its 230 kV project. The construction cost cap was \$40 million less than PJM's low end estimate for its suggested solution and more than \$80 million less than PJM's upper estimate. Northeast Transmission Development stands behind its original cost estimate of \$116.3-\$148.6 million for the 230 kV project. By offering a construction cost cap, Delaware consumers will see the benefit of the lower costs if the actual construction costs of the project come in underneath the cost

cap of \$171 million and will see the benefit of the construction cost cap if the actual construction costs of the project exceed \$171 million. The construction cost cap of \$171 million is \$71 million less than the current PSE&G cost estimate of \$242 Million for its 500 kV solution.²¹

19. As a result of Northeast Transmission Development's construction cost cap proposal, PJM issued the letter attached as Exhibit 1 to the four original finalist project sponsors. In its letter, PJM has allowed each project sponsor to supplement its proposal to provide a construction cost cap or any other cost reduction or containment commitments. As noted, the Northeast Transmission Development construction cost cap reduces the maximum rate-payer costs to at least \$40 million below PJM's lowest estimate for 4 of the 5 finalist proposals. These ratepayer savings are only applicable if Northeast Transmission Development is awarded the project proposal. If PJM determines that the 230 kV project is more efficient or cost-effective but that only an incumbent Delaware transmission owner can build and own the project under Delaware law, PJM will award the project to the incumbent transmission owner regardless of whether the incumbent will commit to the construction cost cap.

A DECLARATORY ORDER IS APPROPRIATE CONFIRMING THAT DELAWARE LAW DOES NOT PROHIBIT NORTHEAST TRANSMISSION DEVELOPMENT FROM CONSTRUCTING AND OWNING INTERSTATE TRANSMISSION IN DELAWARE

PJM's Request To Finalists

20. In a July 23, 2014 Letter to the Transmission Expansion Advisory Committee, PJM informed stakeholders that the PJM Board of Managers had decided to defer action on selecting a project to address the Artificial Island reliability needs.²² The TEAC letter indicated that it would

²¹ This construction cost cap is the first and only construction cost cap offered anywhere in the United States under FERC Order No. 1000.

²² Letter from Steve Herling to Transmission Expansion Advisory Committee attached as Exhibit 3 ("TEAC Letter").

allow finalists to modify proposals to address any cost containment proposal they wished to incorporate.

21. Notwithstanding the fact that no entity raised a concern to the PJM Board that Nonincumbent Developers were prohibited to build or own transmission in Delaware, in its letter to finalists PJM asserted the following:

it has been brought to PJM's attention that the State of Delaware public utility regulations *may* restrict the ability of a developer to site and construct new transmission if the Proposer does not currently have a service territory established in the area of their project.²³

PJM then went on to require that project sponsors for Delaware projects "provide a detailed response, including legal references, as well as confirmation from the Delaware Public Service Commission or the Office of the Delaware Attorney General regarding Proposer's legal ability to site and construct transmission in the state of Delaware consistent with its project proposal."²⁴

22. Prior to PJM's Board action, on June 2, 2014 the Commission itself filed comments with PJM regarding the respective Artificial Island proposals.²⁵ While the Chairman's Letter raised what Northeast Transmission Development believes are legitimate concerns regarding the justness and reasonableness of PJM's proposed cost allocation for the 230 kV proposals,²⁶ the Commission's correspondence did not raise any concern regarding the ability of the Nonincumbent Developers to actually build under Delaware law. Northeast Transmission Development was not surprised by this

²³ Exhibit 1 at 2 [emphasis added].

²⁴ *Id.*

²⁵ Letter from Dallas Winslow, Chairman Delaware PSC to Steve Herling, Vice President Planning at PJM ("Chairman's Letter") attached hereto as Exhibit 4.

²⁶ Although agreeing with the Chairman's Letter that cost allocation is not an appropriate determinative factor for selection of the solution to the Artificial Island reliability issue (Chairman's Letter at 1), at numerous PJM meetings Northeast Transmission Development has vocally supported the Commission concerning the unjust and unreasonable nature of the cost allocation for the 230 kV proposals. PJM announced in late August 2014 that they were changing the cost allocation of the 500 kV proposals, due to an error in the initial calculation. The practical impact is that DPL zone's potential cost allocation for the 500 kV proposals has now increased materially and dramatically to approximately 33 percent.

omission as it does not read Delaware law to provide any limitation on its ability to construct and own interstate transmission in Delaware.

Analysis Of Delaware Law Does Not Support PJM's Concern

23. In mid-June 2014, more than a year into the Artificial Island RFP process, Northeast Transmission Development learned from PJM that questions had been raised regarding the ability of Nonincumbent Developers to construct and own transmission in Delaware if they did not have an existing retail service territory. Northeast Transmission Development immediately provided PJM (with a copy to Commission Staff) with a legal analysis of Delaware law regarding the legal issue of whether Nonincumbent Developers are permitted to construct and own transmission in Delaware. Northeast Transmission Development's analysis focused on Section 203B to establish that Delaware does not preclude Nonincumbent Developer construction and ownership of transmission built to address regional needs.²⁷

24. As Northeast Transmission Development's analysis states, the first determination is whether the statute in question is ambiguous. Northeast Transmission Development does not believe that there is any ambiguity in the Delaware Code. Although it may be possible for someone to read a single phrase in 203B(g)²⁸ out of context and have that impression that the section addressed something more than **retail** service territories, a review of the entirety of Section 203B shows no intent to exclude Nonincumbent Developers from ownership of transmission in interstate commerce. Indeed, even the first sentence of 203B(g) references only the "**exclusive retail electric service territories** heretofore established by the Commission . . ."²⁹ This is not surprising as

²⁷ Northeast Transmission Development analysis is attached as Exhibit 5.

²⁸ To the extent that there is confusion, Northeast Transmission Development assumes it arises out of the inclusion of transmission in the phrase "each electric distribution company shall have the exclusive right to furnish *transmission* and distribution services to all electricity-consuming facilities located within its service territory . . ." [emphasis added]

²⁹ 26 Delaware Code § 203B(g) [emphasis added]. 203B(g) reads as follows:

deregulation in Delaware was intended to provide consumers with additional supply opportunities. The “exclusive retail service territories” established for purposes of moving supply, regardless of the provider, to consumers was intended to protect consumers from the expense of duplicative distribution and transmission (to the extent related to retail supply) infrastructure. Nothing about the service territories reflects a legislative intent to provide an exclusive right to construct and own transmission required to meet regional needs. Thus, applying generally applicable statutory construction principles, the only reading of the Delaware Code that is supportable under Delaware law is that the sole exclusive service territories in Delaware are retail service territories. Section 203B and Section 203B(g) cannot therefore be read to apply a right of first refusal to build transmission which is unrelated to any specific retail customers.

25. Delaware law holds that a “statute is ambiguous if it is susceptible of two *reasonable interpretations* or if a literal reading of its terms would lead to an unreasonable or absurd result not contemplated by the legislature.”³⁰ Although 203B(g) reserves to “each electric distribution company” the “right to furnish transmission and distribution services to all electricity-consuming facilities located within its service territory,” the Artificial Island RFP has nothing to do with providing transmission service to any “electricity-consuming facilities” in a specific retail service

(g) The exclusive retail electric service territories heretofore established by the Commission pursuant to this section shall continue as exclusive service territories for the transmission and distribution of electricity. Except as otherwise provided herein, each electric distribution company shall have the exclusive right to furnish transmission and distribution services to all electricity-consuming facilities located within its service territory and shall not furnish, make available, render or extend its transmission and distribution services to a consumer located within the service territory of another electric distribution company; provided that any electric distribution company may extend or construct its facilities in or through the service territory of another electric distribution company, if such extension or construction is necessary for such company to connect any of its facilities or to serve its customers within its own service territory. As of the implementation dates as set forth in § 1003(b)(1) and (2) of this title [repealed], there shall be no exclusive service territories for the supply of electricity, except as otherwise herein provided.

³⁰ *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)[emphasis added] (citations and internal quotation marks omitted).

territory. This very point is established by the cost allocation concerns raised in the Chairman's Letter's, where it notes that the Artificial Island RFP addressed "an operational problem in the New Jersey Transmission zone"³¹ Thus, the Artificial Island RFP addressed regional reliability concerns caused by conditions not only outside a particular Delaware retail service territory, but outside the state of Delaware as a whole, and certainly not related to service to "electricity-consuming facilities located within [a] service territory."

26. Even if Section 203B(g) could be said to be ambiguous, Delaware law would still provide that no exclusive interstate transmission territory exists that would exclude Northeast Transmission Development from Delaware. If a statute is found to be ambiguous, "then [the court] consider[s] it as a whole and ... read[s] each section in light of all the others to produce a harmonious whole."³² As Northeast Transmission Development's evaluation of the entirety of Section 203 establishes, the statute does not support an exclusive interstate transmission service territory. In this regard, each sub-section of Section 203, to the extent that it references a service territory at all, references a "retail service territory," and nothing more.

A Declaratory Order From The Commission Is Appropriate

27. As discussed above, Northeast Transmission Development has already provided PJM with its legal analysis "including legal references." By this Petition, Northeast Transmission Development requests that the Commission issue a Declaratory Order confirming that Delaware law does not restrict the ability of a developer to site and construct new interstate transmission if the Proposer does not currently have a retail service territory established in the area of its project. Northeast Transmission Development recognizes that it is an unusual request for PJM to mandate that RFP respondents obtain a Public Service Commission opinion regarding a matter of law, and

³¹ Chairman's Letter at 2.

³² *Id.*

Northeast Transmission Development would normally be reluctant to burden the Commission with such a request. However, Order No. 1000 opened transmission development to entities that have not previously been permitted to compete for regionally planned transmission in PJM, thus raising issues of first impression. Further, until addressed, the alleged uncertainty will hang over any transmission projects proposed for Delaware. Although Northeast Transmission Development believes that Delaware law creates no burden to its construction and ownership of the project it proposed, because PJM required finalists to provide the requested formal confirmation Northeast Transmission Development is concerned that without the Declaratory Order requested by this Petition, PJM will not select Northeast Transmission Development's proposal (even if it is determined to be the lowest cost alternative) or will select Northeast Transmission Development's proposal and assign it to Delmarva for construction and ownership.³³ This approach would not only deprive Northeast Transmission Development of the ability to construct and own the project it proposed, it would deprive rate-payers of the cost containment and other advantages to which Northeast Transmission Development committed.

28. Because this issue is relevant not only to the Artificial Island RFP but also to any future transmission proposals touching on Delaware, it has the potential to cause long term chilling of Nonincumbent Developer participation in projects touching on Delaware. Closing off Delaware to competition is not in the best interests of ratepayers. As the Chairman's Letter acknowledges, the cost estimate difference between the proposals submitted was well in excess of \$1 billion. The highest cost proposal was submitted by an incumbent developer. Northeast Transmission Development submitted the low cost transmission line proposal, with the second lowest being from

³³ Given that Delmarva is a subsidiary of PEPCO Holdings Inc., which has an agreement to combine with Exelon Inc. upon regulatory approval, it is unclear what benefit a right of first refusal would actually provide Delaware.

an incumbent PJM transmission owner who submitted a project outside of its traditional retail distribution service territory.

29. The type of competition reflected by the Artificial Island RFP benefits rate-payers. Without open competition, the regional transmission planning process would not have the benefit of alternative proposed solutions and projects like the Mid-Atlantic Power Pathway would be constructed and owned by incumbent transmission owners without any determination as to whether the project is the more efficient or cost-effective.

Conclusion

Based on the foregoing, Northeast Transmission Development requests that the Commission issue a Declaratory Order confirming that Delaware law does not restrict the ability of Northeast Transmission Development from siting, constructing and owning new interstate, non-retail transmission in Delaware, subject to Northeast Transmission Development obtaining any necessary approvals.

Dated: August 29, 2014

Respectfully Submitted,



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**Counsel for Northeast Transmission
Development, LLC**

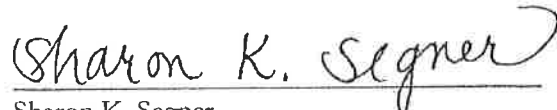
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF PETITION OF)
NORTHEAST TRANSMISSION)
DEVELOPMENT, LLC FOR)
EXPEDITED DECLARATORY ORDER)

AFFIDAVIT OF SHARON K. SEGNER


WASHINGTON)
DISTRICT OF COLUMBIA)

BE IT REMEMBERED that on this 29th day of August, 2014, personally appeared before me, a notary public for the Washington, District of Columbia, Sharon K. Segner, who being by me duly sworn, did depose and say that she is Vice President for LS Power Development, LLC (of which Northeast Transmission Development, LLC is an affiliate) and that the facts recited in the foregoing Petition for Expedited Declaratory Order are true and correct to the best of her knowledge, information and belief.


Sharon K. Segner

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

JOHANNE F. ARPIN
NOTARY PUBLIC
District of Columbia
My Commission Expires Dec. 14, 2015


Notary Public
My Commission Expires:



BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF PETITION OF)
NORTHEAST TRANSMISSION)
DEVELOPMENT, LLC FOR AN)
EXPEDITED DECLARATORY ORDER)

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2014, the Public Service Commission (the "Commission") determines and orders as follows:

WHEREAS, on August 29, 2014, Northeast Transmission Development, LLC ("Petitioner") filed a Petition for Expedited Declaratory Order confirming that neither Delaware law nor prior orders of the Commission prohibit Nonincumbent transmission providers such as the Petitioner from siting, constructing and owning electric transmissions facilities used in interstate commerce, upon receipt of necessary approvals; and

WHEREAS, PJM Interconnection L.L.C. ("PJM") is the regional transmission organization that coordinates the movement of wholesale electricity in the State of Delaware and all or parts of 12 other states and the District of Columbia; and

WHEREAS, in April, 2013, PJM issued a request for proposals pursuant to its Regional Transmission Expansion Plan for transmissions solutions to improve operational performance in the Artificial Island area; and

WHEREAS, Petitioner is a finalist sponsor of a proposed transmission project in the Artificial Island RFP; and

WHEREAS, PJM has raised a question of whether Delaware law restricts the ability of Nonincumbent transmission developers to site, construct or own new transmission facilities in this State, and directed finalists to provide confirmation from the Delaware Public Service Commission

or the Delaware Attorney General's Office by September 12, 2014, of the finalist's legal ability to site and construct transmission in the State of Delaware; and

WHEREAS, the Artificial Island RFP represents PJM's first competitive solicitation for transmission under the Federal Energy Regulatory Commission's Order 1000 requiring, subject to state law, *inter alia*, competition and coordinated regional planning in the construction of new electric transmission; and

WHEREAS, the Commission has determined, as a matter of public importance and its' exclusive original jurisdiction to regulate public utilities in the State of Delaware, that it should clarify and confirm that Delaware law does not prohibit Nonincumbent transmission developers from siting, constructing and owning in the State of Delaware electric transmission facilities used in interstate commerce, upon receipt of necessary approvals.

NOW, THEREFORE IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. The Petition of Northeast Transmission Development, LLC, for a declaratory order is hereby GRANTED. Subject to all requirements of Delaware law, including the requirement that Northeast Transmission Development, LLC obtain a Certificate of Public Convenience and Necessity from the Commission prior to beginning the business of a Public Utility in this State, nothing in Delaware law or any prior order of the Commission prohibits Northeast Transmission Development, LLC from siting, constructing and owning in the State of Delaware transmission facilities used in interstate commerce.

BY ORDER OF THE COMMISSION

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

EXHIBIT 1



2750 Monroe Boulevard
Audubon, PA 19403

Virginia Electric and Power Company
Ronnie Bailey
701 East Cary Street
Richmond, VA 23219

Transource Energy, LLC
Takis Laios
1 Riverside Plaza,
Columbus Ohio, 43215

LS Power Development, LLC
Sharon Segner
400 Chesterfield Center, Suite 110
St. Louis, MO 63017

Public Service Electric and Gas Company
Kim C. Hanemann
4000 Hadley Road
South Plainfield NJ 07080

August 12, 2014

RE: Artificial Island Supplemental Proposal Request

Project P2013_1-1A - Two (2) Thyristor Controlled Series Compensation (TCSC) Devices near New Freedom¹ (Dominion)

Proposal P2013_1-1C - Install a new 500kV line from Hope Creek - Red Lion without Salem Hope Creek 2nd Tie (Dominion)

Proposal P2013_1-2B - Two (2) 500/230 transformers near Salem and loop in Red Lion - Cartanza 230 and Red Lion - Cedar Creek 230 kV (Transource)

Proposal P2013_1-5A - New 230 kV station that taps existing Cedar Creek - Red Lion 230kV and Cartanza - Red Lion 230kV, submarine and overhead (LS Power)

Proposal P2013_1-7K New 500kV Hope Creek - Red Lion Line, without Salem-Hope Creek 2nd Tie (PSE&G)

Dear Proposer,

At the July Board meeting, the PJM Board deferred selection for the Artificial Island project solution in order to obtain additional information. PJM staff will be gathering additional information from those entities that have proposed projects that have passed the various levels of analysis undertaken by staff as laid out at the May 19 TEAC meeting. As described in the July 23rd letter to the TEAC, finalist bidders will have the opportunity to supplement their proposals.

¹ Based on Dominion's July 16th letter, PJM has determined that it would be appropriate to seek additional information as outlined above regarding the Dominion 1A project.

PJM is inviting you as a "finalist" bidder (Proposer) to submit final terms of project costs. We reiterate that cost is only one of several considerations that will be a factor in the final selection for the AI Project Proposal Window. This request is not open for Proposers to make changes to the project scope. The scope of a submission must be limited to factors that specifically address project cost. If a Proposer wishes to supplement its proposal in terms of cost, the Proposer must include sufficient detail for PJM to evaluate the details of its cost proposal, including the specific details surrounding any cost cap that a proposer wishes to submit. Submission of a cost cap is not required but if a Proposer wishes to submit a cost cap, the Proposer must be explicit in identifying the scope of the work that is included and excluded from the project cost or cost cap. Any contractual terms and conditions that would apply to the proposed project cost or cost cap must also be specified in the submission.

Each project's scope of work under consideration is that which was studied by PJM with respect to performance criteria including PJM modifications as noted on the attached diagrams and as discussed at the May 19 TEAC meeting. Any supplemental proposal must be consistent with the attached diagrams. Proposers must affirm the project schedule based on scope with PJM modifications and projected in-service date.

Further, it has been brought to PJM's attention that the State of Delaware public utility regulations may restrict the ability of a developer to site and construct new transmission in Delaware if the Proposer does not currently have a service territory as established by the state commission in the area of their project. Therefore, PJM requests that all Proposers who have submitted projects that require construction within the state of Delaware, provide a detailed response, including legal references, as well as confirmation from the Delaware Public Service Commission or the Office of the Delaware Attorney General regarding Proposer's legal ability to site and construct transmission in the State of Delaware consistent with its project proposal.

If you wish to supplement your proposal, the submission must be sent to PJM at RTEP@pjm.com no later than close of business on September 12, 2014 for consideration.

We appreciate your continued cooperation as we move forward on the Artificial Island competitive solicitation process.

Very truly yours,



Steven Herling
Vice President - Planning

Attachment

CC:

Terry Boston
Mike Kormos
Paul McGlynn
Mark Sims
Suzanne Glatz
Pauline Foley

EXHIBIT 2

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation
By Transmission Owning and Operating
Public Utilities

Docket No. RM10-23-000

REPLY COMMENTS OF LS POWER TRANSMISSION, LLC IN SUPPORT OF THE
COMMISSION'S NOTICE OF PROPOSED RULEMAKING

I. **THERE IS WIDESPREAD, NATIONAL SUPPORT AMONG STATE COMMISSIONS, PUBLIC INTEREST GROUPS, RESIDENTIAL AND INDUSTRIAL CONSUMERS OF ELECTRICITY, MAJOR TRADE ASSOCIATIONS, AND MANY OTHERS FOR ELIMINATING RIGHTS OF FIRST REFUSAL FOR INCUMBENT TRANSMISSION OWNERS**

The comments filed in the NOPR represent widespread, national support for both the removal of the ROFR and the design of the proposed reforms. This support is national in scope, representing the diverse interests of state commissions from coast to coast, both in regional transmission organizations ("RTOs") and regions that do not have RTOs. These supportive comments directly contradict the false contention by MidAmerican Energy that "there has not been an outcry among state authorities to remove the existing ROFRs; and state support is vital for the Commission's proposal to be effectively implemented."¹ As described below, the evidence is the opposite because there is a strong support among state commissions for the ROFR reforms. In addition, there is strong support from the Federal Trade Commission, public interest groups, residential and industrial customers of electricity and major trade associations.

¹ Comments of MidAmerican Energy Holdings Company, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 12 ("Mid American Comments").

A. Federal and State Commissions Support FERC'S Proposal to Remove the Right of First Refusal

Following is a selection of comments which support the removal of any federal ROFR made by state regulatory commissions, as well as the Federal Trade Commission.

Federal Trade Commission²

The FTC concurs with FERC's proposed elimination of the ROFR. Consumers benefit from market competition that often takes the form of new entry. . . . Objections to elimination of the ROFR, as described in the NOPR, do not appear to be well-founded.

Arizona Corporation Commission³

The ACC supports removal of any right of first refusal ("ROFR") that provides an incumbent public utility transmission provider with an undue advantage from FERC-approved tariffs or agreements, while preserving state authority.

² Comments of the Federal Trade Commission, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 7, 9 ("FTC Comments").

³ Arizona Corporation Commission's Comments, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 4 ("ACC Comments").

California Public Utilities Commission and California Energy Commission⁴

The CPUC and [CEC] support this proposal, with qualifications. Throughout the CAISO stakeholder process for a revised transmission planning process emphasizing policy-related transmission needs, the CPUC advocated eliminating the [ROFR] except in limited cases where such discrimination can be shown to be just and reasonable, as determined through the application of objective standards. This might include circumstances where there are valid constraints regarding a proposed project's use of an incumbent's existing facilities, or regarding maintaining timely and reliable service to load and generation customers.

California Department of Water Resources⁵

Competition among transmission providers that promotes efficiencies and innovation should be supported in regulatory policy and in transmission planning.

Connecticut Department of Public Utility Control and the Rhode Island Public Utilities Commission⁶

The CT DPUC and RI PUC support the Commission's proposal to eliminate incumbent transmission utilities right of first refusal to provide more robust opportunities for alternative and lower cost solutions to regions' transmission needs.

Massachusetts Department of Public Utilities and the Massachusetts Department of Energy Resources⁷

Massachusetts supports the Commission's proposed rule intended to eliminate any preferential treatment enjoyed by incumbent

⁴ Notice of Intervention of the Public Utilities Commission of the State of California and Joint Comments of the Public Utilities Commission and the Energy Resources Conservation and Development Commission of the State of California, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 14-15 ("CPUC and CEC Comments").

⁵ Motion to Intervene and Comments of the California Department of Water Resources State Water Project, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 5.

⁶ Notice of Intervention and Comments of the Connecticut Department of Public Utility Control and the Rhode Island Public Utilities Commission Regarding Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 3.

⁷ Comments of the Massachusetts Department of Public Utilities and the Massachusetts Department of Energy Resources, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 17-18.

transmission providers at the expense of nonincumbent transmission developers. . . . By leveling the playing field for all prospective project sponsors, the proposed rule should encourage greater participation in the planning process by independent and merchant developers. This should mean increased competition among project sponsors, resulting in the lowest cost approaches to meeting system needs, whether in the form of new transmission or non-transmission alternatives.

Public Utilities Commission of Nevada⁸

It is the PUCN's position that rules that discriminate between incumbent transmission owners and non-incumbents not only violate the principles of openness and transparency, they inhibit Nevada's policy to foster partnerships that create renewable energy investments in Nevada like the One Nevada Line ("ON Line") project that was recently approved by the PUCN.

New England States Committee on Electricity^{9, 10}

In general terms, NESCOE supports the NOPR's policy preference to eliminate undue discrimination that may exist against non-incumbent providers. NESCOE encourages the Commission to allow New England the opportunity and adequate time to sort through what issues require discussion, to identify changes that may be needed and to implement them in a way that conforms to, or at least does not adversely interfere with, the regional planning process.

New Jersey Board of Public Utilities¹¹

⁸ Comments of the Public Utilities Commission of Nevada, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 3.

⁹ The New England States Committee on Electricity ("NESCOE") is a not-for-profit organization representing the collective interests of the six New England States on regional electricity matters. It is directed by Managers appointed by the six New England Governors. See <http://www.nescoe.com>. According to the Comments of NESCOE on Notice of Proposed Rulemaking, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 1, n.1 ("NESCOE Comments"), the New England Conference of Public Utilities Commissioners ("NECPUC") has authorized NESCOE to represent that NECPUC generally concurs with its comments as well.

¹⁰ NESCOE Comments at 24.

¹¹ Comments of the New Jersey Board of Public Utilities, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 5, 6.

The NJBPU supports potential benefits, including cost savings, that may result from allowing alternative non-incumbent developers to propose alternative transmission solutions. . . . The NJBPU further supports the Commission's goal to prevent discriminatory treatment in transmission planning processes, but understands that equal rights must be followed by equal responsibilities and obligations at the federal, regional, state and local level.

Public Utilities Commission of Ohio¹²

The Ohio Commission believes that FERC's proposal to eliminate the right of first refusal of incumbent transmission providers has merit to the extent that parameters are established to ensure that ratepayers see cost savings and enhanced reliability.

Ohio Consumers' Counsel and the West Virginia Consumer Advocate Counsel¹³

To encourage competition in transmission development, the Commission should eliminate the right of first refusal that currently allows incumbent transmission owners to construct any transmission facilities in their service territory. By eliminating barriers to the participation of merchant and independent transmission developments in the planning process, the Commission can encourage additional transmission development that could be constructed at a lower cost to consumers. Thus, Joint Consumer Advocates support the Commission's proposal that would "require removal from a transmission provider's OATT or agreements subject to the Commission's jurisdiction provisions that establish a federal right of first refusal for an incumbent transmission provider."

Pennsylvania Public Utility Commission¹⁴

From a general perspective, the PAPUC contends that all proposed independent transmission projects should be treated in the same manner as part of the regional transmission planning process. . . .

¹² Comments Submitted on Behalf of the Public Utilities Commission of Ohio, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 14.

¹³ Comments of the Office of Ohio Consumers' Counsel and the West Virginia Consumer Advocate Division, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 7, 8 (citing NOPR at P 64, quoting NOPR at P 41).

¹⁴ Comments of the Pennsylvania Public Utility Commission, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 22.

In crafting rules designed to address these issues, FERC must ensure that, with respect to RTO transmission planning, there is no undue preference, explicit or implicit, for either incumbent or non-incumbent transmission providers or their affiliates. . . . In conclusion, the PAPUC supports the Commission's proposal to attempt to eliminate some of the barriers to full participation by non-incumbent developers but cautions that any changes not undercut state commission statutory obligations to ensure the obligation to serve and the need to review siting obligations.

Public Service Commission of Wisconsin¹⁵

The PSCW supports FERC's efforts to maintain RTOs in a nondiscriminatory posture with respect to merchant transmission line seeking developers to enter electric transmission markets.

Organization of MISO States ("OMS")¹⁶

OMS generally views that "transmission service" should be the focus, rather than "incumbent or non-incumbent transmission ownership." . . . "The Commission must ensure that, with respect to RTO transmission planning, there is no undue preference for incumbent or non-incumbent transmission providers or their affiliates."

B. Trade Associations, Public Interest Groups, and Residential and Industrial Consumers of Electricity Support Elimination of the ROFR

The broad and diverse support for the elimination of ROFRs is not limited to federal agencies and state commissions. The following major trade associations and major industry participants also provided strong support for elimination of ROFRs:

- American Antitrust Institute¹⁷
- American Forest and Paper Association¹⁸

¹⁵ Comments of the Public Service Commission of Wisconsin, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 6.

¹⁶ Comments of the Organization of MISO States, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 12 (citing OMS Comments filed on Nov. 23, 2009 in Docket No. AD09-8-000, at 13).

¹⁷ Comments of American Antitrust Institute, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 4, 5 ("AAI supports the Commission's proposal to eliminate the [right of first refusal] from the OATT. Anything short of removing the RFF provision- such as exercising the right within a limited time frame, as has been suggested by some commenters-does little to dismantle the entry barrier.") (citations omitted).

- American Wind Energy Association¹⁹
- Electricity Consumers Resource Council, American Chemistry Council, Association of Businesses Advocating Tariff Equity, Carolina Utility Customers Association, Coalition of Midwest Transmission Customers, Florida Industrial Power Users Group, Georgia Industrial Group-Electric, Industrial Energy Users-Ohio, Oklahoma Industrial Energy Consumers, PJM Industrial Customer Coalition, West Virginia Energy Users Group and Wisconsin Industrial Energy Group²⁰
- Project for Sustainable FERC Policy, on behalf of Alliance for Clean Energy New York, Citizens Utility Board of Wisconsin, Climate and Energy Project, Conservation Law Foundation, Earthjustice, Environment Northeast, Environmental Defense Fund, Environmental Law & Policy Center, Fresh Energy, Great Plains Institute, Institute for Market Transformation, Iowa Environmental Council, Land Trust Alliance, National Audubon Society, Natural Resources Defense Council, Pennsylvania Land Trust Alliance, Nevada Wilderness Project, NW Energy Coalition, Pace Energy and Climate Center, Piedmont Environmental Council, Sierra Club, Southern Alliance for Clean Energy, The Wilderness Society, Union of Concerned Scientists, and Western Grid Group²¹
- Sonoran Institute²²
- Wind Coalition²³

¹⁸ Comments of American Forest & Paper Association, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 2, 4 (“AFP&A’s members are among the nation’s largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. . . . AFP&A supports the elimination of the right of first refusal from the Open Access Transmission Tariff as proposed by the Rule.”).

¹⁹ Comments of American Wind Energy Association, *et al.*, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 29-30 (“AWEA [] fully supports the Commission’s call for the elimination of rules, like the ROFR, that have the potential to unduly discriminate between incumbent and non-incumbent transmission developers. . . . The sponsorship framework outlined in paragraphs 87 through 101 of the NOPR are a reasonable first step toward eliminating the potential for discrimination.”).

²⁰ Comments of ELCON and the Associated Industrial Groups, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 7, 25, 26 (“ELCON and the Associated Industrial Groups largely support the NOPR’s proposed elimination of the [ROFR] for incumbent transmission development projects.”).

²¹ Joint Comments of Public Interest Organizations, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 12-13.

²² Comments of Sonoran Institute, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 1.

²³ Comments of the Wind Coalition, RM10-23-000 (filed Sep. 29, 2010), at 14 (“The Wind Coalition asserts that the Federal Power Act should prohibit discrimination against those entities wishing to compete to build transmission resources. Discrimination against or in favor of transmission companies based on their status as an incumbent alone, should not be allowed.”).

C. Several Generators, Power Marketers and Pipeline Company Filed Comments Supportive of Elimination of a Federal ROFR for Transmission

The following generators, generator trade associations, power marketers and pipeline company filed comments which were supportive of the Commissions proposal to eliminate ROFRs from Commission approved tariffs.

- Colorado Independent Energy Association²⁴
- DC Energy, LLC
- Direct Energy Services, LLC, Direct Energy Business, LLC, and Energy America LLC
- Enbridge Inc.
- First Wind Energy, L.L.C.²⁵
- Horizon Wind Energy²⁶
- Invenergy Wind Development LLC²⁷
- Northwest & Intermountain Power Producers Coalition²⁸
- NRG Companies
- Powerex Corporation

D. Non-Incumbent Transmission Developers Support the Elimination of Rights of First Refusal

It should not be a surprise that many non-incumbent transmission developers, who are disadvantaged from ROFRs, filed comments supportive of their elimination:

- Anbaric Holdings, LLC and Powerbridge, LLC
- Clean Line Energy Partners, LLC
- EIF Management, LLC
- Green Energy Express and 21st Century Transmission Holdings
- LSP Transmission
- Nevada Hydro Company, LLC

²⁴ Comments of the Colorado Independent Energy Association, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 3, 7-8.

²⁵ Comments of First Wind Energy, L.L.C., Docket No. RM10-23-000 (filed Sep. 29, 2010), at 8-10.

²⁶ Motion to Intervene and Comments of Horizon Wind Energy, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 2.

²⁷ Comments of Invenergy Wind Development LLC, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 2.

²⁸ Comments of Northwest & Intermountain Power Producers Coalition, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 2-9 ("NIPPC Comments").

- Pattern Transmission, LP
- Western Independent Transmission Group

E. Even Some Incumbent Transmission Owners Support FERC's Proposal to Eliminate Rights of First Refusal

Lastly, while it is not surprising that opponents to the Commission's ROFR reforms are comprised almost entirely of the incumbent transmission owners that benefit from retention of ROFRs and other prohibitions on competitive transmission suppliers, it is important to note that incumbent utilities do not speak with one voice. Even within the diverse utility industry, support for the removal of the right of first refusal came from key national leaders in the utility industry:

- NextEra Energy, Inc.²⁹
- Transmission Access Policy Study Group³⁰
- New York Independent System Operator³¹
- Duke Energy Corporation³²
- Exelon Corporation³³

²⁹ Comments of NextEra Energy, Inc., Docket No. RM10-23-000 (filed Sep. 29, 2010), at 5, 16 ("NextEra agrees that the federal ROFR provisions that may cause discrimination among transmission developers should be eliminated. . . . It is not reasonable to allow an incumbent transmission owner to exercise a ROFR to snatch away projects that new entrants conceived of and developed through the transmission planning process. Whether that ROFR is exercised as within 90 days (as suggested by some parties as some sort of compromise) or later makes no difference as to the fundamental unfairness of allowing this practice.") ("NextEra Comments").

³⁰ Comments of Transmission Access Policy Study Group, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 60 ("TAPS supports limiting the TO's ROFR in Commission-jurisdictional tariffs.") ("TAPS Comments").

³¹ Comments of the New York Independent System Operator, Inc., Docket No. RM10-23-000 (filed Sep. 29, 2010), at 16-19.

³² Comments of Duke Energy Corporation, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 15 ("Duke supports a policy that allows any party proposing a regional or inter-regional transmission project that ultimately is approved as part of a regional transmission expansion plan to construct and own the transmission project, and to receive a regulated return on the investment subject to the applicable regional cost allocation.") ("Duke Comments").

³³ Comments of Exelon Corporation, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 31 ("Exelon Comments") ("Exelon supports the Commission's proposal of permitting qualified non-incumbent developers to construct, own, and receive cost recovery of facilities selected in a regional transmission planning process. However, Exelon believes the Commission should not apply that new

(footnote continued)

- Transmission Dependent Utility Systems (Arkansas Electric Cooperative Corporation, Golden Spread Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., North Carolina Electric Membership Corporation, and Seminole Electric Cooperative, Inc.)³⁴
- Old Dominion Electric Cooperative³⁵
- Northern California Power Agency³⁶
- California Municipal Utilities Association³⁷
- Transmission Agency of Northern California³⁸
- Eastern Massachusetts Consumer-Owned Systems³⁹
- Large Public Power Council⁴⁰
- Modesto Irrigation District⁴¹

policy to transmission upgrades required to meet NERC and local reliability standards in a single transmission zone.”).

³⁴ Comments of the Transmission Dependent Utility Systems on Notice of Proposed Rulemaking, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 34 (“TDU Systems therefore support the Commission’s proposed reforms to promote the participation of non-incumbent transmission providers within the parameters of existing regional transmission planning processes.”).

³⁵ Comments of Old Dominion Electric Cooperative, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 5 (“ODEC generally agrees with the Commission’s proposal to ensure that non-incumbent and incumbent transmission owners have similar rights and responsibilities in transmission planning.”).

³⁶ Comments of the Northern California Power Agency, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 8 (“NCPA supports the principle that any entity – whether it is an investor owned utility, municipal entity, or independent developer – should have the right to propose, construct and own transmission projects.”).

³⁷ Initial Comments of the California Municipal Utilities Association, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 3, 16-17.

³⁸ Comments of the Transmission Agency of Northern California, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 12-16.

³⁹ Initial Rulemaking Comments of Eastern Massachusetts Consumer-Owned Systems, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 7-9 (“EMCOS support the Commission’s proposals to (1) eliminate rights of first refusal provided to incumbent transmission owners in Commission-jurisdictional agreements; and (2) require that a regional revenue requirement to support transmission projects that originate in a regional planning process but that are developed by nonincumbents.”).

⁴⁰ Comments of the Large Public Power Council at 22-23 (“LPPC does not generally object to FERC’s proposed tariff revisions specifying the terms under which non-incumbent transmission developers will participate in the planning process. The effort to specify procedures for ensuring that non-incumbent transmission developer proposals may be evaluated, and the developers’ fitness to complete projects determined, is generally sensible.”) (citation omitted).

⁴¹ Comments of the Modesto Irrigation District, Docket No. RM10-23-000 (filed Sep. 29, 2010), at 4-5.

Accordingly, on balance, the Commission's proposed ROFR reforms have received an overwhelmingly strong response from state agencies and industry participants, with the exception of certain incumbent transmission owners who object largely on the basis of non policy-driven, commercial self-interests.

EXHIBIT 3



2750 Monroe Blvd
Audubon, PA 19403-2497

Steven R. Herling
Vice President - Planning

July 23, 2014

Dear TEAC Members:

The PJM Board of Managers has evaluated more than 25 proposals to resolve grid stability problems in the area known as Artificial Island, including a proposal recommended by PJM staff. The Board has received a wide range of comments from interested stakeholders including issues related to electrical performance, environmental impact and cost allocation. In addition, LS Power has modified its proposal to place a fixed cap on the costs associated with the project.

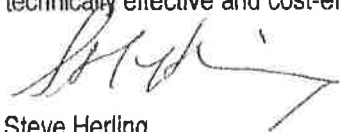
The Board appreciates the analyses and comments submitted by various stakeholders through an entirely new competitive process guided by FERC Order 1000. To ensure a thorough and fair review, given the complexities of the issues, the Board has determined that it will take the matter under advisement and defer a selection at this time. To further inform the Board, PJM staff will be undertaking the following supplemental steps:

1. PJM will review, in an open stakeholder session with the Transmission Expansion Advisory Committee, our response to the specific issues raised in the letters submitted to us. We will review how issues raised in letters submitted to the Board were initially addressed and will note any issues that require further analysis. Finally we will present the rationale behind the Board's decision to defer a selection at this time;
2. As noted, LS Power has submitted a fixed cost cap on its proposal as part of its letter of July 8, 2014. While we will be working on changes in our process to ensure that any future proposals are presented to PJM in a more timely fashion, the Board feels it appropriate to allow the four "finalist" bidders to have the opportunity to supplement their proposals in light of LS Power's proposal. (Those bidders are Public Service Electric and Gas, Transource Energy, LS Power and Dominion.) The project costs included in any such supplemental proposals to PJM will be factors considered in the final selection for an Artificial Island solution. However, the Board has reiterated that cost is only one of several considerations that will drive a final decision.

3. PJM will be reaching out to the Nuclear Regulatory Commission to discuss technical issues associated with certain proposals impacting nuclear switchyards.

4. In order to ensure fairness and transparency, and to enable necessary discussions with any of the qualifying entities wishing to supplement their proposal, PJM is exploring ways to enhance our process. Additional information will be provided once we examine any submittals we receive.

The Board appreciates stakeholders' patience during this process. Order 1000, which guided our competitive bidding initiative on this project, has created entirely new processes which are especially challenging when evaluating transmission solutions as complex as those required for the Artificial Island stability issues. For these reasons, the Board is outlining these additional steps to ensure that the most technically effective and cost-efficient proposal to solve the Artificial Island stability issues is selected.



Steve Herling

EXHIBIT 4



STATE OF DELAWARE
THE PUBLIC SERVICE COMMISSION
861 SILVER LAKE BLVD
CANNON BUILDING, SUITE 100
Dover, Delaware 19904

TELEPHONE: (302) 736-7529
FAX: (302) 739-4849

June 2, 2014

VIA ELECTRONIC DELIVERY

Mr. Steven Herling
Vice President – Planning
PJM Interconnection
PO Box 1525
Southeastern, PA 19399-1525

Re: **COMMENTS OF DELAWARE PUBLIC SERVICE COMMISSION
REGARDING TRANSMISSION EXPANSION ADVISORY COMMITTEE
CONSIDERATION OF ARTIFICIAL ISLAND PROPOSALS**

Dear Mr. Herling,

As requested at the Monday, May 19th Special TEAC meeting, the Delaware Public Service Commission (“Delaware PSC”) hereby submits these comments regarding consideration of the proposals to resolve the stability issues identified to provide for maximum power generation from Artificial Island (“AI”). The Delaware PSC recognizes, and appreciates, that ultimate decisions by the PJM Board regarding AI will be predominantly based on appropriate engineering requirements. As discussed further below, however, there are significant concerns with the potential cost allocation impacts illustrated at recent Transmission Expansion Advisory Committee (“TEAC”) meetings.

In response to the Regional Transmission Expansion Plan proposal window initiated by PJM to address the AI stability issues on April 29, 2013, there were 26 proposed solutions submitted and evaluated by the TEAC. There was a range of costs from \$100 million to \$1.550 billion and included 500kV and 230kV transmission facilities as well as new transformation, substations, and additional circuit breakers. The proposals provided a diversity of station connections, a variety of routing options, project risks, resource requirements, and timelines. The Delaware PSC Staff monitored the TEAC meetings and certainly appreciates the complexity required in the evaluation to reduce the proposals to the 12 Southern Crossing and Red Lion Lines.

In response to a request from the Delaware PSC Staff, at the May 8, 2014 TEAC meeting PJM provided examples of cost responsibility for a Load Ratio Share and a DFAX allocation. As shown on slide 37 of that presentation¹ for a 500kV facility, Delmarva Power & Light Company (“Delmarva”) was responsible for approximately 4.5% of the cost. The major responsibilities for the DFAX

¹“May 8 TEAC presentation” <http://www.pjm.com/~media/committees-groups/committees/teac/20140508/20140508-item-01-reliability-analysis-update.ashx>

Mr. Steve Herling
June 2, 2013
Delaware Public Service Commission Comments

allocation of a 500kV facility were AEC at approximately 38% and JCPL at approximately 51%. While the Delaware PSC takes no position at this time on the DFAX percentages shown in the example, the responsibilities appear logical in that cost responsibility is shared mainly among the entities in the New Jersey and Delaware transmission zones.

On the other hand, the cost allocation example for a 230kV facility displayed neither logic nor fairness. As shown on slide 38 of the May 8 TEAC presentation, Delmarva would be assigned 100% of the cost for such a facility. It is not clear to the Delaware PSC why such a dramatic difference could occur in a DFAX allocation between a 500kV and 230kV facility where the benefit of the project to alleviate an operational problem in the New Jersey transmission zone is the same, however, the cost responsibility is assigned solely to the Delaware transmission zone.

The Delaware PSC Staff estimates that the cost impact between the two allocation methodologies could be significant to Delaware ratepayers and (depending on the project selected) could range upwards of a 20% increase in Annual Transmission Revenue Requirements. Given the lack of clarity and cost impact, the Delaware PSC would request PJM to provide additional information in order to assist in the evaluation and assessment of a PJM Board decision regarding AI.

The Delaware PSC would request the following information from PJM:

1. Describe the difference between the DFAX Allocation for a 500kV facility versus a 230kV facility as illustrated for the AI projects.
2. Explain how a transmission project to alleviate an operational issue in one transmission zone could be solely the cost responsibility of a different transmission zone.
3. Provide any other examples in PJM's transmission planning where the cost for a project, or facility, to resolve a reliability and/or operational issue in a transmission zone was entirely assigned to another transmission zone(s)

It would be appreciated if the above information could be provided to the Delaware PSC on or before the June 16, 2014 scheduled TEAC meeting in order to allow for comments, if necessary, prior to the PJM Board meeting scheduled for July 22 on this issue.

Please feel free to contact me or Mr. Robert Howatt our Executive Director, should you have any questions, or if I can be of further assistance in this matter.

Sincerely,

/s/ Dallas Winslow

Chairman

Delaware Public Service Commission

Copies:
Commissioners, Delaware Public Service Commission
Mr. Robert Howatt, Executive Director, Delaware Public Service Commission
Ms. Janis Dillard, Deputy Director, Delaware Public Service Commission
Mr. Craig Glazer, Vice President-Federal Government Policy, PJM

EXHIBIT 5

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June 13, 2014

Via E-Mail

Sharon K. Segner
Vice President
LS Power Development, LLC
400 Chesterfield Center, Suite 110
St. Louis, MO 63017

Re: House Bill 387

Dear Ms. Segner:

This firm is Delaware counsel to LS Power Development, LLC ("LS Power"). On behalf of LS Power, you have asked us to review House Bill 387 recently introduced into the Delaware General Assembly in conjunction with the memorandum of law issued today by Squire Patton Boggs (the "SPB Memo"). The purpose of your request is to obtain our view, as Delaware counsel, with respect to whether the SPB Memo accurately characterizes the state of Delaware law on the question of whether legislation is required to allow LS Power or any affiliates to engage in the construction and operation of transmission lines as contemplated by the Artificial Island RFP. We understand that the Artificial Island RFP contemplates the construction and operation of multistate transmission lines designed to enhance regional reliability, and that it does not involve the supply of electric service to retail customers.

The SPB Memo analyzes relevant Delaware law and opines that § 203B does not restrict independent electric transmission companies that are not providing retail electric service, and it concludes that HB 387 is not needed. We have reviewed relevant Delaware law and the SPB Memo, and we concur with the analysis and conclusions set forth therein. Specifically, we agree that the provisions of 26 *Del. C.* § 203B apply only to providers of retail electric service, and therefore do not apply to activities contemplated by the Artificial Island RFP.

Sharon K. Segner
June 13, 2014
Page 2

Please contact me if you have questions or need additional information.

Very truly yours,

A handwritten signature in black ink, appearing to be 'MWT', followed by a long horizontal line extending to the right.

MICHAEL W. TEICHMAN

MWT:bfd

cc: F. Michael Parkowski, Esquire
Christine P. Schiltz, Esquire
Elio Battista, Esquire
Michael R. Engleman, Esquire

Memo

Michael R. Engleman
T 202.457.6027
michael.Engleman@squirepb.com

To: Sharon Segner
From: Michael R. Engleman
Date: June 13, 2014
Subject: Analysis of Delaware Statutes Regarding Their Application to Independent Transmission Development (1)

Legislation has been introduced in Delaware to clarify language in Section 203B(g), Title 26 of the Delaware Code, regarding the scope of retail electric service territories. Reading the statutory provision as a whole, as Delaware law requires, it is clear that there is no ambiguity as the statutory provision was not intended to create exclusive service territories for transmission development in Delaware, only exclusive retail service territories. The statutory provisions creating exclusive retail territories do not apply to restrict the developer of projects approved by PJM to address regional transmission needs.

Delaware law on statutory construction is well settled.

First, [the court] must determine whether the statute is ambiguous. If it is unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls. The statute is ambiguous if it is susceptible of two reasonable interpretations or if a literal reading of its terms would lead to an unreasonable or absurd result not contemplated by the legislature. If the statute is ambiguous, then [the court] consider[s] it as a whole and ... read[s] each section in light of all the others to produce a harmonious whole. CML V, LLC v. Bax, 28 A.3d 1037, 1041 (Del. 2011) (citations and internal quotation marks omitted).

Further, the Delaware Legislature itself has instructed that, for the purposes of interpreting its statutes, "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." 1 Del. C. § 303. Applying these principles to Title 26 indicates that Section 203B is intended to restrict activities related to retail service, nothing else.

Section 203 is in Chapter 1, Public Service Commission, Subchapter II. Jurisdiction and

(1) Author Not Admitted in Delaware

44 Offices in 21 Countries

Squire Patton Boggs (US) LLP is part of the international legal practice Squire Patton Boggs which operates worldwide through a number of separate legal entities.

Powers. The Subchapter addresses the Commission's jurisdiction, or lack of jurisdiction, over various activities. Section 202 titled "Limitations on jurisdiction of Commission" addresses a restriction on jurisdiction on municipally-owned utilities but in referring to Section 203B provides a useful preliminary indication of the scope of that section. Subsection (a) of Section 202 provides: "Except insofar as may be necessary to implement §§ 203A and 203B of this title **regarding the establishment and administration of retail electric service territories . . .**" [emphasis added] While this reference is not dispositive because Section 203A covers more than just "establishment and administration of retail electric service territories" it supplies context for in reading "each section in light of all the others to produce a harmonious whole." (CML V, LLC v Bax).

Likewise, Section 203B itself must be read as a whole, and not just with reference to Subsection (g). Section 203 B is titled "Service territories for electric utilities" but the very first sentence of Section 203B (a) provides "(a) Subject to the provisions of § 202 of this title, the Commission shall, upon notice and after hearing, establish boundaries throughout the State within which public utilities providing retail electric service shall have the obligation and authority to **provide retail electric service.**" Subsection (b) details how the Commission should establish the retail boundaries. Subsection (d) grandfathered and retail customer who "was receiving retail electric service from a public utility other than the public utility within whose service territory such customer is located. . . ." Subsection (e) addresses inadequate service to such retail customers." Subsection (f) provides that "After the establishment of retail electric service territories under this section, 2 or more public utilities subject to Commission jurisdiction may from time to time hereafter apply to the Commission for adjustment of their adjoining retail electric service territories. . . ." And (g) provides "the **exclusive retail electric service territories** heretofore established by the Commission pursuant to this section shall continue as exclusive service territories for the transmission and distribution of electricity." [emphasis added] The remainder of Section 203(g) provides additional context and confirms that the reference to "transmission" was in the context of serving specific retail customers.

Except as otherwise provided herein, each electric distribution company shall have the **exclusive right to furnish** transmission and distribution services **located within its service territory to all electricity-consuming facilities and shall not furnish**, make available, render or extend its transmission and distribution services to a consumer located within the service territory of another electric distribution company; provided that any electric distribution company may extend or construct its facilities in or through the service territory of another electric distribution company, if such extension or construction is necessary for such company to connect any of its facilities or to serve its customers within its own service territory. As of the implementation dates as set forth in § 1003(b)(1) and (2) of this title [repealed], there shall be no exclusive service territories for the supply of electricity, except as otherwise herein provided. [emphasis added].

The provision makes it clear that the territory defined is a retail territory. The provision further establishes that the "transmission" referenced is transmission related only to that retail service as a retail entity can put transmission in another's service territory if "such extension or construction is necessary for such company to connect any of its facilities or to serve its customers within its own service territory." Thus, the territory is not "exclusive" as to

transmission, even among retail providers. This language clearly suggests that if a transmission project is not to service the specific retail customers in the exclusive territory, there is NO restriction on the entity that may develop it.

Finally, subsection (c) does not reference retail service territories but confirms that the references in 203B (g) regarding transmission were only relevant to supplying the retail customers because the statute notes that transmission assets are not relevant to determining the retail boundary. The provision states "In acting under subsection (b) of this section, the Commission shall give no consideration to the location or existence of transmission facilities."

Based on the foregoing and applying Delaware law regarding statutory construction, the provisions of Section 203B cannot be read to apply a right of first refusal to build transmission which is unrelated to any specific retail customers. In the context of the Artificial Island RFP, the need being addressed is a regional reliability need, caused in part by conditions not only outside a particular Delaware retail service territory, but outside the state of Delaware as a whole. No fair reading of the statutory provisions indicates an intent to mandate an exclusive territory to build the Delaware portions of a multi-state project selected in a regional transmission plan addressing FERC jurisdictional transmission in interstate commerce.

MRE

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF PETITION OF)
NORTHEAST TRANSMISSION)
DEVELOPMENT, LLC FOR AN)
EXPEDITED DECLARATORY ORDER)

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2014, I served a true and correct copy of the attached Petition for Expedited Declaratory Order upon the individual(s) listed below by first class mail, postage prepaid.

To: David L. Bonar
Public Advocate
Division of the Public Advocate
820 N. French Street, 4th Floor
Wilmington, DE 19801


PARKOWSKI, GUERKE & SWAYZE, P.A.

JAMES D. NUTTER, ESQUIRE
Del. Bar I.D. No. 3654
116 W. Water Street
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DATED: August 29, 2014