

## **35.19 Additional Provisions**

### **35.19.1 *Force Majeure.***

A Party shall not be considered to be in default or breach of this Agreement, and shall be excused from performance or liability for damages to any other party, if and to the extent it shall be delayed in or prevented from performing or carrying out any of the provisions of this Agreement, arising out of or from any act, omission, or circumstance by or in consequence of any act of God, labor disturbance, sabotage, failure of contractors or suppliers of materials, act of the public enemy, war, invasion, insurrection, riot, fire, storm, flood, ice, earthquake, explosion, epidemic, breakage or accident to machinery or equipment or any other cause or causes beyond such Party's reasonable control, including any curtailment, order, regulation, or restriction imposed by governmental, military or lawfully established civilian authorities, or by making of repairs necessitated by an emergency circumstance not limited to those listed above upon the property or equipment of the Party or property or equipment of others which is deemed under the Operational Control of the Party. A *Force Majeure* event does not include an act of negligence or Intentional Wrongdoing by a Party. Any Party claiming a *Force Majeure* event shall use reasonable diligence to remove the condition that prevents performance and shall not be entitled to suspend performance of its obligations in any greater scope or for any longer duration than is required by the *Force Majeure* event. Each Party shall use its best efforts to mitigate the effects of such *Force Majeure* event, remedy its inability to perform, and resume full performance of its obligations hereunder.

### **35.19.2 *Force Majeure Notification.***

A Party suffering a *Force Majeure* event ("Affected Party") shall notify the other Party ("Non-Affected Party") in writing ("Notice of *Force Majeure* Event") as soon as reasonably practicable specifying the cause of the event, the scope of commitments under the Agreement affected by the

event, and a good faith estimate of the time required to restore full performance. Except for those commitments identified in the Notice of *Force Majeure* Event, the Affected Party shall not be relieved of its responsibility to fully perform as to all other commitments in the Agreement. If the *Force Majeure* Event continues for a period of more than 90 days from the date of the Notice of *Force Majeure* Event, the Non-Affected Party shall be entitled, at its sole discretion, to terminate the Agreement.

### **35.19.3 Indemnification.**

“Indemnifying Party” means a Party who holds an indemnification obligation hereunder. An “Indemnitee” means a Party entitled to receive indemnification under this Agreement as to any Third Party claim. Each Party will defend, indemnify, and hold the other Party harmless from all actual losses, damages, liabilities, claims, expenses, causes of action, and judgments (collectively, “Losses”), brought or obtained by any Third Party against such other Party, only to the extent that such Losses arise directly from:

(a) Gross negligence, recklessness, or willful misconduct of the Indemnifying Party or any of its agents or employees, in the performance of this Agreement, except to the extent the Losses arise (i) from gross negligence, recklessness, willful misconduct or breach of contract or law by the Indemnitee or such Indemnitee’s agents or employees, or (ii) as a consequence of strict liability imposed as a matter of law upon the Indemnitee, or such Indemnitee’s agents or employees;

(b) Any claim arising from the transfer of Intellectual Property in violation of Section 35.19.8; or

(c) Any claim that such Indemnitee caused bodily injury to an employee of Third Party due to gross negligence, recklessness, or willful conduct of the Indemnifying Party.

- (d) The Indemnitee shall give Notice to the Indemnifying Party as soon as reasonably practicable after the Indemnitee becomes aware of the Indemnifiable Loss or any claim, action or proceeding that may give rise to an indemnification. Such notice shall describe the nature of the loss or proceeding in reasonable detail and shall indicate, if practicable, the estimated amount of the loss that has been sustained by the Indemnitee. A delay or failure of the Indemnitee to provide the required notice shall release the Indemnifying Party (a) from any indemnification obligation to the extent that such delay or failure materially and adversely affects the Indemnifying Party's ability to defend such claim or materially and adversely increases the amount of the Indemnifiable Loss, and (b) from any responsibility for any costs or expenses of the Indemnitee in the defense of the claim during such period of delay or failure.
- (e) The indemnification by either Party shall be limited to the extent that the liability of a Party seeking indemnification would be limited by any applicable law and arises from a claim by a Party acting within the scope of this Agreement as to obligations of the other Party under this Agreement.

#### **35.19.4 Headings.**

The headings used for the Articles and Sections of this Agreement are for convenience and reference purposes only, and shall not be construed to modify, expand, limit, or restrict the provisions of this Agreement.

#### **35.19.5 Liability to Non-Parties.**

Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any person or entity that is not a Party or a permitted successor or assign.

**35.19.6 Liability Between Parties.**

The Parties' duties and standard of care with respect to each other, and the benefits and rights conferred on each other shall be no greater than as expressly stated herein. Neither Party, its directors, officers, trustees, employees or agents, shall be liable to the other Party for any loss, damage, claim, cost, charge or expense, whether direct, indirect, incidental, punitive, special, exemplary or consequential, arising from the other Party's performance or nonperformance under this Agreement, except to the extent that a Party, is found liable for gross negligence or willful misconduct, in which case the Party responsible shall be liable only for direct and ordinary damages and not for any incidental, consequential, punitive, special, exemplary or indirect damage.

**35.19.7 Unauthorized Transfer of Third-Party Intellectual Property.**

In the performance of this Agreement, no party shall transfer to another party any Intellectual Property, the use of which by another Party would constitute an infringement of the rights of any Third Party. In the event such transfer occurs, whether or not inadvertent, the transferring Party shall, promptly upon learning of the transfer, provide Notice to the receiving Party and upon receipt of such Notice the receiving Party shall take reasonable steps to avoid claims and mitigate losses.

**35.19.8 Intellectual Property Developed Under This Agreement.**

If during the term of this Agreement, the Parties mutually develop any new Intellectual Property that is reduced to writing or any tangible form, the Parties shall negotiate in good faith concerning the ownership and licensing of such Intellectual Property.

**35.19.9 Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.

### **35.19.10 License and Authorization.**

The agreements and obligations expressed herein are subject to such initial and continuing governmental permission and authorization as may be required. Each Party shall be responsible for securing and paying for any approvals required by it from any regulatory agency of competent jurisdiction relating to its participation in this Agreement and will reasonably cooperate with the other Party in seeking such approvals.

### **35.19.11 Assignment.**

This Agreement shall inure to the benefit of, and be binding upon and may be performed by, the successors and assigns of the Parties hereto respectively, but shall not be assignable by either Party without the written consent of the other.

### **35.19.12 Amendment.**

#### **35.19.12.1 Authorized Representatives.**

No amendment of this Agreement shall be effective unless by written instrument duly executed by the Parties' authorized representatives. For the purposes of this section, an authorized person refers to individuals designated as such by Parties in their respective corporate by-laws.

#### **35.19.12.2 Review of Agreement.**

The terms of this Agreement are subject to review for potential amendment at the request of either Party. If, after such review, the Parties agree that any of the provisions hereof, or the practices or conduct of either Party impose an inequity, hardship or undue burden upon the other Party, or if the Parties agree that any of the provisions of this Agreement have become obsolete or inconsistent with changes related to the Interconnection Facilities, the Parties shall endeavor in good faith to amend or supplement this Agreement in such a manner as will remove such inequity, hardship or undue burden, or otherwise appropriately address the cause for such change.

### **35.19.12.3 Mutual Agreement.**

The Parties may amend this Agreement at any time by mutual agreement in accordance with Section 35.19.12.1 above.

### **35.19.13 Performance.**

The failure of a Party to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any right held by such Party. Any waiver on any specific occasion by either Party shall not be deemed a continuing waiver of such right, nor shall it be deemed a waiver of any other right under this Agreement.

### **35.19.14 Rights, Remedies or Benefits.**

This Agreement is not intended to and does not create any rights, remedies, or benefits of any kind whatsoever in favor of any entities other than the Parties, their principals and, where permitted, their assigns.

### **35.19.15 Agreement.**

This Agreement, including all Attachments attached hereto, is the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior or contemporaneous understandings or agreements, oral or written, with respect to the subject matter of this Agreement.

### **35.19.16 Governmental Authorizations.**

This Agreement, including its future amendments is subject to the initial and continuing governmental authorizations, including approval of the Federal Energy Regulatory Commission, required to establish, operate and maintain the Interconnection Facilities as herein specified. Each Party shall take all actions necessary and reasonably within its control to maintain all governmental rights and approvals required to perform its respective obligations under this Agreement.

**35.19.17 Unenforceable Provisions.**

If any provision of this Agreement is deemed unenforceable, the rest of the Agreement shall remain in effect and the Parties shall negotiate in good faith and seek to agree upon a substitute provision that will achieve the original intent of the Parties.

**35.19.18 Execution.**

This Agreement may be executed in multiple counterparts, each of which shall be considered an original instrument, but all of which shall be considered one and the same Agreement, and shall become binding when all counterparts have been signed by each of the Parties and delivered to each Party hereto. Delivery of an executed signature page counterpart by telecopier or e-mail shall be as effective as delivery of a manually executed counterpart.

**35.19.19 Payments.**

Unless otherwise indicated in writing by the parties, all payments due under this Agreement will be effected in immediately available funds of the United States of America.

**35.19.20 Regulatory Authority.**

If any regulatory authority having jurisdiction (or any successor boards or agencies), a court of competent jurisdiction or other Governmental Authority with the appropriate jurisdiction (collectively, the "Regulatory Body") issues a rule, regulation, law or order that has the effect of cancelling, changing or superseding any term or provision of this Agreement (the "Regulatory Requirement"), then this Agreement will be deemed modified to the extent necessary to comply with the Regulatory Requirement. Notwithstanding the foregoing, if a Regulatory Body materially modifies the terms and conditions of this Agreement and such modification(s) materially affect the benefits flowing to one or both of the Parties, as determined by either of the Parties within twenty (20) business days of the receipt of the Agreement as materially modified, the Parties agree to attempt in good faith to negotiate

an amendment or amendments to this Agreement or take other appropriate action(s) so as to put each Party in effectively the same position in which the Parties would have been had such modification not been made. In the event that, within sixty (60) days or some other time period mutually agreed upon by the Parties after such modification has been made, the Parties are unable to reach agreement as to what, if any, amendments are necessary and fail to take other appropriate action to put each Party in effectively the same position in which the Parties would have been had such modification not been made, then either Party shall have the right to unilaterally terminate this Agreement forthwith.

**35.19.21 Notices.**

Except as otherwise agreed from time to time, any Notice, invoice or other communication which is required by this Agreement to be given in writing, shall be sufficiently given at the earlier of the time of receipt or deemed time of receipt if delivered personally to a senior official of the Party for whom it is intended or electronically transferred or sent by registered mail, addressed as follows:



PJM: Phillip G. Harris  
President & CEO  
PJM Interconnection L.L.C.  
955 Jefferson Avenue  
Valley Forge Corporate Center  
Norristown, PA 19403-4501  
Tel: (610) 666-4377  
Fax: (610) 666-4281

NYISO: New York System Operator  
10 Krey Boulevard  
Rensselaer, New York 12144  
Attention: Vice President Operations & Reliability

or delivered to such other person or electronically transferred or sent by registered mail to such other address as either Party may designate for itself by Notice given in accordance with this section or delivered by any other means agreed to by the Parties hereto.

Any Notice, or communication so mailed shall be deemed to have been received on the third business day following the day of mailing, or if electronically transferred shall be deemed to have been received on the same business day as the date of the electronic transfer, or if delivered personally shall be deemed to have been received on the date of delivery or if delivered by some other means shall be deemed to have been received as agreed to by the Parties hereto.

The use of a signed facsimile of future Notices and correspondence between the Parties related to this Agreement shall be accepted as proof of the matters therein set out. Follow-up with hard copy by mail will not be required unless agreed to by the Coordination Committee.

A Party may change its designated recipient of Notices, or its address, from time to time by giving Notice of such change.

**IN WITNESS WHEREOF**, the signatories hereto have caused this Agreement to be executed by their duly authorized officers.

PJM INTERCONNECTION, L.L.C.

By: Michael J. Kormos, Senior VP – Reliability Services

\_\_\_\_\_

Date: \_\_\_\_\_

NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.

By: Mark S. Lynch, President and CEO

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NYISO Tariffs --> Open Access Transmission Tariff (OATT) --> 35 OATT Attachment CC - Joint Operating Agreement Among And -  
-> 35.19 OATT Att CC Additional Provisions

Date: \_\_\_\_\_