



February 10, 2015

Mr. Carl Patka
New York Independent System Operator, Inc.
Assistant General Counsel
10 Krey Boulevard
Rensselaer, NY 12144

Re: NextEra Energy Transmission New York, Inc. Comments on the Proposed Reliability Planning Process Development Agreement

Dear Mr. Patka:

NextEra Energy Transmission New York, Inc. (NEETNY) appreciates this opportunity to present to the New York Independent System Operator (NYISO) the following comments on the proposed Development Agreement for consideration.

General Comments

NEETNY agrees with LS Power's comment¹ to remove the definition for Operating Agreement. Non-incumbent Transmission Owners (TOs) should sign the ISO/TO agreement just as incumbent TOs have done. There is no discernable difference between the development obligations of non-incumbent and incumbent TOs, and, therefore, they should be held to the same standards of performance as a developer. A single developer agreement for non-incumbents and incumbents alike would also help ensure equal treatment. Furthermore, maintaining a single agreement will reduce administrative overhead and avoid inadvertent differences that can occur when changes are made.

Definitions

The definition for Force Majeure offered in the Development Agreement, which describes such events as those "which could not have been avoided by the exercise of reasonable diligence," differs from the Force Majeure event definition in both the NYISO Tariff and pro-forma Interconnection Agreement. Since the pro-forma Interconnection Agreement also governs

¹ Comments by LSP Transmission and North America Transmission Comments on Draft Development Agreement to the NYISO in advance of the discussion at the February 3, 2015 ESPWG meeting.

interconnection of a Developer's project under the NYISO's Reliability Planning Process (RPP) and has been approved by FERC, it is appropriate that the NYISO use that definition in the Development Agreement. Further, the currently-proposed definition (in large part because of the inclusion of the phrase cited, above) reads more like a provision setting forth a duty on the Developer, rather a definition of Force Majeure. Thus, NEETNY recommends that the definition of Force Majeure be changed to read:

“An event of Force Majeure means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any Curtailment, order, regulation or restriction imposed by governmental military or lawfully established civilian authorities, or any other cause beyond a party's control. A Force Majeure event does not include an act of negligence or intentional wrongdoing.” NYISO Open Access Transmission Tariff, Attachment X, section 30.1, Definitions.

Articles 3.3.2 and 3.3.3

These sections are overly complex and duplicative, and should therefore be simplified and combined into one Article 3.3.2² as follows:

The Developer shall meet the Critical Path Milestones in accordance with the Development Schedule set forth in Appendix C to this Agreement. The Developer's failure to meet a Critical Path Milestone specified in the Development Schedule, ~~as such Critical Path Milestone may be amended with the agreement of the NYISO under this Article 3.3,~~ shall constitute a Breach of this Agreement under Article 7.3, unless the Developer and NYISO agree to an extension in the due date for the Critical Path Milestone, with such an agreement to extend can come before or within fifteen (15) business days after the due date, or the failure to meet a Critical Path Milestone is the result of the action or inaction of NYISO or the interconnecting Transmission Owner.

The Developer shall keep the NYISO informed of any possible delays in a Critical Path Milestone and notify the NYISO within five (5) business days of any known delays to provide time for the Developer and NYSIO to agree, if possible, to a new due date.

Failure to meet a Critical Path Milestone will only risk not meeting a Reliability Need if missing that Critical Path Milestone will adversely alter the in-service date and the Reliability Need must still be met by the in-service date. The Developer and NYISO should have the opportunity to discuss these issues, determine the impact on the in-service date, and, thus, the appropriateness to extend a Critical Path Milestone without NYISO being required to declare the Developer in Breach.

² Thus, deleting Article 3.3.3.

In addition, NEETNY requests that the NYISO include the language above referencing NYISO's or interconnecting Transmission Owner's action or inaction resulting in the failure to meet a Critical Path Milestone or in-service date to protect Developer from being deemed in breach due to actions or inactions on the part of those parties.

Article 3.3.4

For many of the same reasons set forth for the revisions to Articles 3.3.2 and 3.3.3, NEETNY believes the following clarifications are needed to this section:

If, absent notification from the Developer, the NYISO believes that the Developer will be unable to, or has failed to, meet a Critical Path Milestone, the NYISO may request in writing that the Developer submit to the NYISO within five (5) Business Days a written response indicating whether it will be unable to, or has failed to, meet a Critical Path Milestone and providing all required supporting documentation for its response, including if indicated, a remedy. The NYISO will promptly review Developer's response. If based on its review, the NYISO determines, in its opinion, that the Developer will be unable to meet a Critical Path Milestone, the NYISO shall inform Developer within 5 business days, and the Developer may request that the NYISO consent to extend the Critical Path Milestone. in accordance with the requirements in Article 3.3.3. If based on its review, the NYISO determines that the Developer has failed to meet a Critical Path Milestone and this failure will result in the inability for the Developer to meet the in-service date, the NYISO may declare a ~~Developer's failure to meet the Critical Path Milestone shall constitute~~ a Breach of this Agreement under Article 7.3.

Article 3.4

The following clarifications are needed to simplify the language and to reflect that it is the definition section which controls what is considered a Significant Modification.

The Developer shall not make a Significant Modification to the Transmission Project without the prior written consent of the NYISO, ~~including, but not limited to, modifications necessary for the Developer to obtain required approvals or authorizations from Governmental Authorities; provided, however, that the NYISO's determination regarding~~ a Significant Modification to the Transmission Project under this Agreement shall be separate from, and shall not replace, the NYISO's review and determination of Material Modifications to the Transmission Project under Attachment X of the OATT. The Developer may request that the NYISO review whether a modification to the Transmission Project would constitute a Significant Modification. The Developer shall provide the NYISO with all ~~required~~ requested information reasonably needed to assist the NYISO in making its determination and shall be responsible for the costs of any study work the NYISO must perform in making its determination. The NYISO's performance

of this review shall not constitute its consent to delay the completion of any Critical Path Milestone.

Article 3.8

NEETNY agrees with LS Power's comment that the NYISO should support the Developer's efforts to obtain regulatory approval of the Developer's Transmission Project that has been determined as the more efficient or cost-effective transmission solution to satisfy a Reliability Need. NEETNY also recognizes that the NYISO may be called upon by the NY PSC to provide information on alternative proposals. Reflecting both these concerns, the section should be revised as follows.

As between the Parties, the Developer shall be solely responsible for all planning, design, engineering, procurement, construction, installation, management, operations, safety, and compliance with Applicable Laws and Regulations, Applicable Reliability Requirements, and Transmission Owner Technical Standards associated with the Transmission Project, including, but not limited to, scheduling, meeting Critical Path Milestones and Advisory Milestones, timely requesting review and consent to any project modifications, and obtaining all necessary permits, siting, and other regulatory approvals. Notwithstanding any other provision of this Section, at the Developer's request NYISO shall provide reasonable effort to support for 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. The NYISO shall have no management 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.

Articles 6.3 and 6.4

NEETNY observes that the insurance requirements in sections 6.3 and 6.4 appear to differ from the insurance requirements in the pro-forma Standard Interconnection Agreement. NEETNY requests that NYISO provide the basis for this difference.

Article 7.1

NEETNY believes that Termination for any reason for not meeting an in-service date, including Force Majeure, is overly broad and not clearly defined. There can be events that will render missing the in-service date of a project irrelevant (e.g., where a Reliability Need date has moved due to system changes) and that are beyond the reasonable control of the Developer (e.g., connecting Transmission Owner work delays).

The NYISO may terminate this Agreement by providing written notice of termination to the Developer in the event that: (i) the Transmission Project is halted pursuant to Section 31.2.8.2.2 of Attachment Y of the OATT; (ii) the Developer notifies the NYISO that it has ~~been denied not received~~ the required approvals or authorizations by Governmental Authorities required to develop, construct, and operate the Transmission Project by the Required Project In-Service Date; (iii) the Developer notifies the NYISO that its required approvals or authorizations by Governmental Authorities have been withdrawn by the Governmental Authorities; or (iv) the Developer is in Default cannot complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event; or (v) the NYISO declares a default pursuant to Article 7.4 of this Agreement. The NYISO will provide the written notice of termination within ten (10) Business Days of its determination under Articles 7.1 (i) or (iv) or its receipt of notice from the Developer under Articles 7.1(ii) or (iii), which notice will specify the date of termination; *provided, however,* that if the Agreement was filed and accepted by FERC pursuant to Section 31.2.8.1.6 of Attachment Y of the OATT, the NYISO will promptly file with FERC a notice of termination of this Agreement following its provision of the notice of termination to the Developer, and the termination will be effective when it has been accepted for filing by FERC.

NEETNY also notes that section 7.2 of the PJM Designated Entity Agreement recognizes Force Majeure events as an excuse for nonperformance. Moreover, section 7.3 of the PJM Agreement also recognizes “a breach or default of the Designated Entity Agreement associated with the Project by a party to the Designated Entity Agreement other than the Designated Entity” as a Force Majeure event.

Article 7.3

NEETNY requests that the NYISO include Developer protections in the Development Agreement where the NYISO’s or interconnecting Transmission Owner’s action or inaction results in the failure to meet a Critical Path Milestone or in-service date. For example, if the interconnecting Transmission Owner does not work with the Developer to coordinate protection systems in a timely manner, such inaction on the interconnecting Transmission Owner’s part could result in the Developer not meeting the current “In-Service Date” that the Developer and NYISO agreed upon. NEETNY notes that the CAISO APSA (e.g., Article 5.8) and the PJM Designated Entity Agreement (e.g., Article 7.3) both have protections for the developer in the case of delays caused by and interconnection TO.

A Breach of this Agreement shall occur when: (i) the Developer notifies the NYISO in writing that it will not proceed to develop the Transmission Project for reasons other than those set forth in Articles 7.1(i) through (iv); (ii) the Developer fails to meet a Critical Path Milestone, as the milestone may be extended with the agreement of the NYISO under Article 3.3.3 of this Agreement, set forth in the Development Schedule in Appendix C to this Agreement; (iii) the Developer makes a Significant Modification to the Transmission Project without the prior

written consent of the NYISO; (iv) the Developer fails to pay a monthly invoice within the timeframe set forth in Article 3.5; (v) the Developer misrepresents a material fact of its representations and warranties set forth in Article 11 and such misrepresentation has a material adverse effect on the NYISO; (vi) a Party assigns this Agreement in a manner inconsistent with the terms of Article 9 of this Agreement; (vii) the Developer fails to comply with any other material term or condition of this Agreement; (viii) a custodian, receiver, trustee or liquidator of the Developer, or of all or substantially all of the assets of the Developer, is appointed in any proceeding brought by the Developer; or (ix) any such custodian, receiver, trustee, or liquidator is appointed in any proceeding brought against the Developer that is not discharged within ninety (90) Days after such appointment, or if the Developer consents to or acquiesces in such appointment; however, if any of the above actions are the result of Force Majeure or the action or inaction of NYISO or the interconnecting Transmission Owner, the Developer is not in Breach.

Article 7.4

NEETNY disagrees that missing a Critical Path Milestone should result in a finding of Breach and subsequent Termination without providing for a cure period. Failure to meet a Critical Path Milestone may not necessarily lead to the Developer missing the In-Service Date. There should be an opportunity to review the impact of missing a Critical Path Milestone on the In-Service Date. Missing a Critical Path Milestone Date could warrant closer project scrutiny and status reporting but should not unconditionally result in a finding of Breach and Termination.

Upon a Breach, the non-Breaching Party shall give written notice of the Breach to the Breaching Party describing in reasonable detail the nature of the Breach and, where known and applicable, the steps necessary to cure such Breach, including whether and what such steps must be accomplished to complete the Transmission Project by the Required Project In-Service Date. The Breaching Party shall have thirty (30) Calendar Days from receipt of the Breach notice within which to cure a Breach other than the failure to meet a Critical Path Milestone or such other period of time as may be agreed upon by the Parties. If the Breach is cured within such timeframe, the Breach specified in the notice shall cease to exist. If the Breaching Party does not cure its Breach within this timeframe or cannot cure the Breach in a manner that provides for the Transmission Project to be completed by the Required Project In-Service Date, the non-Breaching Party shall have the right to declare a Default and terminate this Agreement pursuant to Article 7.1. ~~In the event of a Breach based upon the Breaching Party's failure to meet a Critical Path Milestone, the non-Breaching Party shall have the right to declare a Default and terminate this Agreement pursuant to Article 7.1 without providing for a cure period.~~

Article 14.4

NEETNY agrees with LS Power that this section should be revised to recognize Force Majeure as an excuse for nonperformance or deleted altogether. The PJM Designated Entity Agreement, section 7, recognizes the majority of Force Majeure events and only excludes certain conditions “(i) a failure of performance that is due to an affected Party’s own negligence or intentional wrongdoing; (ii) any removable or remedial causes (other than settlement of a strike or labor dispute), which an affected Party fails to remove or remedy within a reasonable time; or (iii) economic hardship of an affected Party.” The CAISO APSA, section 13, also recognizes Force Majeure as an excuse for nonperformance and directs that “the Parties shall revise this Agreement, including Appendix B and Appendix E, following a Force Majeure event.”

Appendix C

NEETNY agrees with LS Power that the NYISO exceeded what is necessary when identifying Critical Path Milestones. We understand that the NYISO wishes to identify a preliminary list of possible Critical Path Milestones, however, it may be advisable to include such a list in the Reliability Planning Process manual rather than the pro-forma Development Agreement. Including an overly broad list could result in the NYISO having to file a non-conforming agreement with FERC simply because some items in the Attachment C list of Critical Path Milestones may not be applicable to a given project.

Thank you for your consideration of NEETNY’s comments on the Draft NYISO Development Agreement. We look forward to continued discussion with the NYISO and stakeholders at the coming ESPWG meetings. Please feel free to contact me at 561-694-3897 should you have any questions.

Respectfully submitted,

/s/ Monique Brechter

Monique Brechter
Executive Director Development, NextEra Energy Transmission New York, Inc.

Sent via e-mail to: Leigh Bullock, Michael Messonnier and Carl Patka