

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

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| New York Independent System Operator, Inc. | ) |                         |
|  | ) | Docket No. ER13-102-007 |
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**REQUEST FOR LEAVE TO ANSWER AND ANSWER OF  
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

Pursuant to Rule 213 of the Commission’s<sup>1</sup> Rules of Practice and Procedure,<sup>2</sup> the New York Independent System Operator, Inc. (“NYISO”) respectfully submits this request for leave to answer and answer (“Answer”). The Answer responds to the protests of LS Power<sup>3</sup> and NextEra<sup>4</sup> (“Protests”) concerning the NYISO’s and the New York Transmission Owners’ joint May 18, 2015, supplemental compliance filing in this proceeding (“Compliance Filing”).<sup>5</sup> That filing included a *pro forma* Development Agreement in Attachment Y of the NYISO Open Access Transmission Tariff (“OATT”) between the NYISO and the Developer of an alternative

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<sup>1</sup> Capitalized terms not defined in this Answer shall have the meaning set forth in the Development Agreement filed in the Compliance Filing, Section 31.1.1 of Attachment Y of the NYISO Open Access Transmission Tariff (“OATT”), or in Section 1 of the OATT.

<sup>2</sup> 18 C.F.R. § 385.213 (2014).

<sup>3</sup> *New York Independent System Operator, Inc. and New York Transmission Owners*, Protest of LS Power Transmission LLC and LSP Transmission Holdings, LLC, Docket No. ER13-102-007 (June 8, 2015) (“LS Power Protest”). In this Answer, “LS Power” refers to LS Power Transmission, LLC and LSP Transmission Holdings, LLC.

<sup>4</sup> *New York Independent System Operator, Inc. and New York Transmission Owners*, Protest of NextEra Energy Resources, LLC, Docket No. ER13-102-007 (June 8, 2015) (“NextEra Protest”). In this Answer, “NextEra” refers to NextEra Energy Resources, LLC.

<sup>5</sup> *New York Independent System Operator, Inc. and New York Transmission Owners*, Compliance Filing, Docket No. ER13-102-007 (May 18, 2015) (“May 2015 Compliance Filing”). The NYISO jointly filed its May 2015 Compliance Filing with the New York Transmission Owners, which include Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company d/b/a LIPA, New York Power Authority, New York State Electric & Gas Corp., Niagara Mohawk Power Corp. d/b/a National Grid, Rochester Gas & Electric Corp., and Orange & Rockland Utilities, Inc.

regulated transmission project selected in the NYISO's reliability planning process as the more efficient or cost-effective solution to an identified Reliability Need ("Development Agreement").

The Commission should reject the Protests in their entirety as they: (i) raise issues beyond the scope of this proceeding, (ii) impermissibly collaterally attack issues that the Commission has already resolved, and (iii) propose changes to the Development Agreement that, if adopted, would diminish the effectiveness of the agreement and impede the NYISO's ability to take the actions required to maintain the reliability of the New York State Transmission System. The Commission should, therefore, accept the Compliance Filing without modification, and find that the NYISO and New York Transmission Owners (collectively, the "Filing Parties") have fully complied with the requirements of Order No. 1000 and the Commission's directives in the April 16, 2015 order in this proceeding ("April 2015 Order").<sup>6</sup>

### **I. REQUEST FOR LEAVE TO ANSWER**

The Commission has discretion to, and routinely accepts, answers to protests where, as here, they help to clarify complex issues, provide additional information, are otherwise helpful in the development of the record in a proceeding, or assist in the decision-making process.<sup>7</sup> The NYISO's Answer to LS Power's and NextEra's Protests satisfies those standards and should be accepted because it addresses inaccurate or misleading statements, and provides additional information that will help the Commission fully evaluate the arguments in this proceeding.

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<sup>6</sup> *New York Independent System Operator, Inc.*, Order on Rehearing and Compliance, 151 FERC ¶ 61,040 (2015) ("April 2015 Order").

<sup>7</sup> See, e.g., *Southern California Edison Co.*, 135 FERC ¶ 61,093 at P 16 (2011) (accepting answers to protests "because those answers provided information that assisted [the Commission] in [its] decision-making process"); *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 at P 24 (2011) (accepting the answers to protests and answers because they provided information that aided the Commission in better understanding the matters at issue in the proceeding); *New York Independent System Operator, Inc.*, 140 FERC ¶ 61,160 at P 13 (2012) and *PJM Interconnection, LLC*, 132 FERC ¶ 61,217 at P 9 (2010) (accepting answers to answers and protests because they assisted in the Commission's decision-making process).

## **II. BACKGROUND**

In response to the Order No. 1000 regional transmission planning and cost allocation directives,<sup>8</sup> the Filing Parties have submitted compliance filings to revise the NYISO's tariff requirements for its Comprehensive System Planning Process ("CSPP"), which is composed of the NYISO's reliability, economic, and public policy planning processes.<sup>9</sup> The Commission has largely accepted the NYISO's revised CSPP as compliant with the Order No. 1000 requirements.<sup>10</sup> In response to the limited directives in the Commission's April 2015 Order, the Filing Parties submitted in the Compliance Filing a small number of additional tariff revisions to Attachment Y of the OATT and included a *pro forma* Development Agreement in Appendix C in Section 31.7 of Attachment Y.

## **III. ANSWER**

### **A. The Commission Should Reject As Beyond the Scope of this Proceeding LS Power's Requested Directive to Expand the Application of the Development Agreement.**

The Commission should reject LS Power's argument that the incumbent Responsible Transmission Owner<sup>11</sup> must be required to execute the Development Agreement if its regulated

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<sup>8</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"). For convenience, unless otherwise specified, references in this filing to "Order No. 1000" should be understood to encompass Order Nos. 1000, 1000-A, and 1000-B.

<sup>9</sup> See *New York Independent System Operator, Inc. and New York Transmission Owners*, Compliance Filing, Docket No. ER13-102-001, -002, -004 (September 15, 2014); *New York Independent System Operator, Inc. and New York Transmission Owners*, Compliance Filing, Docket No. ER13-102-002 (October 15, 2013) ("October 2013 Filing"); *New York Independent System Operator, Inc. and New York Transmission Owners*, Compliance Filing, Docket No. ER13-102-000 (October 11, 2012).

<sup>10</sup> See April 2015 Order; *New York Independent System Operator, Inc.*, Order on Rehearing and Compliance, 148 FERC ¶ 61,044 (2014) ("July 2014 Order"); *New York Independent System Operator, Inc.*, Order on Compliance Filing, 143 FERC ¶ 61,059 (2013).

<sup>11</sup> A Responsible Transmission Owner is a Transmission Owner designated by the NYISO to plan and, if necessary, implement a regulated backstop solution to maintain system reliability, pursuant to the terms of the NYISO/TO Reliability Agreement. It should be noted that the LS Power protest sometimes

backstop solution is selected by the NYISO as the more efficient or cost-effective transmission solution in the NYISO's reliability planning process.<sup>12</sup> LS Power's request is beyond the scope of the Commission's directives in its April 2015 Order. That order required the Filing Parties to file the *pro forma* Development Agreement proposed by the Filing Parties, referencing the requirements set forth in Section 31.2.8.1.6 of Attachment Y,<sup>13</sup> which provided that:

If the selected regulated solution is an alternative regulated transmission solution, the Other Developer or Transmission Owner that proposed the selected alternative regulated solution shall . . . (i) execute an agreement with the ISO committing the Other Developer or Transmission Owner to seek all necessary approvals required for its proposed project, to develop and construct its proposed project if approvals are received, and to abide by the related requirements set forth in Attachment Y of the ISO OATT, the ISO Tariffs, and ISO Procedures, and (ii) provide construction milestones necessary to develop and construct its proposed project to achieve the required in-service date, including milestone dates for obtaining all necessary approvals. . . .<sup>14</sup>

The Filing Parties, therefore, have filed a *pro forma* Development Agreement consistent with the requirements of Section 31.2.8.1.6. The Development Agreement applies equally to an incumbent Transmission Owner and a non-incumbent Other Developer that proposes a selected alternative regulated transmission solution. The NYISO's tariffs, however, do not require, and the Commission did not direct the Filing Parties to require, that the Responsible Transmission Owner of a regulated backstop solution execute the Development Agreement for obligations

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uses the terms "existing transmission owners," "incumbent transmission owners," or "incumbent transmission developers," when the reference is applicable only to a Responsible Transmission Owner. Similarly, the LS Power protest refers to "regulated" projects as contrasted with "alternate" projects. However, under the NYISO's tariff both a regulated backstop solution and a selected alternative regulated transmission solution are entitled to full cost recovery on a regulated basis.

<sup>12</sup> LS Power Protest at pp 3-6.

<sup>13</sup> April 2015 Order at P 23 (referencing the development agreement proposed by the Filing Parties and citing in footnote 51 to Section 31.2.8.1.6, which provision requires a development agreement between the NYISO and the Developer of an alternative regulated transmission project).

<sup>14</sup> The language of Section 31.2.8.1.6 was modified in the May 2015 Compliance Filing to replace this existing language with the instructions for the Developer of an alternative regulated transmission solution to execute the Development Agreement. The substance of the provision was incorporated into the *pro forma* Development Agreement, which is included in Appendix C of Section 31.7 of Attachment Y.

already covered by the Commission-approved *Agreement Between the New York Independent System Operator, Inc. and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs* (“ISO/TO Reliability Agreement”), executed in June 2010.

As previously described by the Filing Parties, the purpose of the Development Agreement is to memorialize the obligation of the Developer of an alternative regulated transmission solution selected in the NYISO’s reliability planning process to complete its project in time to satisfy a Reliability Need on the New York State Transmission System – regardless of whether the Developer is an incumbent Transmission Owner or a non-incumbent Other Developer.<sup>15</sup> The agreement was required for such Developer because it is not subject to the contractual and legal obligations applicable to the Responsible Transmission Owner to ensure that a Reliability Need is satisfied. By contrast, a Responsible Transmission Owner is already obligated to develop and construct a regulated backstop solution under the ISO/TO Reliability Agreement.<sup>16</sup> Nothing in Order No. 1000 or any of the Commission’s compliance orders on the NYISO’s regional transmission planning process required the NYISO to amend the existing ISO/TO Reliability Agreement providing for a regulated backstop solution to maintain reliability.<sup>17</sup>

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<sup>15</sup> October 2013 Filing at p 27.

<sup>16</sup> The ISO/TO Reliability Agreement is available at:  
[http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/Comprehensive\\_Planning\\_Process\\_for\\_Reliability\\_Needs\\_Agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/Comprehensive_Planning_Process_for_Reliability_Needs_Agreement.pdf).

Notwithstanding LS Power’s labeling of the ISO/TO Reliability Agreement as the “Incumbent TO Developer Agreement,” the ISO/TO Reliability Agreement only applies to the Responsible Transmission Owner that is obligated to develop and construct a regulated backstop solution. All other incumbent Transmission Owners would have to propose a transmission project as an alternative regulated transmission solution and, if the project were selected, would have to execute the Development Agreement.

<sup>17</sup> The Commission has accepted the regulated backstop solution process as not inconsistent with Order No. 1000. See July 2014 Order at PP 72-74.

The distinction between the contractual obligations to develop a mandatory regulated backstop solution versus developing an alternative regulated transmission solution on a voluntary basis is not unduly discriminatory. The contractual obligations under the ISO/TO Reliability Agreement appropriately reflect and build upon the obligations of a Responsible Transmission Owner as an electric corporation under New York law to provide safe and adequate electric service, build power lines and other improvements, and provide electric service.<sup>18</sup> Unlike the Responsible Transmission Owner, a Developer that has voluntarily proposed an alternative regulated transmission solution may decide not to complete its selected project, leaving the responsibility and cost of addressing the Reliability Need to the incumbent Responsible Transmission Owner(s).<sup>19</sup> By comparison, in the event that an incumbent Responsible Transmission Owner could not timely complete its regulated backstop solution for any reason, the Responsible Transmission Owner would remain obligated both under the NYISO tariffs and under New York law to address the identified Reliability Needs.<sup>20</sup>

As the Developer of an alternative regulated transmission solution is not subject to the same legal obligations as the Responsible Transmission Owner(s) in New York, it is neither unduly discriminatory nor unreasonable to require only the Developer of a selected alternative

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<sup>18</sup> See, e.g., N.Y. Pub. Serv. L. § 2(13) (defining “electric corporation”); N.Y. Pub. Serv. L. § 65 (requiring “electric corporations” to “furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable”); N.Y. Pub. Serv. L. § 66(2) (requiring “electric corporations” to make “reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other such reasonable devices, apparatus and property of . . . electric corporations”).

<sup>19</sup> LS Power incorrectly presumes that there will always be a regulated backstop solution developing in parallel with its project. Based on the progress of a selected alternative regulated transmission solution, the NYISO may elect not to trigger or to halt the regulated backstop solution. In such instance, it is even more important that the alternative regulated transmission project is timely developing and that the NYISO be able to take action as soon as possible to address the Reliability Need if the Developer cannot timely complete the project.

<sup>20</sup> For example, the Responsible Transmission Owner must propose a Gap Solution in the event one is required. OATT, Att.Y Section 31.2.11.3 (revised numbering in May 2015 Compliance Filing).

regulated transmission solution to enter into a Development Agreement with the NYISO. Such agreement is essential to provide assurance that the Developer: (i) will timely complete the selected project, or (ii) if the project is not timely progressing, will provide the NYISO with the ability to terminate the project and take action to address the Reliability Need, including triggering a regulated backstop solution or Gap Solution to proceed.<sup>21</sup>

**B. The NYISO Must Have the Right to Terminate the Development Agreement if the Developer Cannot Timely Complete its Project for Any Reason to Maintain Reliability.**

The Commission should reject the protestors' request that the NYISO be prohibited from declaring a breach or terminating the Development Agreement if the Developer cannot satisfy the terms of the agreement due to a *Force Majeure* event or the actions or inactions of a third party. The NYISO selects and triggers a transmission project in its reliability planning process for the purpose of timely satisfying an identified Reliability Need in the event market-based solutions are not available. Because the NYISO is ultimately responsible for maintaining the reliability of the New York State Transmission System, it must have the right to terminate the Development Agreement and identify alternative means of satisfying an identified Reliability Need if the Developer cannot complete its project by the Required Project In-Service Date for any reason. The Commission has previously accepted in the Designated Entity Agreement filed by PJM Interconnection, L.L.C. ("PJM") that PJM can terminate the agreement, regardless of the

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<sup>21</sup> While the ISO/TO Reliability Agreement does not explicitly include certain requirements set forth in the Development Agreement (*e.g.*, milestones), similar requirements for the regulated backstop solution are set forth in the NYISO's tariffs. For example, the NYISO's tariffs provide for active monitoring of the development of the Responsible Transmission Owner's regulated backstop solution against key milestones. OATT, Att. Y, Section 31.2.13.2 (revised numbering in May 2015 Compliance Filing). If the NYISO determines that the Responsible Transmission Owner is not taking the actions necessary to timely construct the project to satisfy the Reliability Need by the need date, the NYISO will notify the Commission and may take such action as it reasonably considers appropriate to satisfy the Reliability Need by the need date. OATT, Att. Y, Section 31.2.10.2 (includes language proposed in May 2015 Compliance Filing).

occurrence of a *Force Majeure* event, if the developer cannot perform its obligations under the agreement.<sup>22</sup>

The NYISO has already addressed protestors' concerns by adopting several provisions that add significant flexibility in the Development Agreement for the NYISO and the Developer to address project delays that arise for any reason, while also permitting the NYISO to take action to maintain system reliability if the selected project cannot be completed by the Required Project In-Service Date. As an initial matter, the Developer of the selected project is required to notify the NYISO of potential delays or issues that would endanger the timely completion of the project.<sup>23</sup> The purpose of the notification requirements is to identify potential issues as soon as possible, so that the parties can work cooperatively to resolve any issues in a manner that enables the project to proceed and enter into service by the Required Project In-Service Date. In the event of a potential delay, the Developer may request that the NYISO consent to extend a Critical Path Milestone. In reviewing a Developer's request to extend individual Critical Path Milestones, the NYISO would take into account the grounds for the delay, including the

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<sup>22</sup> See *PJM Interconnection, L.L.C.*, Order Conditionally Accepting Proposed Agreements Subject to a Further Compliance Filing, 148 FERC ¶ 61,187 (2014) ("PJM Order") at P 101 (finding the termination provisions in Sections 8.0 and 10.2 just and reasonable and not overly stringent.). Under PJM's Designated Entity Agreement, a Developer's inability to perform due to third party action may be considered a *Force Majeure* event (Section 10.3). Notwithstanding such a *Force Majeure* event, PJM can still terminate the agreement if the Developer cannot satisfy its obligations under the agreement (Sections 8.0 and 10.2). The NYISO understands that the Commission has accepted language in the Approved Project Sponsor Agreement for the California Independent System Corporation ("CAISO") that could limit the CAISO's ability to terminate an agreement based on a delay caused by a third-party. The Commission accepted this language relying on the CAISO tariff requirement that it can "take such action as it reasonably considers appropriate" in case of such delays. See *California Independent System Operator Corporation*, Order Conditionally Accepting Tariff Revisions, 149 FERC ¶ 61,107 (2014) at P 83 (referencing CAISO Tariff, Section 24.6.4). However, it is unclear how CAISO would timely address a reliability need in the event a project's completion is delayed beyond the date of the reliability need and interim alternatives are not available or feasible. As the NYISO is obligated to maintain the reliability of the New York State Transmission System and the purpose of the NYISO's reliability planning process is to ensure that a Reliability Need is timely satisfied, the Commission should reject the Protestors' attempt to limit the NYISO's ability to take action that is required to maintain reliability.

<sup>23</sup> Development Agreement, Article 3.3.3.



occurrence of a *Force Majeure* event or the actions or inactions of a third party. Assuming that the Developer demonstrates to the NYISO's satisfaction that it is still capable of completing its project with modified milestones by the Required Project In-Service Date, the NYISO's consent to modify the Critical Path Milestone will not be unreasonably withheld.<sup>24</sup>

If, notwithstanding the notification and extension requirements, the Developer finds itself in breach for failing to satisfy a Critical Path Milestone, the Developer will still have the opportunity to cure the breach, including the ability to request at that time that the NYISO extend the relevant milestone.<sup>25</sup> If the Developer is unable to cure the breach, the NYISO may, but is not required to, declare a default.<sup>26</sup> In addition, if the NYISO has declared a default or has otherwise determined that a project will not be completed by the Required Project In-Service Date, the NYISO may, but is not required to, terminate the Development Agreement.<sup>27</sup>

In addition to this flexibility in the Development Agreement, the Filing Parties proposed in the Compliance Filing a new tariff provision that requires the incumbent Transmission Owners identified in the NYISO's interconnection process as the Connecting Transmission Owner or Affected Transmission Owner to act in good faith in timely performing their obligations that are required for the Developer to satisfy its obligations under the Development Agreement.<sup>28</sup> This language provides a tariff basis for the NYISO or the Developer to request Commission action in the event an unreasonable delay was to occur. In addition, a project's timely progress through the NYISO's interconnection process is driven in large part by the

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<sup>24</sup> *Id.* at Article 3.3.4.

<sup>25</sup> *Id.* at Article 7.2.

<sup>26</sup> *Id.* at Article 7.2.

<sup>27</sup> Development Agreement, Article 8.1; *see* PJM Order at P 101 (“We find that the proposed termination provisions are just and reasonable, and not overly stringent. Section 10.2 provides PJM with an option, not an obligation, to terminate.”).

<sup>28</sup> OATT, Att. Y, Section 31.2.8.1.7 (proposed in May 2015 Compliance Filing).

Developer's full and prompt cooperation, including timely providing all required project information. The process also provides the Developer with the means to address potential delays in the process. For example, if the Developer determines that there is an impasse in finalizing an interconnection agreement caused by the NYISO or the Connecting Transmission Owner, the Developer may direct the NYISO to file the agreement unexecuted with the Commission.<sup>29</sup>

In sum, the Commission should reject the Protests as the provisions in the Development Agreement and the NYISO's tariffs appropriately balance the need for flexibility in addressing unexpected delays in the development and construction of a transmission project with the NYISO's obligation to maintain the reliability of the New York State Transmission System.<sup>30</sup>

**C. The Commission Should Reject LS Power's Attack on the NYISO's Interconnection Procedures as a Collateral Attack on Order No. 1000 and Beyond the Scope of this Proceeding and Filing, and as Meritless in Any Event.**

The Commission should reject LS Power's argument that the NYISO must be required to implement a new interconnection process specific to alternative regulated transmission projects.<sup>31</sup> LS Power's argument is nothing more than a collateral attack on the Order No. 1000 determination not to require changes to interconnection procedures.<sup>32</sup> As recently reiterated by the Commission, "Order No. 1000 does not require an RTO to amend its interconnection procedures and in fact, it clearly states that Order No. 1000 proceedings are not the proper proceedings for parties to raise issues about the interconnection agreements and procedures

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<sup>29</sup> OATT, Att. X, Section 30.11.2.

<sup>30</sup> The Commission should reject as unnecessary NextEra's proposed "interim solution" insert to Article 8.1(iv) described on pages 7 and 8 of its protest. Article 8.1(iv) only permits the NYISO to terminate the agreement if the Transmission Project cannot be completed by the Required Project In-Service Date. Assuming that the Developer or another party is able to mitigate a *Force Majeure* event through an interim solution in a manner that permits the Developer's project to still be completed by the Required Project In-Service Date, the NYISO would not have grounds to terminate the agreement under Article 8.1(iv).

<sup>31</sup> LS Power Protest at pp 6-9.

<sup>32</sup> See Order No. 1000 at P 760.

under Order Nos. 2003, 2006, or 661.”<sup>33</sup> If, however, the Commission was to address LS Power’s argument on the merits, it should reject them for the reasons set forth below.

Article 4 of the Development Agreement does not create any new interconnection requirements, but simply reflects the application of the NYISO’s existing Commission-approved interconnection requirements to a non-incumbent Developer. The OATT provides for two distinct processes for the evaluation of interconnection and transmission projects – (1) the transmission expansion process set forth in Sections 3.7 and 4.5 of the OATT; and (2) the interconnection process set forth in Attachment X of the OATT. As described below, the NYISO appropriately reviews the interconnection of a non-incumbent Developer’s transmission project under the interconnection process set forth in Attachment X of the OATT.

The Attachment X interconnection process provides for three interconnection studies: (1) the Interconnection Feasibility Study (“Feasibility Study”); (2) the System Reliability Impact Study (“SRIS”); and the (3) Class Year Interconnection Facilities Study. Generation projects (including generation projects proposed by Transmission Owners) and “Merchant Transmission Facilities” are evaluated in accordance with Attachment X of the OATT. Consistent with its tariff requirements and past practice, the NYISO evaluates non-incumbent Developers’ transmission projects under Attachment X as their projects are “Merchant Transmission Facilities” as that term is defined in Attachment X.<sup>34</sup> Notwithstanding the use of “merchant” in

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<sup>33</sup> *ISO New England Inc., et al.*, Order on Compliance Filing, 151 FERC ¶ 61,133 (2015) at P 109.

<sup>34</sup> See OATT, Att. X, Section 30.1 (“Merchant Transmission Facility shall mean Developer’s device for the transmission of electricity identified in the Interconnection Request, proposing to interconnect to the New York State Transmission System, but shall not include Attachment Facilities, System Upgrade Facilities or System Deliverability Upgrades. Merchant Transmission Facilities shall be those transmission facilities developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements. Merchant Transmission Facilities shall not include upgrades or additions to the New York State Transmission System made by a Transmission Owner signatory to the ISO-Related Agreements.”).

the term, the definition of “Merchant Transmission Facility” clearly includes any transmission facilities proposing to interconnect to the New York State Transmission System that are being developed by an entity other than a Transmission Owner. This is true regardless of the means by which the facilities will be financed. It is, therefore, appropriate under the Commission-approved NYISO OATT to treat non-incumbent Developer’s alternative regulated transmission projects as “Merchant Transmission Facilities” and to perform the three sequential interconnection studies for these projects as set forth under Attachment X.

The tariff establishes a separate transmission expansion process under Sections 3.7 and 4.5 of the OATT that is used for proposals by Eligible Customers to expand or reinforce the New York State Transmission System. The definition of Eligible Customers includes the existing Transmission Owners, but does not include non-incumbent Developers.<sup>35</sup> This process provides for a System Impact Study (“SIS”) and a Facilities Study, but not a Feasibility Study, which is solely a requirement of the interconnection procedures in Attachment X.

The Feasibility Study is not required for an incumbent Transmission Owner under the transmission expansion process because the study work would necessarily already be performed by the Transmission Owner, often as part of its local transmission planning process, before it decided to initiate an SIS Request under the OATT Section 3.7 process.<sup>36</sup> However, a Feasibility Study plays an important role in the NYISO’s evaluation of a non-incumbent Developer’s

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<sup>35</sup> See OATT, Article 1 (“Eligible Customer: (i) An entity that is engaged, or proposes to engage, in the wholesale or retail electric power business including any electric utility, power marketer, Federal power marketing agency, or any person generating Energy for sale for resale is an Eligible Customer under the Tariff. . . .”).

<sup>36</sup> The Feasibility Study may be waived under the Attachment X interconnection process upon the agreement of the NYISO, the Developer, and each Connecting Transmission Owner. OATT, Att. X, Section 30.6.1. Given the importance of the Feasibility Study, the NYISO and the New York Transmission Owners’ practice has been to waive the study only in those circumstances in which the technical work necessary for subsequent studies has already been completed or is inapplicable.

alternative regulated transmission project in the interconnection process.<sup>37</sup> The larger and more complex a project is, the more critical the Feasibility Study is.<sup>38</sup>

In its protest, LS Power also mischaracterizes the interaction between the NYISO's interconnection process and its reliability planning process, erroneously labelling the interconnection process an "after-the-fact interconnection process."<sup>39</sup> A non-incumbent Developer may submit its Interconnection Request and begin the interconnection process at any time, and the clear intent of the NYISO's tariff requirements for the reliability planning process is that the interconnection or transmission expansion process, as applicable, will run in parallel with the reliability planning process. In determining the viability and sufficiency of a proposed project and evaluating the project for purposes of possible selection, the NYISO will take into account the status of Developer's project in the interconnection or transmission expansion process and the information derived from the studies in these processes, including the composition and estimated costs of any required interconnection and upgrade facilities.<sup>40</sup>

Regardless of whether the Developer is a Responsible Transmission Owner proposing a

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<sup>37</sup> The Feasibility Study involves the following technical analysis: (i) the fundamental step of designing how the project will connect to the existing system; (ii) identification of "fatal flaws" with regard to preliminary engineering, mechanical and geographical feasibilities; and (iii) thermal, voltage and short circuit analyses that indicate potential overloads that the project may cause.

<sup>38</sup> Although in many Feasibility Studies, the NYISO finds the proposed project to be feasible, the evaluation can add considerable value within the context of the interconnection study process. Determining the precise interconnection location and configuration of the project is critical to the interconnection study process because it dictates which contingencies are generated by the project that must be evaluated to assess the reliability impacts of the proposal. This is an essential element of the project's evaluation in the interconnection study process and must be determined before the NYISO can move forward to the analyses that are required in the SRIS phase.

<sup>39</sup> LS Power Protest at p. 7.

<sup>40</sup> Under the NYISO's reliability planning process, the Developer must submit with its project information the status of its project in the interconnection process. *See* OATT, Att. Y, Section 31.2.4.8. In addition, as part of its selection metrics, the NYISO reviews the composition and costs of interconnection facilities, System Upgrade Facilities, System Deliverability Upgrades, Network Upgrades, and Distribution Upgrades, which are determined through the interconnection process. *See, e.g.,* OATT, Att. Y, Section 31.2.6.5.1.1.

regulated backstop solution or a Transmission Owner or Other Developer proposing an alternative regulated transmission solution, the Developer will be responsible for the interconnection costs of its project, whether determined through the interconnection or transmission expansion process, and the NYISO will take these costs into account in selecting the more efficient or cost-effective transmission solution.

**D. The Commission Should Reject LS Power’s Proposed Change to the Definition of Change of Control, Which Would Impede the NYISO’s Ability to Ensure that Developers Are Qualified.**

The Commission should reject LS Power’s request to modify the definition of the term “Change of Control” in the Development Agreement to exempt from that term the transfer of control from the Developer to its parent company or to another company under its parent company’s control.<sup>41</sup> The NYISO must have the capability to evaluate and determine whether any new entity seeking to replace the Developer of the selected project – whether affiliated or unaffiliated with the initial Developer – is qualified and capable of developing and constructing the project in a timely manner consistent with the parameters of the project that was approved by the NYISO Board.

The assignment provisions in Article 10 of the Development Agreement require the NYISO’s consent to an assignment of the agreement.<sup>42</sup> Such an assignment includes the transfer of a project through a Change of Control. The NYISO’s consent to an assignment, including a Change of Control, will not be unreasonably withheld if the Developer or its assignee demonstrates that the assignee: (i) satisfies the NYISO’s developer qualification requirements set forth in its tariffs, and (ii) has the capability to comply with the requirements in the agreement

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<sup>41</sup> LS Power Protest at pp 9-10.

<sup>42</sup> The NYISO is not required to consent to an assignment under the limited circumstances in which the Developer is assigning the agreement for collateral security purposes to aid in providing project financing. Development Agreement, Article 10.

and to construct and place in-service the transmission project by the Required Project In-Service Date consistent with the assignor's cost estimates for the project. The Commission has found such qualification-related conditions on an assignment to be reasonable.<sup>43</sup>

The Change of Control requirement restricts a Developer from using a transfer of control from the Developer to an affiliated or unaffiliated third party as an end run around the assignment requirements, including the satisfaction of the Developer qualification requirements. The Commission should reject the creation of a potential loop hole in the qualification of Developers. The requirement that a new entity taking over a project via a Change of Control demonstrate that it is qualified does not establish a heavy burden for a qualified entity – particularly in the scenario described by LS Power in which its parent company is prepared to demonstrate support for the new entity.<sup>44</sup>

**E. The Commission Should Reject NextEra's Proposed Change to the Notification Requirements Because They Would Interfere with the NYISO's Ability to Timely Identify and Address Potential Project Delays.**

Article 3.3.3 of the Development Agreement requires the Developer to notify the NYISO thirty days prior to the date of each Critical Path Milestone whether it “will meet” the milestone by the specified date. The Commission should reject NextEra's proposed replacement of “will meet” the Critical Path Milestone with “expects to meet” because it contradicts the purpose of requiring Developers to notify the NYISO regarding any potential delays in timely completing a

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<sup>43</sup> In accepting the assignment requirements for PJM's Designated Entity Agreement, the Commission stated that: “it is reasonable to require a prospective assignee to demonstrate, through specific qualification criteria, that the assignee can meet the qualification criteria applicable to Designated Entities, and therefore, a prospective assignee must also be able to demonstrate to PJM that it can meet the same qualification criteria as the original Designated Entity.” PJM Order at P 45.

<sup>44</sup> A parent company's agreement under Section 31.2.4.1 of Attachment Y to the NYISO OATT to support a Developer for purposes of that Developer's satisfaction of its qualification requirements does not transfer to another entity.

project needed for reliability.<sup>45</sup> The NYISO is relying upon the notification requirements in the Development Agreement to monitor whether the project is developing in line with its Critical Path Milestone and to identify and immediately address potential delays.

If thirty days prior to a Critical Path Milestone, a Developer is uncertain whether it will timely satisfy a milestone for any reason, including for reasons beyond its control, it should inform the NYISO of a potential delay and, if necessary, request that the milestone be extended under the relevant provisions of the agreement.<sup>46</sup> This approach enables the NYISO and the Developer to identify and address potential delays as soon as possible prior to the milestone date, rather than waiting for the Developer to unexpectedly miss a milestone and have to attempt to address any revisions to the milestone schedule as part of the breach and cure process.

**F. The Commission Should Reject NextEra’s Proposed Change to Extend the Cure Period, Which Is Unnecessary and Would Interfere with the Existing Requirements to Timely Identify and Address Potential Project Delays.**

The Commission should reject NextEra’s proposed extension of the thirty-day time period for curing a breach of the Development Agreement.<sup>47</sup> Article 7.2 of the Development Agreement already permits the NYISO and the Developer to agree to extend the cure period.<sup>48</sup> In addition, the Development Agreement should not be modified to incent Developers to address potential delays in satisfying Critical Path Milestones through a lengthy breach and cure process. Instead, once a Developer becomes aware of a delay in its ability to satisfy a Critical Path

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<sup>45</sup> NextEra Protest at p 2.

<sup>46</sup> Notwithstanding the thirty day notification requirement, a Developer is always required to inform the NYISO within fifteen days of its discovery of a potential delay. Development Agreement, Article 3.3.3.

<sup>47</sup> NextEra Protest at pp. 5-6.

<sup>48</sup> The breaching party: “shall have thirty (30) Calendar Days from receipt of the Breach notice to cure the Breach, *or such other period of time as may be agreed upon by the Parties . . .*” Development Agreement, Article 7.2 (emphasis added).



Milestone, the Developer should request as soon as possible the NYISO's consent to extend the milestone, rather than missing the milestone and seeking to cure it after a breach has been declared. Finally, in the event that the Developer was found to be in breach due to a delay in satisfying a Critical Path Milestone and cannot cure the breach within thirty days, the Developer may already seek to cure the breach by requesting the NYISO's consent to extend the impacted milestone within the thirty day cure period.

#### **IV. CONCLUSION**

**WHEREFORE**, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this Answer and accept the Compliance Filing in the above-referenced docket without requiring any modifications.

Respectfully submitted,

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June 23, 2015

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Rensselaer, NY this 23<sup>rd</sup> day of June, 2015.

/s/ Joy A. Zimmerlin

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