LSP Transmission and North America Transmission
Comments on Draft Development Agreement

LSP Transmission and North America Transmission (collectively "LS Power") provide the following comments on the draft Development Agreement between NYISO and proposed alternative regulated solution developers. LS Power concurs with the NYISO that there should be three pro-forma Development Agreements developed and filed with FERC – one for reliability projects, one for CARIS projects, and one for public policy projects. These LS Power comments are focused on the reliability draft provided to stakeholders.

Definitions Section:

The definition of "In-Service Date" should be revised to remove the phrase "at its full design capability" and replace it with "consistent with "consistent with the Project Description." LS Power believes that "full design capability" is vague and could be used as an overly stringent threshold for determining whether a project meets its in-service date. LS Power believes that the Project Description in Appendix A should govern, rather than a vague term "at its full design capability".

Remove the definition for Operating Agreement. Nonincumbent Transmission Owners should sign the ISO/TO agreement as the only going forward mechanism for transferring operational control.

Article 3.8:

The second sentence currently reads: "The NYISO shall have no responsibility and shall have no liability regarding the management or supervision of the Developer's development of the Transmission Project or the compliance of the Developer with Applicable Laws and Regulations, Applicable Reliability Requirements, and Transmission Owner Technical Standards." Remove "shall have no responsibility and" from the sentence and add a new third sentence stating: "Notwithstanding any other provision of this Section, NYISO shall be obligated to exclusively support the Developer's effort to obtain regulatory approval of the Transmission Project as the more efficient or cost-effective transmission solution to satisfy a Reliability Need, including but not limited to, providing testimonial support for its Article VII submission as needed or necessary."

Article 4.1:

Article 4.1's reference to Attachment S "Rules to Allocate Responsibility for Cost of New Interconnection Facilities" is misplaced as Attachment S addresses cost allocation for "new interconnection facilities that are required for the reliable interconnection of generation projects and merchant transmission projects to the New York State Transmission System." A project for which a Development Agreement between NYISO and a Developer is filed is neither a generation project nor a merchant transmission project. Likewise Attachment X "Standard Large Facility Interconnection Procedures (Applicable to Generating Facilities that exceed 20 MWs and to Merchant Transmission Facilities)" is not applicable. NYISO should develop Order No. 1000

specific interconnection standards for transmission projects selected as the more efficient or cost-effective solution. Reference to generator or merchant transmission interconnection is inappropriate.

The Article is also inappropriate in that it sets different standards for nonincumbent developers and transmission owner developers by stating "*provided however*, if the Developer is a Transmission Owner, the Developer shall instead satisfy all applicable transmission expansion requirements set forth in Sections 3.7 and 4.5 of the OATT." Whatever Interconnection standards are applicable, they should apply to all Developers.

Article 5:

Remove the phrase "at its full design capability" and replace it with "consistent with the Project Description." LS Power believes that "full design capability" is vague and could be used as an overly stringent threshold for determining whether a project meets its in-service date. LS Power believes that the Project Description in Appendix A should govern, rather than a vague term "at its full design capability".

In (v) the sentence should end after Agreement, deleting "or the Operating Agreement, as applicable." All Developers should sign the TO/ISO agreement.

Article 7.4:

Add the following language in the second sentence following Critical Path Milestone: "which will result in the failure of the Developer to meet the In-service Date". Identical language should be added after "Critical Path Milestone' in the last sentence of the Article. Default should only be declared upon an identified inability to meet the In-Service date, not mere failure to meet a Critical Path Milestone if that Milestone can be overcome and the In-service date still met. There should be cure period if the In-Service Date is not in jeopardy.

Article 7.6:

This Article should be deleted in its entirety.

Article 8:

Articles 8.1 and 8.2 are non-reciprocal provisions and should be revised to provide reciprocal obligations. FERC addressed similar provisions in *So. Carolina Elec. & Gas Co.*, 147 FERC ¶ 61,126 (2014), at paragraphs 224 and 225. There the transmission provider tried to limit its liability and require indemnification of it but was not limiting others liability or providing indemnification to them. For example, the Commission stated: "The indemnification provision must likewise be revised. SCE&G does not explain why the nonincumbent transmission developer must indemnify the incumbent transmission providers, but the incumbent transmission providers are not at the same time required to hold the nonincumbent transmission developer harmless." The same should be true here, for liability and indemnification.

Article 11:

The Reps, Warranties and Covenants Article requires Reps, Warranties and Covenants of the Developer but has no similar obligation on the part of NYISO. This section should be reciprocal.

Article 14.4:

Article 14.4 as written should be deleted and substituted with the following:

"No Party shall be considered to be in Default with respect to any obligation hereunder, if prevented from fulfilling such obligation by Force Majeure. A Party unable to fulfill any obligation by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this Article shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance. If required, the Parties shall revise the Development Agreement including, but not limited to, Appendix C, following a Force Majeure event."

This language is similar to language accepted by the Commission with respect to the California Approved Project Sponsor Agreement. As Article 14.4 was written the declaration of a Force Majeure event was meaningless. NYISO should consider making the Force Majeure section a standalone section.

Article 14.6:

It is unclear the purpose of this article other than to relieve NYISO of all liability for any of its required actions and to make such actions meaningless. If the Developer is required to obtain NYISO sign-off or approval, it should be entitled to rely on that sign-off or approval. If the Developer is not, the provision is not needed.

Article 14.15:

Article 14.15 should reference the Federal Power Act in addition to New York law.

Article 14.16:

Article 14.16 should reference filings with the Federal Energy Regulatory Commission for any matters subject to the Commission's jurisdiction.

Appendix C should be revised. As currently drafted the list of "Critical" path milestones is overly inclusive. While LS Power understands that the prefatory language suggests that critical milestones will be determined on a case by case basis, LS Power believes that it is inappropriate to suggest that certain matters will ever be "Critical" Path Milestones. This is particularly true since the current

draft of the Development Agreement would make the failure to obtain any of the listed items a ground for a declaration of default. **LS Power believes that Critical Path Milestones should be limited to the following, with all other items moved to Advisory Milestones.**

LS Power-suggested Critical Path Milestones:

- Acquisition of all necessary construction approvals and authorizations of Governmental Authorities, including identification of all required regulatory approvals.
- Closing of Project Financing.
- Completion of Key Contracts.
- Procurement of major equipment and materials.
- Acquisition of [all or %] required rights of way and property / demonstration of site control or eminent domain authority.
- Completion, verification and testing.
- Execution of operating and maintenance agreements
- Required Project In-Service Date.

LS Power would also note that the proposed NYISO inclusion of the "Execution of Interconnection Agreement" milestone is particularly inappropriate in light of FERC's November 7, 2014 Order in CAISO on the CAISO Approved Project Sponsor Agreement (FERC Docket ER14-2824-000). Below LS Power includes the relevant FERC Order language from CAISO, making it clear that the approved sponsor will not be held accountable for delays caused by the interconnecting PTO and this cannot be grounds for reassignment. NYISO should also add this clarifying language to the Developer Agreement.

26. "… Second, as discussed later in this order, we condition our acceptance of the pro forma APSA on CAISO submitting a compliance filing to clarify that the approved project sponsor will not be held accountable for delays caused by the interconnecting PTO. We believe this clarification addresses the concern that an interconnecting PTO may have undue influence on an approved project sponsor meeting its milestones reflected in the pro forma APSA."

83. We will direct CAISO to revise section 5.8 of the pro forma APSA, consistent with CAISO's statements in its answer. CAISO notes that this provision, in conjunction with section 24.6.4 of the Tariff, allows it to address any delays while also accounting for the cause of such a delay. CAISO states, and we agree, that the cause of the delays should be evaluated and that a delay caused by the Interconnecting PTO should not be sufficient to justify reassignment of the project. Further, while section 5.8 of the pro forma APSA is narrowly based on the specific timeline of the project, section 24.6.4 of the Tariff gives CAISO broader discretion to evaluate project delays. Thus, this provision allows CAISO to address delays in transmission projects and ensure that system reliability is maintained. Therefore, consistent with CAISO's Tariff and its own statements, we direct CAISO to include in the compliance filing directed herein modifications to section 5.6 of its pro forma

APSA to clarify that the approved project sponsor will not be held accountable for delays caused by the Interconnecting PTO.

(CAISO Tariff 24.6.4: "If the CAISO determines that that Approved Project Sponsor cannot secure necessary approvals or property rights or is otherwise unable to construct a transmission solution… the CAISO shall take such action as it reasonably considers appropriate.")

PROPOSED TARIFF REVISIONS

Section 31.2.8.1.6 should be revised to address a lack of clarity regarding the effects of a Developer's request to have a Development Agreement filed unexecuted. Specifically the language starting with "provided however" should read as follows: "*provided however*, if the Developer determines that negotiations are at an impasse, it may request in writing that the ISO file the Development Agreement in unexecuted form with the Commission, in which case the Developer shall not be deemed to have withdrawn its selected alternative regulated transmission solution and the Developer shall remain eligible for cost allocation under the ISO Tariffs."

Section 31.2.10.1.2: The newly added last sentence, starting "If the Responsible Transmission Owner agrees" should be deleted.