

153 FERC ¶ 61,341  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

New York Independent System Operator, Inc.

Docket No. ER13-102-007

ORDER CONDITIONALLY ACCEPTING TARIFF REVISIONS  
AND REQUIRING FURTHER COMPLIANCE

(Issued December 23, 2015)

1. On May 18, 2015, the New York Independent System Operator, Inc. (NYISO) and the New York Transmission Owners<sup>1</sup> (together, the Filing Parties) submitted revisions to NYISO's Open Access Transmission Tariff (OATT) and filed a *pro forma* development agreement (Development Agreement) for NYISO's reliability transmission planning process to comply with Order No. 1000<sup>2</sup> and the Commission's Third Compliance Order

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<sup>1</sup> The New York Transmission Owners comprise Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Lighting Company d/b/a the Long Island Power Authority (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. The Filing Parties note that LIPA and New York Power Authority, as transmission owners not subject to the Commission's jurisdiction under section 205 of the Federal Power Act, have voluntarily participated in the development of the Filing Parties' filing.

<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

in this proceeding.<sup>3</sup> In this order, we accept the Filing Parties' Fourth Compliance Filing submitted pursuant to those orders, effective January 1, 2014, subject to further compliance.

## **I. Background**

2. On October 11, 2012, the Filing Parties jointly submitted revisions to Attachment Y of the NYISO OATT to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000 (First Compliance Filing). On April 18, 2013, the Commission issued the First Compliance Order, accepting the Filing Parties' First Compliance Filing, subject to compliance.<sup>4</sup>

3. On October 15, 2013, the Filing Parties jointly submitted additional revisions to Attachment Y of the NYISO OATT to comply with the First Compliance Order (Second Compliance Filing). NYISO noted in a supplemental filing to its Second Compliance Filing that it was "developing agreements it expects to require in implementing" its revised regional transmission planning process—a *pro forma* development agreement for a transmission developer selected to construct a transmission project and a *pro forma* operating agreement for a nonincumbent transmission developer to execute when its transmission project enters into service.<sup>5</sup> On July 17, 2014, the Commission issued the Second Compliance Order, accepting, subject to further compliance, the Filing Parties' Second Compliance Filing.<sup>6</sup>

4. On September 15, 2014, the Filing Parties jointly submitted tariff revisions to Attachment Y of the NYISO OATT in response to the Second Compliance Order (Third Compliance Filing). On April 16, 2015, the Commission issued the Third Compliance Order, in which it also addressed requests for rehearing and clarification of

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<sup>3</sup> *N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,040, at P 3 (2015) (Third Compliance Order). The instant filing will be referred to as the Fourth Compliance Filing.

<sup>4</sup> *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, at P 1 (2013) (First Compliance Order).

<sup>5</sup> NYISO, Supplemental Filing, Docket No. ER13-102-003, at 10 (filed July 2, 2014).

<sup>6</sup> *N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at P 3 (2014) (Second Compliance Order).

the Second Compliance Order.<sup>7</sup> Relevant here, LS Power filed a request for clarification of the Second Compliance Order, asking that the Commission require the Filing Parties to file the *pro forma* agreements with the Commission.<sup>8</sup> In the Third Compliance Order, the Commission granted LS Power's request for clarification and directed the Filing Parties to submit any such *pro forma* agreement for review by the Commission.<sup>9</sup> The Third Compliance Order also accepted, subject to further compliance, the Filing Parties' Third Compliance Filing and required other minor changes to the NYISO OATT, as discussed further below.<sup>10</sup>

5. Pursuant to the Third Compliance Order, the Filing Parties submitted the instant Fourth Compliance Filing.

## **II. Notice of Filing and Responsive Pleadings**

6. Notice of the Filing Parties' Fourth Compliance Filing was published in the *Federal Register*, 80 Fed. Reg. 30,223 (2015), with protests and interventions due on or before June 8, 2015. LS Power Transmission, LLC and LSP Transmission Holdings, LLC (collectively, LS Power) and NextEra Energy Resources, LLC (NextEra) filed protests. On June 23, 2015, NYISO filed an answer to the protests. On July 20, 2015, LS Power filed an answer to NYISO's answer.

## **III. Procedural Matters**

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>11</sup> prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by NYISO and LS Power because they have provided information that assisted us in our decision-making process.

## **IV. Substantive Matters**

8. We find that the Filing Parties have partially complied with the directives in the Third Compliance Order. Accordingly, we conditionally accept the Fourth Compliance

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<sup>7</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 3.

<sup>8</sup> *Id.* P 22.

<sup>9</sup> *Id.* P 23.

<sup>10</sup> *Id.* PP 48-51, 54, 58-59.

<sup>11</sup> 18 C.F.R. § 385.213(a)(2) (2015).

Filing, effective January 1, 2014, subject to further compliance. We direct the Filing Parties to submit, within 30 days of the date of issuance of this order, a further compliance filing, as discussed below.

**A. Selecting Regional Transmission Projects in the Regional Transmission Plan for Purposes of Cost Allocation**

**1. Third Compliance Order**

9. In the Third Compliance Order, the Commission found that the Filing Parties' proposed tariff provisions describing NYISO's process for determining whether to trigger a regulated backstop solution to proceed in parallel with a selected alternative regulated transmission solution were ambiguous in light of language in a related tariff provision regarding halting a regulated backstop solution. The Commission explained that the language in section 31.2.8.1.3 of the NYISO OATT indicated that NYISO would consider numerous factors in deciding whether to trigger a regulated backstop solution, including whether the transmission developer had "received its Article VII certification or other applicable siting permits or authorizations under New York State law."<sup>12</sup> On the other hand, section 31.2.8.2.2 provided that NYISO would halt a regulated backstop solution if the selected alternative regulated transmission solution received those permits or authorizations, executed an agreement with NYISO, and provided construction milestones.<sup>13</sup> The Commission found that reading both sections in concert suggested that an alternative regulated transmission solution's receipt of those permits or authorizations "may be a de facto condition, rather than one of numerous factors, that NYISO considers in determining whether to trigger a regulated backstop solution."<sup>14</sup> Therefore, the Commission required the Filing Parties to propose tariff revisions "to clarify that whether a selected alternative regulated [transmission] solution has received its permits or authorizations under New York State law, including Article VII certification or other applicable siting permits, will be treated as just one factor in NYISO's determination whether to trigger the regulated backstop solution for an identified reliability transmission need."<sup>15</sup>

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<sup>12</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 50 (quoting Proposed NYISO OATT, Attachment Y, § 31.2.8.1.3).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* P 50 & n.103 (citing Proposed NYISO OATT, Attachment Y, §§ 31.2.8.2.2, 31.2.8.1.6).

<sup>15</sup> *Id.* P 51.

## 2. Fourth Compliance Filing

10. According to the Filing Parties, their proposed revisions to section 31.2.8.1.3 clearly set forth a non-exhaustive list of factors that NYISO will consider in reviewing the status of a selected alternative regulated transmission solution to determine whether it is necessary to trigger a regulated backstop solution to ensure the identified Reliability Need<sup>16</sup> is resolved.<sup>17</sup> With revisions as indicated, proposed section 31.2.8.1.3 states:

Prior to the Trigger Date for the regulated backstop solution, the ISO will review the status of the development by the Other Developer or Transmission Owner of the selected alternative regulated transmission solution, including, but not limited to, reviewing: (i) whether the ~~Other Developer or Transmission Owner~~ of the alternative regulated transmission solution has executed a Development Agreement or requested that it be filed unexecuted with the Commission pursuant to Section 31.2.8.1.6; (ii) whether the Developer is timely progressing against the milestones set forth in the Development Agreement; and (iii) the status of the Developer's obtaining required permits or authorizations, including whether the Developer has satisfied the requirements of Section 31.2.8.1.6 and received its Article VII certification or other applicable siting permits or authorizations under New York State law.<sup>18</sup>

For purposes of internal consistency, the Filing Parties state that they also propose to revise section 31.2.8.2.1 (previously section 31.2.8.2.2) to provide that NYISO will consider the same non-exhaustive list of factors as in section 31.2.8.1.3 regarding the

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<sup>16</sup> A Reliability Need is “[a] condition identified by [NYISO] as a violation or potential violation of one or more Reliability Criteria,” which are “electric power system planning and operating policies, standards, criteria, guidelines, procedures, and rules promulgated by the North American Electric Reliability Corporation (‘NERC’), Northeast Power Coordinating Council (‘NPCC’), and the New York State Reliability Council (‘NYSRC’), as they may be amended from time to time.” NYISO, OATT, Attachment Y, § 31.1.1 (9.0.0).

<sup>17</sup> Fourth Compliance Filing at 5.

<sup>18</sup> Proposed NYISO OATT, Attachment Y, § 31.2.8.1.3 (underlining proposed new tariff language and striking through proposed deletions).

status of a selected alternative regulated transmission solution in determining whether to halt a regulated backstop solution.<sup>19</sup>

### **3. Commission Determination**

11. We find that the Filing Parties' proposed revisions to sections 31.2.8.1.3 and 31.2.8.2.1 of Attachment Y of the NYISO OATT comply with the directives in the Third Compliance Order. The proposed revisions correct the ambiguity the Commission identified in the Third Compliance Order by clarifying that whether a transmission developer has "received its Article VII certification or other applicable siting permits or authorizations under New York State law" is not a de facto condition in determining whether NYISO should trigger a regulated backstop solution.<sup>20</sup> As proposed, sections 31.2.8.1.3 and 31.2.8.2.1 indicate that whether the transmission developer has obtained these permits or authorizations "will be treated as just one factor in NYISO's determination whether to trigger the regulated backstop solution."<sup>21</sup> Therefore, the proposed revisions are consistent with NYISO's statement that, when evaluating the status of a selected alternative regulated transmission solution, it "will consider, *among other things*, whether the transmission developer of the selected alternative regulated transmission solution has 'received its Article VII certification or other applicable siting permits or authorizations under New York State law.'"<sup>22</sup>

#### **B. Jurisdiction Over Disputes Related to Public Policy Transmission Planning Process**

##### **1. Third Compliance Order**

12. In the Third Compliance Filing, the Filing Parties proposed revisions to clarify the role of the New York Public Service Commission (New York Commission) in NYISO's public policy transmission planning process, including a provision concerning dispute resolution. Specifically, the Filing Parties' dispute resolution provision provided that "[d]isputes about any [New York Commission] decision to either accept or deny a proposed transmission need as one for which transmission solutions should be requested

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<sup>19</sup> Fourth Compliance Filing at 5; Proposed NYISO OATT, Attachment Y, § 31.2.8.2.1.

<sup>20</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 50.

<sup>21</sup> *Id.* P 51.

<sup>22</sup> *Id.* P 50 (emphasis in original).

shall be addressed through judicial review in the courts of the state of New York pursuant to Article 78 of the New York Civil Practice Law and Rules.”<sup>23</sup> In the Third Compliance Order, the Commission stated that this provision could be read as permitting judicial review in state court of matters beyond those solely within the New York Commission’s jurisdiction.<sup>24</sup> The Commission cited *New York Independent System Operator, Inc.*,<sup>25</sup> in which the Commission required NYISO to amend a similar provision.<sup>26</sup> The Commission directed the Filing Parties to propose revisions to the NYISO OATT “to state that only disputes within the New York Commission’s sole jurisdiction may be subject to judicial review in the courts of the State of New York.”<sup>27</sup> The Commission similarly directed the Filing Parties to revise a parallel proposed provision concerning disputes related to LIPA’s determinations whether a proposed transmission need driven by public policy requirements requires a physical modification to transmission facilities located solely within the Long Island Transmission District.<sup>28</sup>

## 2. Fourth Compliance Filing

13. The Filing Parties propose to revise sections 31.4.2.2 and 31.4.2.3(vi) of Attachment Y of the NYISO OATT to clarify the dispute resolution processes provided for therein. Specifically, the Filing Parties propose to revise section 31.4.2.2 as indicated to state:

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<sup>23</sup> *Id.* P 59 (quoting Proposed NYISO OATT, Attachment Y, § 31.4.2.2).

<sup>24</sup> *Id.*

<sup>25</sup> 109 FERC ¶ 61,372 (2004).

<sup>26</sup> Third Compliance Order, 151 FERC ¶ 61,040 at PP 58-59 (citing *N.Y. Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61,372 at P 19; Second Compliance Order, 148 FERC ¶ 61,044 at P 78).

<sup>27</sup> *Id.* P 59.

<sup>28</sup> *Id.* P 90. Specifically, the Filing Parties proposed that “[d]isputes regarding a decision by [LIPA] to either accept or deny a proposed transmission need solely within the Long Island Transmission District shall be addressed through judicial review in the courts of the state of New York pursuant to Article 78 of the New York Civil Practice Law and Rules.” *Id.* PP 78, 91 (quoting Proposed NYISO OATT, Attachment Y, § 31.4.2.3(vi)).

In the event that a dispute is raised solely within the NYPSC's jurisdiction relating to~~Disputes about~~ any NYPSC decision to either accept or deny a proposed transmission need as one for which transmission solutions should be requested, the dispute shall be addressed through judicial review in the courts of the State of New York pursuant to Article 78 of the New York Civil Practice Law and Rules.<sup>29</sup>

The Filing Parties also propose to revise section 31.4.2.3(vi) to state:

In the event that a dispute is raised solely within the Long Island Power Authority's jurisdiction relating to~~Disputes regarding~~ a decision by the Long Island Power Authority to either accept or deny a proposed transmission need solely within the Long Island Transmission District, the dispute shall be addressed through judicial review in the courts of the State of New York pursuant to Article 78 of the New York Civil Practice Law and Rules.<sup>30</sup>

### **3. Commission Determination**

14. We find that the Filing Parties' proposed revisions to sections 31.4.2.2 and 31.4.2.3(vi) of Attachment Y of the NYISO OATT comply with the Commission's directives in the Third Compliance Order.<sup>31</sup> The Filing Parties' proposed language clarifies that only disputes within the New York Commission's sole jurisdiction may be subject to judicial review in the courts of the state of New York.

#### **C. File Any Pro Forma Agreement**

##### **1. Third Compliance Order**

15. In the Third Compliance Order, the Commission required the Filing Parties to file any *pro forma* agreement that they propose to require "between the transmission developer and NYISO for transmission projects selected in the regional transmission plan for purposes of cost allocation."<sup>32</sup> This directive was in response to NYISO's statement in its supplemental filing that it was developing a *pro forma* development agreement and

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<sup>29</sup> Proposed NYISO OATT, Attachment Y, § 31.4.2.2.

<sup>30</sup> Proposed NYISO OATT, Attachment Y, § 31.4.2.3(vi).

<sup>31</sup> Third Compliance Order, 151 FERC ¶ 61,040 at PP 59, 91.

<sup>32</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 23.

a *pro forma* operating agreement, and LS Power's request that NYISO be required to file any such agreement with the Commission.<sup>33</sup> The Commission stated that it was necessary for the Filing Parties to file any such *pro forma* agreement for Commission review "to ensure that similarly situated transmission developers, whether incumbent transmission owners or nonincumbent transmission developers, will be processed in a not unduly discriminatory or preferential manner consistent with Order No. 1000."<sup>34</sup>

## 2. Fourth Compliance Filing

16. The Filing Parties submitted a Development Agreement that they state is to be executed by NYISO and the developer<sup>35</sup> of an alternative regulated transmission solution after it is selected in NYISO's reliability transmission planning process as the more efficient or cost-effective solution to a Reliability Need (Transmission Project).<sup>36</sup> The Filing Parties state that NYISO is in the process of developing a separate *pro forma* development agreement for its public policy planning transmission process and that NYISO does not believe a *pro forma* development agreement is required at this time for its economic transmission planning process.<sup>37</sup> In particular, the Filing Parties explain that economic transmission projects require a voluntary 80 percent weighted super-majority vote of NYISO's stakeholders to proceed; therefore, given the voluntary nature of the projects, and the fact that they are not driven by reliability or public policy needs, economic transmission projects "could enter into service based on the schedule determined by the Developer and stakeholders supporting the project."<sup>38</sup> According to the Filing Parties, the proposed Development Agreement for the reliability transmission planning process sets forth the rights and obligations of the transmission developer in developing and constructing the Transmission Project, and NYISO in monitoring the

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<sup>33</sup> *Id.* PP 21-22; *see also* NYISO, Supplemental Filing, Docket No. ER13-102-003, at 10 (filed July 2, 2014).

<sup>34</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 23.

<sup>35</sup> The developer of an alternative regulated transmission solution may be either an incumbent Transmission Owner or a nonincumbent transmission developer. NYISO, OATT, Attachment Y, § 31.1.1 (9.0.0).

<sup>36</sup> Fourth Compliance Filing at 4, 6.

<sup>37</sup> *Id.* at 7 n.18.

<sup>38</sup> *Id.*

Transmission Project's progress and in evaluating proposed changes to ensure the Transmission Project is placed into service by the Required Project In-Service Date.<sup>39</sup>

### 3. Commission Determination

17. We find that the Filing Parties have partially complied with the Commission's directive to file any *pro forma* agreement that NYISO requires the developer of a transmission solution selected in the regional transmission plan for purposes of regional cost allocation to execute. We therefore conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing, as discussed below.

18. Although the Filing Parties submitted a Development Agreement for the reliability transmission planning process, which we discuss in detail below, we find that the Filing Parties have not fully complied with the Commission's directive to file any *pro forma* agreement, the execution of which "will significantly impact whether a transmission project selected in a regional transmission plan for purposes of cost allocation remains selected in a regional transmission plan for purposes of cost allocation."<sup>40</sup> The Commission's directive in the Third Compliance Order was not limited to transmission solutions selected in the reliability transmission planning process and included any such agreement that NYISO requires for developers of transmission solutions selected in the public policy transmission planning process.<sup>41</sup> We note that, on June 29, 2015, in Docket No. ER15-2059-000, NYISO submitted tariff revisions to its public policy transmission planning process, pursuant to section 205 of the Federal Power Act (FPA),<sup>42</sup> requiring the developer of a transmission solution selected in the regional transmission plan for purposes of cost allocation to execute a development agreement, but did not include a *pro forma* development agreement. NYISO stated in that June 29, 2015 filing that it

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<sup>39</sup> *Id.* at 8. The Required Project In-Service Date refers to the in-service date of the Transmission Project that must be met to resolve the identified Reliability Need for which NYISO selected the Transmission Project. Proposed NYISO OATT, Attachment Y, Appendix C, Recitals.

<sup>40</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 23. NYISO's regional transmission planning process is comprised of: (1) a local transmission planning process; (2) a reliability transmission planning process; (3) an economic transmission planning process; and (4) a public policy transmission planning process. *Id.* P 14.

<sup>41</sup> *Id.*

<sup>42</sup> 16 U.S.C. § 824d (2012).

would begin formulating the *pro forma* development agreement with stakeholders for the public policy transmission planning process later that summer and would use the Development Agreement submitted for the reliability transmission planning process in this proceeding as a model.<sup>43</sup> The Filing Parties' submission here includes no such agreement.

19. A *pro forma* development agreement for the public policy transmission planning process qualifies as "any *pro forma* agreement, the execution of which 'will significantly impact whether a transmission project selected in a regional transmission plan for purposes of cost allocation remains selected in a regional transmission plan for purposes of cost allocation,'" as described in the Third Compliance Order. Therefore, we direct the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing including either a *pro forma* development agreement for the public policy transmission planning process, or tariff revisions clarifying that NYISO will not require a development agreement for the public policy transmission planning process. The Filing Parties state that NYISO does not believe a *pro forma* development agreement is required at this time for its economic transmission planning process.<sup>44</sup> We therefore will not require the Filing Parties to submit a *pro forma* development agreement for the economic transmission planning process at this time.

20. Further, as discussed more fully below in section IV.D.6, we also require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with a comparable operating agreement to the NYISO Transmission Owners Agreement. Article 5 of the Development Agreement requires nonincumbent transmission developers to execute an operating agreement, which may be either the NYISO Transmission Owners Agreement or a comparable operating agreement.<sup>45</sup> However, the Filing Parties have not provided a comparable operating agreement for Commission review and approval. Therefore, we require the Filing Parties to submit a comparable operating agreement, and demonstrate that such agreement is not unduly discriminatory or preferential and how it is comparable to the NYISO Transmission Owners Agreement.

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<sup>43</sup> NYISO, Tariff Filing, Transmittal Letter, Docket No. ER15-2059-000, at 5 & n.18 (filed June 29, 2015).

<sup>44</sup> Fourth Compliance Filing at 7 n.18.

<sup>45</sup> NYISO, OATT, Attachment Y, § 31.1.7 (9.0.0).

**D. Terms of the *Pro Forma* Development Agreement for the Reliability Transmission Planning Process**

21. Turning to the merits of the Development Agreement, we conditionally accept it, effective January 1, 2014, and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions directed below. We find that the uncontested aspects of the Development Agreement not otherwise discussed below are consistent with the Commission's prior directives, and we accept them without further discussion.

**1. Summary of the Terms**

22. Under the current NYISO OATT, for each identified Reliability Need, NYISO solicits a regulated backstop solution that a designated Responsible Transmission Owner<sup>46</sup> proposes, alternative regulated transmission solutions that incumbent Transmission Owners or nonincumbent transmission developers propose, and market-based solutions that will not be selected in the regional transmission plan for purposes of cost allocation.<sup>47</sup> If no market-based solutions will satisfy the Reliability Need, NYISO will select either a regulated backstop solution or an alternative regulated transmission solution as the more efficient or cost-effective solution.<sup>48</sup> If NYISO selects an alternative regulated transmission solution, it may also require a designated Responsible Transmission Owner to develop the regulated backstop solution in parallel.<sup>49</sup> The Filing Parties propose to require the developer of an alternative regulated transmission solution to sign the Development Agreement once the alternative regulated transmission solution is selected as the more efficient or cost-effective solution to satisfy a Reliability Need.<sup>50</sup>

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<sup>46</sup> A "Responsible Transmission Owner" is: "The Transmission Owner or Transmission Owners designated by the ISO, pursuant to Section 31.2.4.3, to prepare a proposal for a regulated backstop solution to a Reliability Need or to proceed with a regulated solution to a Reliability Need. The Responsible Transmission Owner will normally be the Transmission Owner in whose Transmission District the ISO identifies a Reliability Need." *Id.* § 31.1.1 (9.0.0).

<sup>47</sup> *Id.* §§ 31.2.4.3, 31.2.4.5, 31.2.4.7 (11.0.0).

<sup>48</sup> *Id.* § 31.2.8.1 (11.0.0).

<sup>49</sup> *Id.* § 31.2.8.1.3 (11.0.0).

<sup>50</sup> Proposed NYISO OATT, Attachment Y, § 31.2.8.1.6.

The Filing Parties do not propose to require a designated Responsible Transmission Owner developing a regulated backstop solution to sign the Development Agreement.<sup>51</sup>

23. The Filing Parties state that, in drafting the Development Agreement, NYISO reviewed the terms and conditions included in similar agreements and tariff provisions from other regions, including the Designated Entity Agreement in PJM Interconnection, L.L.C. (PJM),<sup>52</sup> the Approved Project Sponsor Agreement in California Independent System Operator Corporation (CAISO),<sup>53</sup> NYISO's *pro forma* Large Generator Interconnection Agreement (LGIA) contained in Attachment X of the NYISO OATT,<sup>54</sup> and NYISO's existing tariff provisions. The Filing Parties also explain that NYISO reviewed the draft Development Agreement and related tariff revisions with stakeholders and made certain revisions based on stakeholder input, but no stakeholder consensus was achieved.<sup>55</sup>

24. Article 1 of the Development Agreement provides definitions for the capitalized terms used in the Development Agreement, along with cross-references to section 31.1.1 of Attachment Y of the NYISO OATT and the general definition provisions in Article 1 of the NYISO OATT for capitalized terms not defined in the Development Agreement.<sup>56</sup>

25. Article 2.1 establishes the effective date of the Development Agreement as either the date that all parties execute the Agreement or, if filed with the Commission as a non-conforming or unexecuted agreement, the effective date accepted by the Commission.<sup>57</sup> Article 2.2 requires NYISO to file unexecuted or non-conforming Development

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<sup>51</sup> Fourth Compliance Filing at 6 n.16.

<sup>52</sup> *Id.* at 7 (citing *PJM Interconnection, L.L.C.*, Docket Nos. ER13-198-005, ER14-2426-001 (Nov. 18, 2014) (delegated letter order); *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 (2014)).

<sup>53</sup> *Id.* (citing *Cal. Indep. Sys. Operator Corp.*, Docket No. ER14-2824-001 (Feb. 12, 2015) (delegated letter order); *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 (2014)).

<sup>54</sup> NYISO, OATT, Attachment X, § 30.14, Appendix 6 (6.0.0).

<sup>55</sup> Fourth Compliance Filing at 7-8.

<sup>56</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 1.

<sup>57</sup> *Id.* Article 2.1.

Agreements with the Commission and directs the developer to cooperate in such a filing.<sup>58</sup> Article 2.3 states that the Agreement will remain in effect until the developer executes an operating agreement with NYISO and has completed the Transmission Project as required by the Development Agreement.<sup>59</sup>

26. Article 3 concerns the development and construction of the Transmission Project. Specifically, Article 3.1 requires the developer to timely seek and obtain all necessary governmental authorizations and approvals for the Transmission Project and to notify NYISO if it may be unable to obtain such approval or authorization, or if the approval or authorization is denied, withdrawn, or modified.<sup>60</sup> Article 3.2 requires a developer to complete the Transmission Project in accordance with the relevant agreements, reliability standards, laws and regulations, good utility practice, and technical standards.<sup>61</sup> Article 3.3 establishes milestone requirements.<sup>62</sup> Article 3.4 provides that a developer cannot make a Significant Modification to the Transmission Project without NYISO's prior written consent.<sup>63</sup> Article 3.5 sets forth the obligations of the developer to pay NYISO's costs of study or project inspection work performed under the Development Agreement.<sup>64</sup> Articles 3.6 and 3.7 establish requirements for NYISO to monitor and inspect the development of the Transmission Project.<sup>65</sup> Article 3.8 establishes the exclusive responsibility and liability of the developer for the development and construction of the Transmission Project and states that NYISO will cooperate with the developer in good faith in providing information needed to obtain required governmental approvals and authorizations.<sup>66</sup> Articles 3.9 through 3.11 provide that the parties may use subcontractors, but remain fully responsible for their obligations under the Development Agreement, that NYISO is not providing transmission, interconnection, or any of its

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<sup>58</sup> *Id.* Article 2.2.

<sup>59</sup> *Id.* Article 2.3.

<sup>60</sup> *Id.* Article 3.1.

<sup>61</sup> *Id.* Article 3.2.

<sup>62</sup> *Id.* Article 3.3.

<sup>63</sup> *Id.* Article 3.4.

<sup>64</sup> *Id.* Article 3.5.

<sup>65</sup> *Id.* Articles 3.6-3.7.

<sup>66</sup> *Id.* Article 3.8.

market services or products established under its tariffs, and that the parties will cooperate to maintain the other party's tax status to the extent tax status is impacted by the Development Agreement.<sup>67</sup>

27. Article 4 concerns coordination with third parties. Specifically, Article 4.1 requires a nonincumbent transmission developer to satisfy all requirements in Attachments X and S of the NYISO OATT to interconnect a Transmission Project.<sup>68</sup> It also requires a Transmission Owner developing an alternative regulated transmission solution to instead satisfy all applicable transmission expansion requirements in sections 3.7 and 4.5 of the NYISO OATT. Article 4.1 further provides that the developer must participate in the interconnection or transmission expansion process if the developer of another facility proposes to interconnect to the Transmission Project. Article 4.2 explains what the developer should do if the Transmission Project will affect the facilities of another system.<sup>69</sup> Article 4.3 sets forth the requirements if the Transmission Project is, or seeks to be, an Interregional Transmission Project.<sup>70</sup>

28. Article 5 requires a developer to satisfy certain operating requirements for the Transmission Project if the developer is not already subject to the operating requirements in the NYISO Transmission Owners Agreement, including executing an operating agreement with NYISO.<sup>71</sup>

29. Article 6 provides the insurance requirements, which NYISO states it adopted from Article 18.3 of its *pro forma* LGIA, with modifications based on NYISO's review of current insurance practices and conditions in New York for the development of a large infrastructure project.<sup>72</sup>

30. Article 7 concerns instances of breach and default of the Development Agreement. According to Article 7.1, a breach will occur when (1) the developer notifies NYISO that it will not proceed to develop the Transmission Project, (2) the developer fails to meet a

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<sup>67</sup> *Id.* Articles 3.9-3.11.

<sup>68</sup> *Id.* Article 4.1.

<sup>69</sup> *Id.* Article 4.2.

<sup>70</sup> *Id.* Article 4.3.

<sup>71</sup> *Id.* Article 5.

<sup>72</sup> *Id.* Article 6; Fourth Compliance Filing at 12.

Critical Path Milestone, (3) the developer makes a Significant Modification to the Transmission Project without NYISO's consent, (4) the developer fails to pay a monthly invoice under the Development Agreement, (5) the developer misrepresents a material fact of its representations and warranties, (6) the Development Agreement is assigned in a manner inconsistent with the assignment provisions, (7) the developer fails to comply with any other material term or condition of the Development Agreement, or (8) the developer enters into or is placed into a bankruptcy or related proceeding.<sup>73</sup> Article 7.2 states that, upon a breach, the breaching party will have 30 days to cure the breach, or such other period agreed upon by the parties, unless the breach was caused by the developer's failure to meet a Critical Path Milestone.<sup>74</sup> Pursuant to Article 7.3, the non-defaulting party may commence an action to require the defaulting party to remedy the default and specifically perform its duties and obligations under the Development Agreement and exercise such other rights and remedies as it may have in equity or at law.<sup>75</sup>

31. Article 8 governs termination of the Development Agreement. Article 8.1 provides that NYISO may terminate the Development Agreement if (1) "the Transmission Project is halted pursuant to" the halting requirements in NYISO's OATT, (2) the developer "is unable to or has not received the required approvals or authorizations by Governmental Authorities," (3) such authorizations have been withdrawn, (4) the developer "cannot complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event," or (5) "NYISO declares a default pursuant to" the default provisions.<sup>76</sup> Article 8.2 requires each party to notify the other party when it becomes aware of an inability to comply with the provisions of the Development Agreement, and to cooperate and provide necessary information regarding such inability to comply.<sup>77</sup> Article 8.3 states that, if NYISO terminates the Development Agreement, it may request within 60 days of termination that an entity other than the developer complete the Transmission Project.<sup>78</sup>

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<sup>73</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 7.1.

<sup>74</sup> *Id.* Article 7.2.

<sup>75</sup> *Id.* Article 7.3.

<sup>76</sup> *Id.* Article 8.1.

<sup>77</sup> *Id.* Article 8.2.

<sup>78</sup> *Id.* Article 8.3.

32. Article 9 provides for NYISO's limited liability under the Development Agreement and the developer's indemnification obligations.<sup>79</sup>

33. Article 10 limits assignment of the Development Agreement, such that a party seeking to assign the rights and obligations must have the prior written consent of the other party, except that the developer may assign the Development Agreement without NYISO's consent for collateral security purposes to aid in financing the Transmission Project.<sup>80</sup>

34. Article 11.1 requires each party to make available to the other party the information necessary to carry out the obligations and responsibilities set forth in the Development Agreement.<sup>81</sup> Article 11.2 explains how the parties will treat Confidential Information.<sup>82</sup>

35. Article 12 lists the representations, warranties, and covenants made by the developer, and requires that the developer comply with all Applicable Laws and Regulations, Applicable Reliability Requirements, and applicable Transmission Owner Technical Standards.<sup>83</sup>

36. Article 13 points to the dispute resolution process described in Article 11 of NYISO's Market Administration and Control Area Services Tariff (Services Tariff) as applicable to disputes arising under the Development Agreement.<sup>84</sup>

37. Article 14 delineates which rights and obligations survive the termination, expiration, or cancellation of the Development Agreement, and for how long.<sup>85</sup>

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<sup>79</sup> *Id.* Article 9.

<sup>80</sup> *Id.* Articles 1, 10.

<sup>81</sup> *Id.* Article 11.1.

<sup>82</sup> *Id.* Article 11.2.

<sup>83</sup> *Id.* Article 12.

<sup>84</sup> *Id.* Article 13.

<sup>85</sup> *Id.* Article 14.

38. Article 15 generally provides standard miscellaneous contract-related provisions. Article 15.4 states that “[t]he occurrence of a Force Majeure event shall not excuse non-performance of any obligations under” the Development Agreement.<sup>86</sup>

39. The Appendices to each Development Agreement will set forth the specifics of the development, construction, and operation of the Transmission Project, as agreed upon by NYISO and the developer.<sup>87</sup>

2. **Responsible Transmission Owners Executing the Development Agreement**

a. **Fourth Compliance Filing**

40. The Development Agreement states that it applies to developers of “alternative regulated transmission solutions” that have been selected “as the more efficient or cost-effective transmission solution to satisfy an identified Reliability Need.”<sup>88</sup> The Filing Parties state that the purpose of the Development Agreement is to provide a mechanism for NYISO to ensure that a selected alternative regulated transmission solution will be constructed and placed in service in time to satisfy an identified Reliability Need (by the Required Project In-Service Date).<sup>89</sup> The Filing Parties explain that a Responsible Transmission Owner (i.e., an incumbent Transmission Owner developer) developing a regulated backstop solution is not required under Attachment Y to execute the Development Agreement because it is already obligated to develop and construct the regulated backstop solution under New York State law and the Agreement Between NYISO and the New York Transmission Owners on the Comprehensive Planning Process for Reliability Needs entered into in June 2010 (NYISO/TO Reliability Agreement).<sup>90</sup> Therefore, according to the Filing Parties, contractually obligating the developer to timely develop and construct the project is particularly important in the case of nonincumbent transmission developers that have not entered into operation and may

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<sup>86</sup> *Id.* Article 15.4.

<sup>87</sup> *Id.* Appendix A (Project Description), Appendix B (Scope of Work), Appendix C (Development Schedule).

<sup>88</sup> *Id.*, Recitals.

<sup>89</sup> Fourth Compliance Filing at 6, 8.

<sup>90</sup> *Id.* at 6 n.16.

have no legal obligation under New York State law.<sup>91</sup> The Filing Parties contend that the Development Agreement “bridges the gap between NYISO’s tariff requirements for the selection of the project and the Developer turning over operational control of the completed transmission facilities.”<sup>92</sup>

**b. Comments and Protests**

41. LS Power argues that the sponsor of a regulated backstop solution selected as the more efficient or cost-effective solution in NYISO’s Order No. 1000 regional transmission planning process should be required to sign the Development Agreement, not only developers of alternative regulated transmission solutions. LS Power contends that, because both regulated backstop solutions and alternative regulated transmission solutions will be evaluated against each other under the regional transmission planning process, the Development Agreement must impose no more stringent obligations on developers of alternative regulated transmission solutions than on Responsible Transmission Owners developing regulated backstop solutions.<sup>93</sup> LS Power asserts that regulated backstop solutions, although considered outside of the Order No. 1000 process, “transform” into Order No. 1000 regional transmission projects when selected as the more efficient or cost-effective solution to an identified Reliability Need; LS Power therefore argues that the developers of regulated backstop solutions must be required to sign the Development Agreement if selected as the more efficient or cost-effective transmission solution.<sup>94</sup> According to LS Power, to the extent an incumbent Transmission Owner does not want to sign the Development Agreement, the incumbent Transmission Owner should be permitted to exclude its regulated backstop solution from consideration as the Order No. 1000 more efficient or cost-effective solution.<sup>95</sup>

42. Furthermore, LS Power asserts that the NYISO/TO Reliability Agreement does not burden incumbent Transmission Owners with any of the requirements proposed in the Development Agreement and imposes only limited obligations, which do not include milestones, interconnection obligations, or breach provisions, and are subject to a variety

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<sup>91</sup> *Id.* at 6 & n.17 (citing N.Y. Pub. Serv. L. §§ 2(13), 65, 66(2)).

<sup>92</sup> *Id.* at 6.

<sup>93</sup> LS Power Protest at 3.

<sup>94</sup> *Id.* at 4-5 (citing Third Compliance Order, 151 FERC ¶ 61,040 at P 35).

<sup>95</sup> *Id.* at 5.

of conditions and reservations.<sup>96</sup> For example, LS Power points to the breach and termination provisions of the Development Agreement, which allow NYISO to terminate the Development Agreement when, among other things, the developer fails to meet a Critical Path Milestone due to the action or inaction of NYISO or a Transmission Owner, or due to a Force Majeure event.<sup>97</sup> The NYISO/TO Reliability Agreement has an explicit performance exclusion for Force Majeure events. LS Power contends that these differences make it unjust and unreasonable for NYISO to exempt Responsible Transmission Owners developing regulated backstop solutions from executing the Development Agreement when those projects are selected as the more efficient or cost-effective solution to a Reliability Need. LS Power points to PJM, where any project evaluated under the Order No. 1000 process, whether sponsored by an incumbent Transmission Owner or nonincumbent transmission developer, is subject to the requirement that the sponsor execute the Designated Entity Agreement if selected.<sup>98</sup> To the extent the Filing Parties rely on legal obligations under New York State law to justify their proposal, LS Power argues that such laws have no ties to the NYISO regional transmission planning process, impose none of the burdens the Development Agreement imposes, and do not create contractual obligations between the Responsible Transmission Owner and NYISO.<sup>99</sup>

**c. Answer**

43. NYISO counters that requiring Responsible Transmission Owners to sign the Development Agreement is beyond the scope of the compliance directive in the Third Compliance Order because, in requiring the Filing Parties to submit the Development Agreement, the Commission referenced section 31.2.8.1.6 of Attachment Y of the NYISO OATT, which only applies to alternative regulated transmission solutions.<sup>100</sup> NYISO states that the Development Agreement applies equally to incumbent Transmission Owners and nonincumbent transmission developers that propose a selected alternative regulated transmission solution. NYISO contends that the NYISO/TO

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<sup>96</sup> *Id.* at 4; *see also id.*, Exhibit A, sections 2-4 (a copy of the NYISO/TO Reliability Agreement).

<sup>97</sup> *Id.* at 11-16.

<sup>98</sup> *Id.* at 5-6.

<sup>99</sup> *Id.* at 4 n.6.

<sup>100</sup> NYISO Answer at 3-4 (citing Third Compliance Order, 151 FERC ¶ 61,040 at P 23 & n.51).

Reliability Agreement covers the same obligations for Responsible Transmission Owners developing regulated backstop solutions as the Development Agreement covers for alternative regulated transmission solutions. NYISO asserts that a Transmission Owner is already obligated to develop and construct a regulated backstop solution under the NYISO/TO Reliability Agreement, whereas developing and constructing an alternative regulated transmission solution is voluntary.<sup>101</sup> Therefore, the sponsor of an alternative regulated transmission solution could decide not to complete the selected Transmission Project, but a Transmission Owner developing a regulated backstop solution that cannot complete the project is still obligated under NYISO's tariffs and New York State law to address the identified Reliability Need.<sup>102</sup>

44. Although the NYISO/TO Reliability Agreement does not explicitly contain such requirements as milestones, NYISO states that similar requirements for regulated backstop solutions are set forth in NYISO's tariffs. First, NYISO points to section 31.2.13.2 of Attachment Y of the NYISO OATT (numbered as proposed), under which NYISO "will monitor and report on the status of regulated solutions to ensure their continued viability to meet Reliability Needs by the need date . . . using the following criteria": (1) three to five years before the Trigger Date,<sup>103</sup> NYISO will verify the feasibility of the regulated backstop solution; (2) one to two years before the Trigger Date, NYISO will perform more extensive review, including the status of interconnection studies, contract negotiations, permit applications, financing, and Site Control;<sup>104</sup> (3) less than a year before the Trigger Date, NYISO will perform a detailed review, including the status of final permits, required interconnection studies, an interconnection agreement, financing, equipment, and implementation of construction schedules; and (4) prior to

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<sup>101</sup> *Id.* at 5-6.

<sup>102</sup> *Id.* at 6 (noting that, under section 31.2.11.3 of Attachment Y of the NYISO OATT, the Transmission Owner would be required to propose a Gap Solution if one is required).

<sup>103</sup> The Trigger Date is defined as "the date by which the ISO must request implementation of a regulated backstop solution or an alternative regulated solution pursuant to Section 31.2.8 in order to meet a Reliability Need." NYISO, OATT, Attachment Y, § 31.1 (9.0.0). By "triggering" that solution, NYISO informs the Developer "that it should submit the [solution] to the appropriate governmental agency(ies) and/or authority(ies) to *begin* the necessary approval process to site, construct, and operate the solution." NYISO, OATT, Attachment Y, §§ 31.2.8.1.2, 31.2.8.1.3, 31.2.8.1.4 (11.0.0) (emphasis added).

<sup>104</sup> *Id.* § 31.2.8.2 (9.0.0).

making a determination about the viability of the regulated backstop solution, NYISO will discuss the determination with the sponsoring Transmission Owner.<sup>105</sup> In the end, if NYISO determines the proposed regulated backstop solution is no longer viable to meet the Reliability Need, the project will be removed from the list of potential regulated backstop solutions. NYISO also provides the example of section 31.2.8.2 of Attachment Y of the NYISO OATT, which, under NYISO's proposed revisions in this proceeding (moving it to section 31.2.10.2), provides for NYISO to submit a report to the Commission and "take such action as it reasonably considers is appropriate to ensure that the Reliability Need is satisfied by the need date" if the Responsible Transmission Owner developing the regulated backstop solution has not submitted its proposal for necessary regulatory action within a reasonable period of time, is unable or fails to obtain necessary approvals or property rights, or is not taking the actions necessary to construct the project.<sup>106</sup>

**d. Commission Determination**

45. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to the NYISO OATT and Development Agreement to require that Responsible Transmission Owners sponsoring regulated backstop solutions sign the Development Agreement if the regulated backstop solution is selected as the more efficient or cost-effective solution to a Reliability Need or is triggered to proceed in parallel with the alternative regulated transmission solution. We agree with LS Power that the sponsor of a regulated backstop solution selected as the more efficient or cost-effective solution or triggered to proceed in parallel with an alternative regulated transmission solution in NYISO's Order No. 1000 regional transmission planning process should be required to sign the Development Agreement.

46. The Commission required NYISO to file the Development Agreement "to ensure that similarly situated transmission developers, whether incumbent transmission owners or nonincumbent transmission developers, will be processed in a not unduly discriminatory manner consistent with Order No. 1000."<sup>107</sup> Although the process of the regulated backstop solution was developed prior to and outside of the Order No. 1000 process, NYISO will be evaluating proposed regulated backstop solutions against proposed alternative regulated transmission solutions to select the more efficient or cost-

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<sup>105</sup> *Id.* § 31.2.12.2 (9.0.0).

<sup>106</sup> *Id.* § 31.2.8.2 (9.0.0); NYISO Answer at 7 n.21.

<sup>107</sup> Third Compliance Order, 151 FERC ¶ 61,040 at P 23.

effective transmission solution in the regional transmission plan for purposes of cost allocation. Therefore, Responsible Transmission Owners sponsoring regulated backstop solutions are similarly situated to sponsors of alternative regulated transmission solutions and should be subject to the same requirements. Treating similarly situated developers differently without justification is unduly discriminatory and preferential. While NYISO references the Commission's citation to section 31.2.8.1.6 of Attachment Y of the NYISO OATT in the Third Compliance Order, which only applies to alternative regulated transmission solutions, we disagree with NYISO's interpretation. The Commission included this citation at the end of a sentence explaining NYISO's proposal, and not as part of a determination.<sup>108</sup> Contrary to NYISO's assertion, this citation did not indicate that the Commission only required the Filing Parties to file a *pro forma* development agreement for developers of alternative regulated transmission solutions.

47. Further, although Responsible Transmission Owners sponsoring regulated backstop solutions have already entered into the NYISO Transmission Owners Agreement and NYISO/TO Reliability Agreement, some of the requirements contained in those agreements are less stringent than those contained in the Development Agreement. For example, as discussed further below, the NYISO Transmission Owners Agreement and the NYISO/TO Reliability Agreement excuse non-performance due to Force Majeure events, while the Development Agreement does not. In addition, the Development Agreement contains milestone requirements that trigger breach and termination provisions, whereas the NYISO Transmission Owners Agreement and the NYISO/TO Reliability Agreement do not. The Filing Parties emphasize the importance of the project milestones in the Development Agreement to ensure that the selected Transmission Project will be completed in time to satisfy the Reliability Need.<sup>109</sup> Although NYISO cites provisions in the NYISO OATT that provide for monitoring of the progress of a regulated backstop solution *before* the Trigger Date, this argument is unconvincing because the milestones in the Development Agreement apply *after* NYISO has triggered the alternative regulated transmission solution.<sup>110</sup> Likewise, although the

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<sup>108</sup> *Id.* P 23 & n.51.

<sup>109</sup> Fourth Compliance Filing at 6 & n.17, 9 (describing the milestone requirements as “the key mechanism in the agreement by which the NYISO can monitor the development of the Transmission Project and provide that it will be in-service in time to satisfy the Reliability Need”).

<sup>110</sup> *Compare* Proposed NYISO OATT, Attachment Y, § 31.2.13.2 (discussing actions NYISO will take *before* the Trigger Date of a regulated backstop solution), *with id.* Appendix C, Recitals (stating that the Development Agreement applies *after* NYISO

(continued...)

NYISO OATT provision providing that NYISO may take appropriate action if the developer of a regulated backstop solution fails to timely construct the project lessens the discriminatory effect of not having the developer of a regulated backstop solution sign the Development Agreement,<sup>111</sup> it does not eliminate the fact that the Development Agreement has specific milestone dates that trigger termination of the project if they are not met and which could lead to the project being assigned to an incumbent Transmission Owner.<sup>112</sup>

48. To ensure that similarly situated transmission developers will be processed in a not unduly discriminatory or preferential manner consistent with Order No. 1000, we therefore require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to the NYISO OATT and Development Agreement to require that all transmission developers sign the Development Agreement if selected as the more efficient or cost-effective solution to an identified need or triggered as the backstop to the alternative regulated transmission solution.<sup>113</sup>

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has directed the developer to proceed with the Transmission Project – i.e., after the Trigger Date).

<sup>111</sup> *Id.* § 31.2.10.2 (defining timely construction as submitting the proposal for necessary regulatory action, obtaining necessary approvals or property rights, and taking actions necessary to construct the project).

<sup>112</sup> *See id.* § 31.2.10.1.3 (stating that NYISO may, under certain circumstances, “request that the Responsible Transmission Owner complete the selected alternative regulated transmission solution”).

<sup>113</sup> This decision is consistent with the Commission’s action in PJM, where LS Power contested PJM’s proposed tariff language that was unclear as to whether both nonincumbent transmission developers and incumbent transmission developers would be required to execute the Designated Entity Agreement. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 265 (2013), *order on reh’g*, 147 FERC ¶ 61,128 (2014), *order on reh’g*, 150 FERC ¶ 61,038 (2015). The Commission found PJM’s tariff language to be vague and required PJM “to clarify that regardless [of] whether a Designated Entity is an incumbent transmission developer or a nonincumbent transmission developer, an entity that accepts its designation as a Designated Entity must submit . . . an executed agreement.” *Id.* P 280.

### 3. Article 1 – Definitions

#### a. Fourth Compliance Filing

49. Article 1 of the Development Agreement provides definitions for the capitalized terms used in the Development Agreement, along with cross-references to the NYISO OATT for capitalized terms not defined in Article 1. The proposed definition of “Force Majeure” provides:

Force Majeure shall mean any cause or occurrence affecting the ability of a Party hereto to perform its obligations under this Agreement, which cause or occurrence is beyond the reasonable control of the Party affected, not reasonably foreseeable by such Party, not due to an act or omission of the Party affected, and which could not have been avoided by the exercise of reasonable diligence.<sup>114</sup>

50. The proposed definition of “Connecting Transmission Owner” provides: “Connecting Transmission Owner shall have the meaning set forth in Attachment X of the OATT.”<sup>115</sup> Attachment X of the NYISO OATT defines “Connecting Transmission Owner” as:

[T]he New York public utility or authority (or its designated agent) that (i) owns facilities used for the transmission of Energy in interstate commerce and provides Transmission Service under the Tariff, (ii) owns, leases or otherwise possesses an interest in the portion of the New York State Transmission System or Distribution System at the Point of Interconnection, and (iii) is a Party to the Standard Large Interconnection Agreement.<sup>116</sup>

#### b. Commission Determination

51. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to the definitions of “Force Majeure” and “Connecting Transmission Owner” in Article 1 of the Development Agreement, as discussed below. We find that

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<sup>114</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 1.

<sup>115</sup> *Id.*

<sup>116</sup> NYISO, OATT, Attachment X, § 30.1 (4.0.0).

the Filing Parties' proposed definition of Force Majeure is too vague and potentially broader than the definition included in NYISO's *pro forma* LGIA.<sup>117</sup> We find that providing examples of events that fall into the category of Force Majeure, such as the examples set forth NYISO's *pro forma* LGIA, is necessary to further refine the term. We therefore require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing revising the definition of Force Majeure to include examples of events to more closely match that of NYISO's *pro forma* LGIA.

52. With regard to the Filing Parties' proposed definition of "Connecting Transmission Owner," we find that the Filing Parties' use of the term "Standard Large Interconnection Agreement" is unclear. The term "Standard Large Interconnection Agreement" does not appear anywhere in NYISO's tariffs other than the definition of "Connecting Transmission Owner."<sup>118</sup> We therefore require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with a revised definition of Connecting Transmission Owner in Article 1 of the Development Agreement and elsewhere in NYISO's tariffs to resolve this ambiguity.

#### 4. **Article 3.3 – Notification Regarding Critical Path Milestones**

##### a. **Fourth Compliance Filing**

53. Article 3 of the proposed Development Agreement concerns the development and construction of the Transmission Project. Article 3.3 establishes milestone requirements. NYISO will provide the Required Project In-Service Date to the developer, and the parties will agree as part of the process for finalizing the Development Agreement on both Critical Path Milestones and Advisory Milestones.<sup>119</sup> The proposed Development

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<sup>117</sup> NYISO's *pro forma* LGIA defines "Force Majeure" by providing a list of examples of events that would be considered Force Majeure events, such as acts of God, labor disturbance, acts of the public enemy, war, insurrection, riot, fire, storm, and flood. *Id.* § 30.14, Appendix 6, Article 1 (6.0.0). We note that PJM's Designated Entity Agreement and CAISO's Approved Project Sponsor Agreement contain similar examples. *See* PJM, Intra-PJM Tariffs, OATT, Attachment KK, § 10.0 (0.1.0); CAISO, OATT, Appendix X, Article 1 (5.0.0).

<sup>118</sup> The NYISO OATT contains provisions for "Standard Large Generator Interconnection Agreement" and "Standard Large Facility Interconnection Procedures," but not "Standard Large Interconnection Agreement." *See* NYISO, OATT, Attachment X, § 30 (4.0.0).

<sup>119</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 3.3.1.

Agreement defines Critical Path Milestones as those milestones that must be met for the Transmission Project to be constructed and operating by the Required Project In-Service Date; Advisory Milestones are defined as those that are not Critical Path Milestones.<sup>120</sup>

54. According to Article 3.3.2, a developer's inability or failure to meet a Critical Path Milestone will constitute a breach of the Development Agreement, but the developer may request in writing that NYISO consent to extend a Critical Path Milestone.<sup>121</sup> NYISO will not unreasonably withhold, condition, or delay its consent to an extension request if the developer demonstrates to NYISO's satisfaction that the Required Project In-Service Date will still be met.<sup>122</sup> Article 3.3.3 requires that the developer notify NYISO 30 days before each Critical Path Milestone "whether it will meet the Critical Path Milestone" and notify NYISO as soon as reasonably practicable, but no later than 15 days after the developer discovers a potential delay in meeting a Critical Path Milestone, including a delay caused by a Force Majeure event.<sup>123</sup> Within 15 days of discovering a potential delay in meeting an Advisory Milestone, the developer must notify NYISO of the potential delay; the developer can extend an Advisory Milestone by notifying NYISO of the change, except the developer must have NYISO's consent if the extension will delay a Critical Path Milestone.<sup>124</sup>

**b. Comments and Protests**

55. With regard to Article 3.3.3, NextEra argues that a developer should not be found to be in breach of the Development Agreement simply by not knowing whether it will meet a Critical Path Milestone when there are factors not fully in the developer's control.<sup>125</sup> NextEra contends that Article 3.3.3 is overly broad and not reflective of the realities of project development. While NextEra admits that it is reasonable on its face to require a developer to notify NYISO 30 days before each Critical Path Milestone whether it will meet the deadline, NextEra asserts that this ignores that a developer may not know whether it will meet that Critical Path Milestone at that time. According to NextEra, a

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<sup>120</sup> *Id.* Article 1.

<sup>121</sup> *Id.* Article 3.3.2.

<sup>122</sup> *Id.* Article 3.3.4.

<sup>123</sup> *Id.* Article 3.3.3.

<sup>124</sup> *Id.* Article 3.3.5.

<sup>125</sup> NextEra Protest at 2.

developer should not be deemed to have breached the Development Agreement when it cannot meet the deadline due to factors outside its control, such as a government agency not issuing a permit at a given date. Rather, NextEra proposes to revise Article 3.3.3 to say that the developer must notify NYISO whether it *expects* to meet the Critical Path Milestone.<sup>126</sup>

**c. Answer**

56. NYISO responds that the “expects to meet” language contradicts the purpose of requiring developers to notify NYISO regarding potential delays in timely completing a Transmission Project.<sup>127</sup> NYISO states that, if 30 days prior to a Critical Path Milestone, the developer is uncertain whether it will meet the Critical Path Milestone, it should notify NYISO of a potential delay and, if necessary, request an extension of time. According to NYISO, this will enable NYISO to identify and address potential delays as soon as possible prior to the date of the Critical Path Milestone, rather than waiting until after the deadline has passed.<sup>128</sup>

**d. Commission Determination**

57. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to Article 3.3.3 to change the language from requiring a developer to notify NYISO “whether it will” meet a Critical Path Milestone to requiring a developer to notify NYISO “whether, to the best of its knowledge, it expects” to meet that milestone. We agree with NextEra that the language of Article 3.3.3 is too stringent. The Filing Parties explain that this provision in Article 3.3.3 enables NYISO to monitor the status of development of the Transmission Project and to identify as soon as possible whether there are any issues that may endanger the ability of the developer to complete the Transmission Project by the Required Project In-Service Date.<sup>129</sup> Requiring the developer to notify NYISO “whether, to the best of its knowledge, it expects” to meet a Critical Path Milestone will not impact NYISO’s ability to monitor the status of the

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<sup>126</sup> *Id.*

<sup>127</sup> NYISO Answer at 15-16 (citing NextEra Protest at 2).

<sup>128</sup> *Id.* at 16 (noting that, notwithstanding the 30-day notification requirement, a developer is always required to inform NYISO within 15 days of its discovery of a potential delay, pursuant to Article 3.3.3).

<sup>129</sup> Fourth Compliance Filing at 10.

Transmission Project and to react to potential delays in its construction. We agree with NextEra's concern that it could be difficult to state with certainty whether a developer "will" meet a Critical Path Milestone because there are factors outside of the developer's control, and which the developer cannot anticipate, that may cause a delay. Moreover, NYISO's *pro forma* LGIA only requires a developer to provide notice if it "reasonably expects that it will be unable to complete" the interconnection "by the specified dates."<sup>130</sup> Revising the language in Article 3.3.3 of the Development Agreement, as required here, will make the Development Agreement more consistent with NYISO's *pro forma* LGIA.

## 5. Article 4 – Interconnection Requirements

### a. Fourth Compliance Filing

58. The Filing Parties state that Article 4 of the Development Agreement "aligns the requirements in the Development Agreement with NYISO's interconnection and transmission expansion processes."<sup>131</sup> Specifically, Article 4.1 requires a nonincumbent transmission developer of an alternative regulated transmission solution selected in the regional transmission plan for purposes of cost allocation to satisfy all of the requirements in Attachments X and S of the NYISO OATT applicable to a "Merchant Transmission Facility" (i.e., NYISO's merchant transmission and generator interconnection process),<sup>132</sup> unless the developer is a Transmission Owner.<sup>133</sup> In contrast, Article 4.1 provides that a Transmission Owner, developing an alternative regulated transmission solution, must instead satisfy all applicable transmission expansion requirements in sections 3.7 and 4.5 of the NYISO OATT (i.e., NYISO's interconnection process that applies to Transmission Owners).<sup>134</sup>

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<sup>130</sup> NYISO, OATT, Attachment X, Appendix 6, § 5.1.1 (6.0.0).

<sup>131</sup> Fourth Compliance Filing at 11.

<sup>132</sup> Attachment X defines a "Merchant Transmission Facility" as a transmission facility "developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements" and "shall not include upgrades or additions to the New York State Transmission System made by a Transmission Owner signatory to the ISO-Related Agreements." NYISO, OATT, Attachment X, § 30.1 (4.0.0).

<sup>133</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 4.1; NYISO, OATT, Attachment S (0.0.0), Attachment X (0.0.0).

<sup>134</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 4.1; NYISO, OATT, §§ 3.7 (0.0.0), 4.5 (0.0.0).

**b. Comments and Protests**

59. LS Power argues that Article 4.1 requires nonincumbent transmission developers to meet interconnection requirements that are inapplicable and inappropriately exempts incumbent Transmission Owners from meeting those requirements.<sup>135</sup> LS Power asks the Commission to reject Article 4.1 both because it provides for differing standards for incumbent Transmission Owners and nonincumbent transmission developers and because it forces Order No. 1000 reliability transmission projects into a “Merchant Transmission Facility” interconnection process that is neither applicable, nor appropriate.<sup>136</sup> LS Power asserts that transmission solutions selected in the regional transmission plan for purposes of cost allocation are not, and should not be treated like, “Merchant Transmission Facilities” that a developer chooses to build at its own expense and risk; rather, they are transmission solutions necessary for NYISO to meet reliability requirements on the system, they have been selected by NYISO as the more efficient or cost-effective solution, and they qualify for regional cost allocation.<sup>137</sup>

60. According to LS Power, NYISO must consider the interconnection requirements for a Transmission Project, and the costs thereof, before it can decide which project proposal is the more efficient or cost-effective solution. LS Power contends that requiring alternative regulated transmission solutions to go through an after-the-fact interconnection process puts them at a disadvantage to regulated backstop solutions and incumbent Transmission Owner-proposed alternative regulated transmission solutions.<sup>138</sup> LS Power explains that this disadvantage arises because the Responsible Transmission Owner developing a regulated backstop solution is likely intimately involved in determining the cost of the interconnection facilities needed for proposed alternative regulated transmission solutions after developers have submitted their project proposals. In addition, LS Power states that Attachments X and S would make the developer responsible for all interconnection costs, rather than requiring the incumbent Transmission Owner placing those interconnection facilities into service to collect the cost through its tariff on file with the Commission.<sup>139</sup> LS Power therefore asks the Commission to require NYISO to develop an interconnection process that is specific to

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<sup>135</sup> LS Power Protest at 6.

<sup>136</sup> *Id.* at 6-7.

<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 7-8.

transmission solutions proposed and selected in NYISO's regional transmission planning process.<sup>140</sup>

61. Further, LS Power believes it is entirely inappropriate for the milestones in the "Merchant Transmission Facilities" interconnection process to become Critical Path Milestones in the Development Agreement for the developer of Order No. 1000 transmission projects selected for regional cost allocation because many of the milestones in the "Merchant Transmission Facilities" interconnection process are in the sole discretion of the incumbent Transmission Owner. LS Power states that this creates a situation in NYISO where the incumbent Transmission Owner will be receiving cost recovery for a regulated backstop solution in parallel to the nonincumbent transmission developer's Order No. 1000 project. According to LS Power, there should be no ability of the incumbent Transmission Owner to thwart the nonincumbent transmission developer's Order No. 1000 project while it continues to advance (with cost recovery) a regulated backstop solution outside of the Order No. 1000 process. LS Power states that, if the "Merchant Transmission Facilities" interconnection process is retained at all, these milestones should only be allowed as Advisory Milestones in the Development Agreement.<sup>141</sup>

**c. Answers**

62. With regard to LS Power's request that NYISO develop an interconnection process specific to Order No. 1000 transmission projects, NYISO argues that this constitutes a collateral attack on the Commission's determination not to require changes to interconnection procedures.<sup>142</sup> NYISO quotes from a recent Commission order reiterating that "Order No. 1000 does not require [a regional transmission organization] 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 under Order Nos. 2003, 2006, or 661."<sup>143</sup>

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<sup>140</sup> *Id.* at 8.

<sup>141</sup> *Id.*

<sup>142</sup> NYISO Answer at 10 (citing LS Power Protest at 6-9; Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 760).

<sup>143</sup> *Id.* at 10-11 (quoting *ISO New England Inc.*, 151 FERC ¶ 61,133, at P 109 (2015)).

63. NYISO explains that Article 4 of the Development Agreement does not create any new interconnection requirements; the NYISO OATT provides for two processes for evaluating interconnection and transmission projects: the transmission expansion process in sections 3.7 and 4.5; and the interconnection process in Attachment X.<sup>144</sup> According to NYISO, the Attachment X interconnection process requires three interconnection studies: (1) an Interconnection Feasibility Study (Feasibility Study); (2) a System Reliability Impact Study (System Impact Study); and (3) a Class Year Interconnection Facilities Study (Facilities Study). NYISO states that generation projects, including those proposed by Transmission Owners, and “Merchant Transmission Facilities” are evaluated for interconnection under Attachment X. NYISO explains that transmission facilities developed by nonincumbent transmission developers are evaluated under Attachment X, notwithstanding the use of the word “merchant,” because they fall within the definition of “Merchant Transmission Facilities” provided in Attachment X.<sup>145</sup> Therefore, NYISO contends it is reasonable to treat nonincumbent transmission developers’ alternative regulated transmission solutions as “Merchant Transmission Facilities” under Attachment X, even though such transmission facilities are eligible for regional cost allocation.

64. NYISO further explains that sections 3.7 and 4.5 of the NYISO OATT cover transmission expansions proposed by Eligible Customers,<sup>146</sup> which include incumbent Transmission Owners, but not nonincumbent transmission developers, to expand or reinforce the New York State Transmission System.<sup>147</sup> NYISO states that the transmission expansion process requires a System Impact Study and a Facilities Study, but not a Feasibility Study, which is solely a requirement of the interconnection

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<sup>144</sup> *Id.* at 11.

<sup>145</sup> *Id.* at 11-12. “Merchant Transmission Facilities” are “those transmission facilities developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements,” and do not include “upgrades or additions to the New York State Transmission System made by a Transmission Owner signatory to the ISO-Related Agreements.” NYISO, OATT, Attachment X, § 30.1 (4.0.0).

<sup>146</sup> The NYISO OATT defines an “Eligible Customer” as: “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. . . .” NYISO, OATT, § 1.5 (4.0.0). Sections 3.7.1 and 4.5.1 of the NYISO OATT state that an Eligible Customer includes a Transmission Owner.

<sup>147</sup> NYISO Answer at 12.

procedures in Attachment X. NYISO contends that a Feasibility Study<sup>148</sup> is not required for incumbent Transmission Owners developing transmission solutions because incumbent Transmission Owners would have already conducted the same type of study prior to interconnection, often as part of their local transmission planning process.<sup>149</sup> On the other hand, NYISO states that the Feasibility Study is critical for nonincumbent transmission developers' projects because it 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>150</sup>

65. NYISO also clarifies that the interconnection process is not after-the-fact, as LS Power characterizes it; rather, a nonincumbent transmission developer may submit its Interconnection Request and begin the Attachment X interconnection process at any time. According to NYISO, "the clear intent of the NYISO's tariff requirements for the

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<sup>148</sup> While the NYISO OATT does not define a Feasibility Study, the Commission has stated that a Feasibility Study is used "to evaluate on a preliminary basis, the feasibility of a proposed interconnection using power flow and short-circuit analyses . . ." *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 36 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008). In addition, the NYISO Interconnection Manual defines the objectives of the Feasibility Study as to "develop a conceptual design for the proposed interconnection, evaluate the impact of the project on the pre-existing electric system at and in electrical proximity to the [Point of Interconnection], preliminarily identify the [Connecting Transmission Owner] Attachment Facilities and any System Upgrade Facilities (SUFs) that would be required to interconnect the project to the system in a reliable manner, and develop nonbinding good faith estimates of the cost and time to construct the required facilities." NYISO, *Transmission Expansion and Interconnection Manual*, at 26 (Nov. 2012), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Manuals\\_and\\_Guides/Manuals/Planning/tei\\_mnl.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Planning/tei_mnl.pdf).

<sup>149</sup> NYISO Answer at 12.

<sup>150</sup> *Id.* at 13 n.37.

reliability planning process is that the interconnection or transmission expansion process, as applicable, will run in parallel with the reliability planning process.”<sup>151</sup> NYISO states that, in determining the viability and sufficiency of a proposed project, and in evaluating the project for purposes of selection, it “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>152</sup> NYISO explains that all developers of transmission solutions, both regulated backstop solutions and alternative regulated transmission solutions, will be responsible for the interconnection costs of their projects and NYISO “will take these costs into account in selecting the more efficient or cost-effective transmission solution.”<sup>153</sup>

66. LS Power responds to NYISO’s assertion that its request that NYISO be required to develop an interconnection process specific to Order No. 1000 transmission projects is a collateral attack on prior Commission orders. In particular, LS Power asserts that NYISO’s citations can be distinguished because LS Power’s protest is that, as part of its Order No. 1000 compliance, NYISO seeks to mandate that nonincumbent transmission developers, and only nonincumbent transmission developers, comply with inapplicable interconnection procedures designed for “Merchant Transmission Facilities.”<sup>154</sup> LS Power quotes from Order No. 1000, which states that “merchant transmission projects are defined as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.”<sup>155</sup> According to LS Power, Order No. 1000 prevents NYISO’s expansive application of its “Merchant Transmission Facilities” interconnection process. LS Power also points to Order No. 1000-A, in which the Commission stated “that the public utility transmission providers in a transmission planning region *must use the same process to evaluate* a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer.”<sup>156</sup> Because

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<sup>151</sup> *Id.* at 13 (citing LS Power Protest at 7).

<sup>152</sup> *Id.* (citing NYISO, OATT, Attachment Y, §§ 31.2.4.8, 31.2.6.5.1.1 (11.0.0)).

<sup>153</sup> *Id.* at 13-14.

<sup>154</sup> LS Power Answer at 2-3 (citing NYISO Answer at 10-12).

<sup>155</sup> *Id.* at 3 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119).

<sup>156</sup> *Id.* at 4 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at P 454) (emphasis added by LS Power).

NYISO does not have an applicable interconnection process for nonincumbent transmission projects seeking regional cost allocation, LS Power requests that NYISO be required to develop such a process.

**d. Commission Determination**

67. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to Article 4 of the Development Agreement to clarify that all alternative regulated transmission solutions will be evaluated for interconnection under Attachments X and S of the NYISO OATT,<sup>157</sup> regardless of whether the entity developing the solution is a Transmission Owner signatory to the NYISO Transmission Owners Agreement or a nonincumbent transmission developer. In addition, we direct the Filing Parties to further revise Article 4 to clarify that Responsible Transmission Owners developing regulated backstop solutions will also be evaluated for interconnection under Attachments X and S. We further require the Filing Parties to revise Article 4 to incorporate the milestones in Attachment X, which are controlled by incumbent Transmission Owners, as only Advisory Milestones. Finally, as discussed further below, we require the Filing Parties to revise the definition of “Merchant Transmission Facilities” to be consistent with the definition in Order No. 1000 and to revise the NYISO OATT to clarify which transmission projects are subject to the interconnection process contained in Attachment X.

68. First, we find the Filing Parties’ proposal to evaluate nonincumbent transmission developer-sponsored alternative regulated transmission solutions for interconnection under Attachments X and S of the NYISO OATT, while evaluating Transmission Owner-sponsored alternative regulated transmission solutions and regulated backstop solutions under sections 3.7 and 4.5 of the NYISO OATT to be unjust and unreasonable and unduly discriminatory and preferential. The Filing Parties propose two separate and different interconnection processes for similarly situated entities (i.e., sponsors of transmission project proposals submitted in NYISO’s regional transmission planning process, which NYISO will evaluate against one another in selecting the more efficient or cost-effective transmission solution in the regional transmission plan for purposes of cost allocation). We find that requiring all Order No. 1000 projects to go through the same interconnection process in NYISO is necessary to ensure that all sponsors of transmission projects selected in the regional transmission plan for purposes of cost allocation are treated in a not unduly discriminatory or preferential manner.

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<sup>157</sup> Attachment X sets forth NYISO’s generation and “Merchant Transmission Facilities” interconnection process. Attachment S contains the related cost requirements for that interconnection process, including the facilities cost allocation procedures.

69. Second, we find that NYISO proposes, without sufficient justification, to subject nonincumbent transmission developers to an interconnection process that is more cumbersome than the interconnection process that applies to incumbent Transmission Owners. For example, the requirements for nonincumbent transmission developers using NYISO's interconnection process in Attachment X include, but are not limited to, submitting an Interconnection Request, participating in all necessary studies (i.e., a Feasibility Study, a System Impact Study, and a Facilities Study, each with an associated study deposit), and executing, and/or requesting NYISO to file unexecuted, an interconnection agreement for Commission review and acceptance.<sup>158</sup> In contrast, the requirements for Transmission Owners using NYISO's transmission expansion process in sections 3.7 and 4.5 of the NYISO OATT are more limited and flexible; for example, while a System Impact Study and a Facilities Study are required, a Feasibility Study is not.<sup>159</sup> NYISO will evaluate regulated backstop solutions proposed by Responsible Transmission Owners against alternative regulated transmission solutions, whether proposed by incumbent Transmission Owners or nonincumbent transmission developers, in selecting the more efficient or cost-effective solution in the regional transmission plan for the purposes of cost allocation.

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<sup>158</sup> Pursuant to Attachment X, a developer proposing to interconnect a new transmission project must submit an Interconnection Request, a non-refundable \$10,000 application fee to be divided equally between NYISO and the Connecting Transmission Owner(s), and a refundable \$30,000 study deposit for the Feasibility Study. NYISO, OATT, Attachment X, § 30.3.1 (5.0.0). NYISO then assigns each project a queue position, which will determine the order of performing the interconnection studies, based on the date and time of receipt of the Interconnection Request. *Id.* § 30.4.1 (2.1.0). Attachment X requires the developer of a new transmission project to go through a Feasibility Study (additional \$30,000 deposit), a System Impact Study (additional \$120,000 deposit), and a Facilities Study (the greater of \$100,000 or the project's portion of the estimated monthly cost of conducting the Facilities Study for that Class Year). *Id.* §§ 30.6 (0.0.0), 30.7 (1.0.0), 30.8 (1.0.0).

<sup>159</sup> In addition, pursuant to sections 3.7 and 4.5 of the NYISO OATT, a Transmission Owner may conduct all or part of the System Impact and Facilities Studies itself and there are no deposit requirements associated with the studies, even if NYISO performs all or part of the studies. NYISO, OATT, §§ 3.7.1, 3.7.4, 4.5.2, 4.5.4 (0.0.0). Attachment X does not, however, grant nonincumbent transmission developers the option of conducting all or part of its own studies. Both processes require reimbursement to NYISO of its study costs if NYISO performs all or part of the studies.

70. For the process to not be unduly discriminatory or preferential, all projects seeking regional cost allocation must submit to the same interconnection process (i.e., Attachments X and S). We note that this finding does not alter or otherwise affect Transmission Owners' ability to propose expansions and upgrades to their own system for transmission projects that are planned outside of NYISO's regional transmission planning process, and therefore would not be eligible for selection in the regional transmission plan for purposes of cost allocation, through the process in sections 3.7 and 4.5 of the NYISO OATT.

71. NYISO contends that the use of two separate processes is appropriate because a Feasibility Study is not necessary for Transmission Owners interconnecting to their own system. According to NYISO, the Transmission Owner would have already conducted the same type of study prior to interconnection, often as part of its local transmission planning process.<sup>160</sup> Nevertheless, there are certain aspects of the two interconnection processes that we find to be unduly discriminatory. For example, pursuant to sections 3.7 and 4.5 of the NYISO OATT, a Transmission Owner does not have deposit requirements associated with the studies that NYISO performs on the Transmission Owner's behalf.<sup>161</sup> Attachment X, however, requires nonincumbent transmission developers to pay study deposits. We see no reason for such disparate treatment. Rather, requiring all Order No. 1000 projects to go through the same interconnection process in NYISO is necessary to ensure a process that is not unduly discriminatory or preferential.<sup>162</sup>

72. While a project developer must execute the Development Agreement after NYISO selects its project as the more efficient or cost-effective solution, NYISO states in its answer that the intent of its reliability transmission planning process is that the interconnection or transmission expansion process, as applicable, will be run in parallel with the reliability transmission planning process, and that NYISO will consider the

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<sup>160</sup> NYISO Answer at 12.

<sup>161</sup> NYISO, OATT, §§ 3.7.1, 3.7.4, 4.5.2, 4.5.4 (0.0.0).

<sup>162</sup> We note that section 30.6.1 of Attachment X allows NYISO, the Connecting Transmission Owner, and the project developer to agree to waive the Feasibility Study. NYISO states in its answer that NYISO and the Transmission Owners' practice has been to waive the Feasibility Study only when the technical work necessary for subsequent studies has already been completed or is inapplicable. Therefore, if an incumbent Transmission Owner has already performed the necessary technical work, the Feasibility Study can be waived. NYISO Answer at 12 n.36. NYISO must apply this tariff requirement to all transmission project developers in a not unduly discriminatory or preferential manner.

status of a project in the interconnection or transmission expansion process when evaluating a project for selection.<sup>163</sup> Section 31.2 of Attachment Y of the NYISO OATT requires that sponsors of regulated backstop solutions and alternative regulated transmission solutions submit information on “the status of ISO interconnection studies and interconnection agreement” with solution proposals for NYISO to determine the viability and sufficiency of the proposal and to evaluate whether the proposal is the more efficient or cost-effective transmission solution.<sup>164</sup> Likewise, section 31.2 provides that, as part of NYISO’s evaluation of proposed transmission solutions for selection in the regional transmission plan, NYISO will consider the equipment for interconnection facilities, including Attachment Facilities and Direct Assignment Facilities, and equipment for System Upgrade Facilities, System Deliverability Upgrades, Network Upgrades, and Distribution Upgrades, to the extent such information is available.<sup>165</sup> This information is derived from studies performed in the interconnection or transmission expansion process.

73. We agree with NYISO that interconnection costs are important to understanding the total cost of a proposed transmission project and find it appropriate for NYISO to consider such costs in its evaluation process; however, we are concerned that NYISO plans to place Order No. 1000 transmission project proposals into its combined generation and interconnection queue before selecting a project. Specifically, while requiring all Order No. 1000 projects to go through the same interconnection process in NYISO is necessary to ensure a process that is not unduly discriminatory or preferential, placing all Order No. 1000 project proposals into the interconnection queue raises two potential concerns: (1) the interconnection queue may become backlogged, delaying project development; and (2) NYISO may be unable to accurately study the impact of new proposed projects on the system if the interconnection queue includes multiple Order No. 1000 project proposals, only one of which will be selected and built. Therefore, to the extent the Filing Parties propose a not unduly discriminatory or preferential process other than the process in Attachments X and S for conducting the interconnection studies necessary for NYISO to select the more efficient or cost-effective transmission solution in the regional transmission plan for purposes of cost allocation, and for that selected

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<sup>163</sup> *Id.* at 13.

<sup>164</sup> NYISO, OATT, §§ 31.2.4.4.1, 31.2.4.4.2, 31.2.4.6, 31.2.4.8.1, 31.2.4.8.2 (11.0.0).

<sup>165</sup> NYISO, OATT, Attachment Y, § 31.2.6.5.1 (11.0.0).

transmission project to interconnect to NYISO's system, we will address that proposed process in the order addressing the compliance filing ordered herein.<sup>166</sup>

74. We further require the Filing Parties to revise the Development Agreement to incorporate the milestones in Attachment X, which are controlled by incumbent Transmission Owners, as only Advisory Milestones. As LS Power highlights in its protest, NYISO proposes to establish Critical Path Milestones in the Development Agreement based on milestones from the "Merchant Transmission Facilities" interconnection process, many of which are in the sole discretion of the incumbent Transmission Owner. LS Power challenges this aspect of NYISO's proposal, given that the incumbent Transmission Owner may be developing (and receiving cost recovery for) a regulated backstop solution in parallel with the selected alternative regulated transmission solution.<sup>167</sup> We find that the milestones in Attachment X, which are controlled by incumbent Transmission Owners, should not be Critical Path Milestones in the Development Agreement. Such a result would unfairly favor incumbent Transmission Owner-developed regulated backstop solutions. We therefore direct the Filing Parties to revise the Development Agreement to incorporate these milestones into the Development Agreement as only Advisory Milestones. This will ensure that incumbent Transmission Owners are not incentivized to delay action on these milestones to the point that NYISO terminates the alternative regulated transmission solution and triggers the regulated backstop solution developed by the incumbent Transmission Owner instead.

75. Although NYISO argues that LS Power's request that NYISO develop an interconnection process specific to Order No. 1000 transmission projects is a collateral attack on the Commission's determination not to require changes to interconnection

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<sup>166</sup> For example, NYISO could consider conducting studies of project proposals in parallel using a "what-if" analysis. Under a "what-if" analysis, NYISO would assume that each Order No. 1000 project proposal submitted for an identified need had been selected and would be built. NYISO would continue with the analysis of proposed transmission and generation projects with a later queue position by using the study results from each Order No. 1000 project proposal in separate "what-if" scenarios for the later-queued project. NYISO could also consider not placing Order No. 1000 project proposals into its interconnection queue until after selection as the more efficient or cost-effective solution (i.e., until there is greater certainty that the project will be built).

<sup>167</sup> LS Power Protest at 8.

procedures,<sup>168</sup> the Commission stated in Order No. 1000 that “issues related to the *generator* interconnection process and to interconnection cost recovery are outside the scope of this rulemaking.”<sup>169</sup> We are dealing here with the transmission interconnection process. Moreover, we are not requiring NYISO to develop an interconnection process specific to Order No. 1000 transmission projects. Rather, we are requiring that NYISO evaluate all projects selected in NYISO’s Order No. 1000 regional transmission planning process using the same process to ensure all transmission developers are treated in a not unduly discriminatory or preferential manner, consistent with Order No. 1000.<sup>170</sup> As stated above, because NYISO will evaluate regulated backstop solutions proposed by Responsible Transmission Owners against alternative regulated transmission solutions, whether proposed by incumbent Transmission Owners or nonincumbent transmission developers, in selecting the more efficient or cost-effective transmission solution in the regional transmission plan for purposes of cost allocation, for the process to not be unduly discriminatory or preferential, all projects must be subject to the same interconnection process. We therefore disagree that this is a collateral attack on prior Commission orders.

76. Finally, we require the Filing Parties to revise the definition of “Merchant Transmission Facility” to be consistent with the definition in Order No. 1000. LS Power argues that the definition of “merchant transmission projects” in Order No. 1000 prevents NYISO’s expansive application of its “Merchant Transmission Facilities” interconnection process.<sup>171</sup> Attachment X defines a “Merchant Transmission Facility” as a transmission facility “developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements” and “shall not include upgrades or additions to the New York State Transmission System made by a Transmission Owner signatory to the ISO-Related

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<sup>168</sup> NYISO Answer at 10-11 (citing LS Power Protest at 6-9; Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 760; *ISO New England Inc.*, 151 FERC ¶ 61,133 at P 109).

<sup>169</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 760.

<sup>170</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 454 (“The Commission clarifies that the public utility transmission providers in a transmission planning region must use the same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer.”).

<sup>171</sup> LS Power Protest at 2 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119).

Agreements.”<sup>172</sup> We find that the definition of “Merchant Transmission Facility” in Attachment X of the NYISO OATT is confusing and conflicts with Commission precedent, which defines a merchant transmission facility as a facility that uses negotiated rates, assumes the full risk associated with the project, cannot pass costs or risk onto captive customers, is under no obligation to build the initial project, and will do so only where a market exists for the project.<sup>173</sup> Consistent with Commission precedent, Order No. 1000 defined merchant transmission facilities “as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates.”<sup>174</sup> We direct Filing Parties to revise the definition of “Merchant Transmission Facility” to be consistent with the definition included in Order No. 1000. To ensure clarity with regard to which transmission projects are subject to the interconnection process contained in Attachment X of the NYISO OATT, we further require the Filing Parties to revise the NYISO OATT to clarify that the interconnection process in Attachment X applies to Merchant Transmission Facilities (as defined consistent with Order No. 1000), transmission facilities developed by an entity that is not a Transmission Owner signatory to the ISO-Related Agreements (whether Merchant Transmission Facilities or not), and Order No. 1000 transmission projects (whether sponsored by incumbent Transmission Owners or nonincumbent transmission developers, consistent with the discussion above).

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<sup>172</sup> NYISO, OATT, Attachment X, § 30.1 (4.0.0).

<sup>173</sup> See *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147, at 61,633 (describing merchant transmission facilities as those that, among other things, assume full market risk, create tradable transmission rights, preclude access to essential facilities by competitors, are subject to market monitoring for market power abuse, coordinate physical energy flow with the reliability requirements of an independent system operator or regional transmission organization, and do not impair pre-existing property rights to use the transmission grids), *order on reh'g*, 96 FERC ¶ 61,326 (2001), *order on clarification*, 103 FERC ¶ 61,213 (2003); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37 (identifying the four areas of concern in granting merchant transmission owners negotiated rate authority), *order on reh'g*, 128 FERC ¶ 61,074 (2009); *Tres Amigas LLC*, 130 FERC ¶ 61,207, at PP 48-52 (discussing the market risk to merchant transmission owners), *order on clarification*, 131 FERC ¶ 61,281 (2010).

<sup>174</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 119.

## 6. Article 5 – Operating Requirements

### a. Fourth Compliance Filing

77. Article 5 of the Development Agreement requires a developer to satisfy certain operating requirements for the Transmission Project if the developer is not already subject to the operating requirements in the NYISO Transmission Owners Agreement.<sup>175</sup> Specifically, Article 5 requires a nonincumbent transmission developer to: enter into an interconnection agreement; satisfy the requirements in that interconnection agreement and NYISO procedures for the safe and reliable operation of the Transmission Project; enter into operating protocols required by NYISO; register with the North American Electric Reliability Corporation (NERC) and comply with NERC reliability requirements; and “prior to energizing the Transmission Project, execute an operating agreement” with NYISO.<sup>176</sup>

78. The Filing Parties explain that stakeholders disagree as to whether a nonincumbent transmission developer should be required to execute the NYISO Transmission Owners Agreement as the operating agreement, or a comparable operating agreement.<sup>177</sup> The Filing Parties point out that section 31.1.7 of Attachment Y of the NYISO OATT, which the Commission approved, allows a developer to execute the NYISO Transmission Owners Agreement, “or an agreement with the ISO under terms comparable” to the NYISO Transmission Owners Agreement, to become a Transmission Owner.<sup>178</sup> The Filing Parties contend that the proper time to consider which operating agreement a nonincumbent transmission developer will be required to execute is when NYISO is developing a comparable operating agreement. The Filing Parties argue that NYISO must select a Transmission Project, and the developer must then construct it, with both events occurring before the issue of which operating agreement to sign must be resolved. Therefore, given the length of time that will inevitably pass before a developer will need to sign an operating agreement, the Filing Parties state that NYISO plans to bring a draft comparable operating agreement to stakeholders later this year and to file it with the Commission once it is approved.<sup>179</sup>

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<sup>175</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 5.

<sup>176</sup> *Id.*

<sup>177</sup> Fourth Compliance Filing at 12.

<sup>178</sup> *Id.* (citing Second Compliance Order, 148 FERC ¶ 61,044 at P 38).

<sup>179</sup> *Id.*

**b. Commission Determination**

79. We conditionally accept the Fourth Compliance filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with a comparable operating agreement to the NYISO Transmission Owners Agreement. We find that the differing operating requirements for Transmission Owner signatories to the NYISO Transmission Owners Agreement and nonincumbent transmission developers in Article 5 are not unduly discriminatory or preferential because such entities are not similarly situated in this regard. The operating requirements for existing Transmission Owners appropriately focus on the operation of the transmission system used for transmission service under the NYISO OATT. The operating requirements for the Development Agreement cover an interim period for an entity that is not yet a signatory to the NYISO Transmission Owners Agreement, that does not own transmission facilities providing transmission service under the NYISO OATT, and that has not yet turned over operational control to NYISO. However, the last requirement for nonincumbent transmission developers is that they execute an operating agreement, which may be either the NYISO Transmission Owners Agreement or a comparable operating agreement.<sup>180</sup> The Filing Parties have not provided such a comparable operating agreement for Commission review and approval. As such, we cannot accept Article 5 of the Development Agreement when it requires nonincumbent transmission developers to sign an operating agreement, which has not been subject to Commission review and approval.<sup>181</sup> Therefore, to the extent that the Filing Parties propose to require a transmission developer to execute a comparable operating agreement to the NYISO Transmission Owners Agreement, we direct Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with this comparable operating agreement. The Filing Parties must demonstrate that such agreement is not unduly discriminatory or preferential and demonstrate how it is comparable to the NYISO Transmission Owners Agreement.

**7. Articles 7.1, 8.1, and 15.4 – Breach and Termination**

**a. Fourth Compliance Filing**

80. Article 7 of the Development Agreement concerns instances of breach and default of the Development Agreement. According to Article 7.1, a breach of the Development

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<sup>180</sup> NYISO, OATT, Attachment Y, § 31.1.7 (9.0.0).

<sup>181</sup> We note that Article 2.3, which provides the term of the Development Agreement, is likewise tied to the developer executing an operating agreement with NYISO. Proposed NYISO OATT, Attachment Y, Appendix C, Article 2.3.

Agreement will occur when: (1) the developer notifies NYISO that it will not develop the Transmission Project; (2) the developer “fails to meet a Critical Path Milestone, as the milestone may be extended with the agreement of the NYISO under Article 3.3.4 of this Agreement . . .;” (3) the developer significantly modifies the Transmission Project without NYISO’s consent; (4) the developer fails to timely pay a monthly invoice; (5) the developer misrepresents a material fact; (6) a party violates the assignment provision in Article 10; (7) the developer fails to comply with a material term or condition; (8) the developer appoints an official to liquidate all or substantially all of its assets; or (9) the developer is required to liquidate all or substantially all of its assets by a proceeding that is not discharged within 90 days.<sup>182</sup>

81. Article 15.4 states that “[t]he occurrence of a Force Majeure event shall not excuse non-performance of any obligations under” the Development Agreement.<sup>183</sup>

82. Article 8 governs termination of the Development Agreement. In particular, Article 8.1 provides that NYISO may terminate the Agreement if (1) the Transmission Project is halted pursuant to the halting requirements in NYISO’s tariffs, (2) the developer is unable to, or has not, received required governmental approvals or authorizations, (3) such authorizations have been withdrawn, (4) the developer cannot complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event, or (5) NYISO declares a default pursuant to the default provisions.<sup>184</sup> If NYISO terminates the Development Agreement for the reasons described in (1) through (3), the developer may be eligible for cost recovery, consistent with NYISO’s existing OATT provisions.<sup>185</sup> The developer would have to seek cost recovery from the Commission for terminations caused by the reasons described in (4) and (5).<sup>186</sup> Article 8.1 also states that, in the event of termination, the developer must use commercially reasonable efforts to mitigate costs,

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<sup>182</sup> *Id.* Article 7.1.

<sup>183</sup> *Id.* Article 15.4.

<sup>184</sup> *Id.* Article 8.1.

<sup>185</sup> *Id.*; Fourth Compliance Filing at 14 (citing NYISO, OATT, Attachment Y, §§ 31.2.8.2.2, 31.2.8.2.5, 31.2.8.2.6 (11.0.0)).

<sup>186</sup> Fourth Compliance Filing at 14.

damages, and charges arising from the termination and any transfer or winding up of the Transmission Project, similar to the requirement in NYISO's *pro forma* LGIA.<sup>187</sup>

83. The Filing Parties explain that some stakeholders objected to NYISO's ability to terminate the Development Agreement for reasons beyond the developer's control, including a Force Majeure event or delays caused by third parties. The Filing Parties argue that NYISO selected, and is relying on, the Transmission Project to resolve an identified Reliability Need; as such, NYISO must be able to take action as soon as possible to find another solution for the Reliability Need if the Transmission Project will not meet the Required Project In-Service Date.<sup>188</sup> The Filing Parties note that the Commission approved a similar termination provision in PJM's Designated Entity Agreement.<sup>189</sup> The Filing Parties state that NYISO will consider the reason the developer cannot complete the Transmission Project by the Required Project In-Service Date and will not unreasonably withhold consent to modify Critical Path Milestones if the developer demonstrates to NYISO's satisfaction that it will still meet the Required Project In-Service Date. With regard to concerns about third-party delays, the Filing Parties explain that they included language in proposed section 31.2.8.1.7 of Attachment Y of the NYISO OATT that requires Connecting or Affected Transmission Owners to act in good faith in timely performing their obligations under the Development Agreement.<sup>190</sup> They argue that this provision addresses third-party delays.

**b. Comments and Protests**

84. LS Power and NextEra both argue that a developer should not be found to be in breach of the Development Agreement, thereby triggering the termination provisions, due to circumstances beyond its control, including due to actions or inactions by an interconnecting Transmission Owner or a Force Majeure event.<sup>191</sup> LS Power notes that NYISO's agreements with Responsible Transmission Owners do not place this burden on

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<sup>187</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 8.1; Fourth Compliance Filing at 14-15 (citing NYISO, OATT, Attachment X, § 30.14 (6.0.0); NYISO, OATT, Attachment X, § 31.7, Appendix 6, § 2.4 (5.0.0)).

<sup>188</sup> Fourth Compliance Filing at 14.

<sup>189</sup> *Id.* (citing *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 101).

<sup>190</sup> *Id.*

<sup>191</sup> LS Power Protest at 11-12; NextEra Protest at 3.

a Responsible Transmission Owner developing a regulated backstop solution.<sup>192</sup> First, LS Power and NextEra point to Article 7.1 of the Development Agreement, which provides that a developer's failure to meet a Critical Path Milestone triggers a breach because "the milestone may be extended with the agreement of the NYISO under "Article 3.3.4." According to NextEra, this language suggests that a developer should have been able to extend a milestone in advance, and therefore avoid a breach, but there is no guarantee that a developer will know in advance whether it will meet the Critical Path Milestone.<sup>193</sup> Moreover, both LS Power and NextEra contend that triggering a breach due to circumstances outside the developer's control is unjust and unreasonable. They point out that such circumstances could include action or inaction by an interconnecting Transmission Owner that competed with the developer for its project to be selected as the more efficient or cost-effective solution and that may develop a regulated backstop solution, or choose to continue the development of the selected alternative regulated transmission solution, if the original developer cannot meet a Critical Path Milestone.<sup>194</sup> LS Power and NextEra note that the Commission considered a similar provision in CAISO's Approved Project Sponsor Agreement and required CAISO "to clarify that the approved project sponsor will not be held accountable for delays caused by the Interconnecting [Participating Transmission Owner]."<sup>195</sup> Although the Filing Parties included language in section 31.2.8.1.7 of Attachment Y of the NYISO OATT to require interconnecting Transmission Owners to "act in good faith in timely

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<sup>192</sup> LS Power Protest at 11.

<sup>193</sup> NextEra Protest at 3.

<sup>194</sup> LS Power Protest at 12; NextEra Protest at 3. LS Power notes that the list of potential milestones that the Filing Parties provide include "Interconnection studies" that are, in many instances, in the control of an incumbent Transmission Owner. LS Power Protest at 12. According to Article 8.3 of the Development Agreement and proposed section 31.2.10.1 of Attachment Y of the NYISO OATT, upon termination of the Development Agreement, NYISO may "request an entity other than the Developer to complete the Transmission Project," in which case the original project developer must "work cooperatively with the NYISO's designee . . . to implement the transition, including entering into good faith negotiations with the NYISO's designee to transfer the Transmission Project to the NYISO's designee." NYISO's designee may be the interconnecting Transmission Owner. Proposed NYISO OATT, Attachment Y, § 31.2.10.1.3.

<sup>195</sup> NextEra Protest at 3-4 (quoting *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 83); LS Power at 12.

performing their obligations,” LS Power counters that there is no contractual connection between this tariff obligation and the Development Agreement, and by the time the developer establishes that actions were not taken in good faith, the Development Agreement could be declared breached and terminated. Therefore, LS Power asks that the Development Agreement have a saving clause to prevent the declaration of breach for the action or inaction of third parties.<sup>196</sup>

85. LS Power and NextEra similarly argue that delays caused by the occurrence of a Force Majeure event should not trigger a breach.<sup>197</sup> LS Power points to CAISO’s Approved Project Sponsor Agreement, which provides that no party to the agreement “shall be considered to be in Default with respect to any obligation hereunder if prevented from fulfilling such obligation by Force Majeure.”<sup>198</sup> Likewise, LS Power quotes from section 5.04 of the NYISO Transmission Owners Agreement, adopted by reference into the NYISO/TO Reliability Agreement, which states that a party will not be considered in default or breach for delays due to Force Majeure events.<sup>199</sup> LS Power asserts that granting an explicit performance exclusion for Force Majeure events for regulated backstop solutions, but not for alternative regulated transmission solutions, places the sponsors of alternative regulated transmission solutions at a commercial disadvantage to incumbent Transmission Owners. LS Power asks that the Commission require NYISO to adopt a Force Majeure provision similar to CAISO’s or to the NYISO Transmission Owners Agreement,<sup>200</sup> whereas NextEra proposes to require the Filing Parties to revise Article 7.1 to provide that a developer’s failure to meet a Critical Path Milestone will trigger a breach of the Development Agreement “so long as the delay is not the result of Force Majeure or the action or inaction of NYISO or the interconnecting Transmission Owner.”<sup>201</sup> NextEra notes that Article 15.4, which provides that “[t]he occurrence of a Force Majeure event shall not excuse non-performance of any obligations under” the Development Agreement, should be stricken.<sup>202</sup>

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<sup>196</sup> LS Power Protest at 13.

<sup>197</sup> *Id.* at 14; NextEra Protest at 4.

<sup>198</sup> LS Power Protest at 14-15.

<sup>199</sup> *Id.* at 15.

<sup>200</sup> *Id.* at 15-16.

<sup>201</sup> NextEra Protest at 4.

<sup>202</sup> *Id.*

86. Similar to the breach provision in Article 7.1, LS Power and NextEra argue that the termination provision in Article 8.1 should not give NYISO the ability to terminate the Transmission Project due to action or inaction on the part of NYISO or the interconnecting Transmission Owner, nor due to the occurrence of a Force Majeure event.<sup>203</sup> They seek revision of Article 8.1 for the same reasons that they seek revision of Article 7.1. In addition, in the case of Force Majeure events, NextEra explains that there may be actions other than termination of the Development Agreement that could address the Reliability Need by the Required Project In-Service Date; NYISO should therefore only be allowed to terminate the Agreement if interim measures undertaken by the developer or another party do not mitigate the Force Majeure event. NextEra proposes, in particular, that Article 8.1 be revised to state that NYISO may terminate the Development Agreement if the developer cannot meet the Required Project In-Service Date for any reason, “except that termination shall not occur when there has been a Force Majeure event that can be resolved through an interim solution, or action or inaction by NYISO or the interconnecting Transmission Owner caused the reason for potential termination.”<sup>204</sup> Similarly, LS Power proposes that Article 8.1 be revised to state that NYISO may terminate the Development Agreement if the developer cannot meet the Required Project In-Service Date for any reason “other than due to the action or inaction of NYISO, the interconnecting Transmission Owner, or another NYISO Transmission Owner.”<sup>205</sup>

**c. Answer**

87. Because NYISO is ultimately responsible for maintaining the reliability of the New York State Transmission System, NYISO argues it must have the right to terminate the Development Agreement and identify alternative means of satisfying an identified Reliability Need if a developer cannot complete its project by the Required Project In-Service Date for any reason.<sup>206</sup> NYISO points to the Commission’s acceptance of sections 8.0, 10.2, and 10.3 in PJM’s Designated Entity Agreement that allow PJM to terminate the Agreement based on a Force Majeure event.<sup>207</sup> NYISO attempts to distinguish CAISO’s Approved Project Sponsor Agreement, which the Commission

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<sup>203</sup> *Id.* at 6; LS Power Protest at 13-14.

<sup>204</sup> NextEra Protest at 6-7.

<sup>205</sup> LS Power Protest at 13-14.

<sup>206</sup> NYISO Answer at 7.

<sup>207</sup> *Id.* at 7-8 (citing *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 101).

required CAISO to revise to excuse non-performance due to delays of interconnecting Transmission Owners, asserting that CAISO can “take such action as it reasonably considers appropriate” in the case of such delays under its tariff, which is different than NYISO.<sup>208</sup>

88. NYISO also notes that it adopted several provisions that add flexibility to address the protesters’ concerns with termination of the Development Agreement due to project delays. First, Article 3.3.3 requires the developer of a Transmission Project to notify NYISO of potential delays or issues that would endanger the timely completion of the project, which will result in the developer identifying any issues in time for the parties to resolve them before the project is delayed.<sup>209</sup> Second, NYISO states that, in the event of a delay, the developer may request an extension of a Critical Path Milestone from NYISO under Article 3.3.4; in considering the request, NYISO explains that it will look at the cause of the delay (i.e., Force Majeure, third party inaction or action, etc.) and will not unreasonably withhold, condition, or delay consent.<sup>210</sup> Third, if a developer fails to satisfy a Critical Path Milestone, the developer has a chance to cure the breach, including the ability to request an extension of the deadline, after which time NYISO may, but is not required to, declare a default and terminate the Development Agreement.<sup>211</sup> NYISO also points out that, with regard to third-party delays, proposed section 31.2.8.1.7 of the NYISO OATT states that Connecting or Affected Transmission Owners must act in good faith in timely performing their obligations that are required for the developer to comply with the Development Agreement, which provides developers with a basis to request Commission action in the event of an unreasonable delay.<sup>212</sup>

89. With regard to NextEra’s proposed “interim solution” insert to Article 8.1(iv), NYISO responds that, assuming a developer or another party is able to mitigate a Force Majeure event through an interim solution, such that the project can still be completed by the Required Project In-Service Date, NYISO would not have grounds to terminate the

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<sup>208</sup> *Id.* at 8 n.22 (citing *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 83).

<sup>209</sup> *Id.* at 8.

<sup>210</sup> *Id.* at 8-9.

<sup>211</sup> *Id.* at 9 (citing Proposed NYISO OATT, Attachment Y, Appendix C, Articles 7.2, 8.1).

<sup>212</sup> *Id.*

Development Agreement.<sup>213</sup> Therefore, NYISO asks that the Commission reject NextEra's request.

**d. Commission Determination**

90. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions discussed below. LS Power and NextEra argue that NYISO should not be allowed to declare a default and terminate the Development Agreement due to a delay caused by a Force Majeure event. NYISO argues that it must have the option to terminate the Development Agreement and identify alternative means of satisfying an identified Reliability Need if a developer cannot complete its project by the Required Project In-Service Date due to a delay caused by a Force Majeure event.<sup>214</sup> We agree with NYISO and conditionally accept this provision in Articles 8.1 and 15.4 of the Development Agreement as just and reasonable. We note that, as in PJM, NYISO has the *option* to terminate the Development Agreement based on delays caused by Force Majeure events.<sup>215</sup> Moreover, while LS Power and NextEra assert that the explicit performance exclusion for regulated backstop solutions contained in the NYISO/TO Reliability Agreement unfairly advantages incumbent Transmission Owners,<sup>216</sup> as discussed above, we are requiring the Filing Parties to revise the NYISO OATT and Development Agreement in the NYISO OATT to require all developers of transmission solutions selected as the more efficient or cost-effective solution, whether regulated backstop solutions or alternative regulated transmission solutions, to sign the Development Agreement. Requiring all transmission developers to sign the Development Agreement eliminates the discriminatory effect of the NYISO/TO Reliability Agreement excusing non-performance due to Force Majeure events, while the Development Agreement in the NYISO OATT does not. While we agree, in principle, that NYISO should have the option to terminate the Development Agreement if a

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<sup>213</sup> *Id.* at 10 n.30 (citing NextEra Protest at 7-8).

<sup>214</sup> *Id.* at 7.

<sup>215</sup> In PJM, the Commission allowed PJM to terminate the Designated Entity Agreement based on Force Majeure events, pointing out that termination was optional, not automatic. *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 101.

<sup>216</sup> Section 5.02 of the NYISO/TO Reliability Agreement incorporates by reference section 5.04 of the NYISO Transmission Owners Agreement, which provides that a party will not be considered in default or breach for delays or inability to carry out obligations under the Agreement due to Force Majeure events.

developer cannot complete its project by the Required Project In-Service Date due to a delay caused by a Force Majeure event, we require the Filing Parties to revise Article 8.1 of the Development Agreement to include language similar to Articles 8.0 and 10.2 of PJM's Designated Entity Agreement.<sup>217</sup> In PJM, the Commission allowed PJM to terminate the Designated Entity Agreement based on Force Majeure events not only because termination was optional, but also because PJM excuses non-performance for the duration of the Force Majeure event and while the developer exercises reasonable efforts to alleviate such event.<sup>218</sup>

91. As for declaring a default and terminating the Development Agreement due to a delay of an interconnecting Transmission Owner (i.e., the "Connecting Transmission Owner") or a Transmission Owner other than the interconnecting Transmission Owner (i.e., the "Affected System" Transmission Owner), we find this provision to be unjust and unreasonable. We therefore direct the Filing Parties to revise Articles 7.1 and 8.1 of the Development Agreement to excuse nonperformance due to delays of a Connecting Transmission Owner, or of an operator or owner of an Affected System.<sup>219</sup> Although the Filing Parties propose language in section 31.2.8.1.7 of the NYISO OATT that requires an interconnecting Transmission Owner to act in good faith, the reasoning in the CAISO order that excusing delays caused by interconnecting Transmission Owners "addresses the concern that an interconnecting [Transmission Owner] may have undue influence on an approved project sponsor meeting its milestones reflected in the *pro forma*" Approved

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<sup>217</sup> PJM, Intra-PJM Tariffs, OATT, Attachment KK, §§ 8.0, 10.2 (0.1.0).

<sup>218</sup> See *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 101 ("Since the facts of any qualifying *force majeure* event will differ, whether the Designated Entity cannot perform due to a *force majeure* event or *mitigate the force majeure event through reasonable efforts* will necessarily be determined at the time of the *force majeure* event.") (emphasis added).

<sup>219</sup> The NYISO OATT defines Affected System as "an electric system other than the transmission system owned, controlled or operated by the Connecting Transmission Owner that may be affected by the proposed interconnection." NYISO, OATT, Attachment X, § 30.1 (4.0.0). The NYISO OATT defines Connecting Transmission Owner as "the New York public utility or authority (or its designated agent) that (i) owns facilities used for the transmission of Energy in interstate commerce and provides Transmission Service under the Tariff, (ii) owns, leases or otherwise possesses an interest in the portion of the New York State Transmission System or Distribution System at the Point of Interconnection, and (iii) is a Party to the Standard Large Interconnection Agreement." NYISO, OATT, Attachment X, § 30.1 (4.0.0).

Project Sponsor Agreement is correct.<sup>220</sup> The Commission there also required CAISO to modify the Agreement “to provide that CAISO may facilitate coordination between the approved project sponsor and the Interconnecting” Transmission Owner, noting that it approved a similar construct in PJM.<sup>221</sup> We are similarly concerned that Transmission Owners other than the interconnecting Transmission Owner have control over some of the milestones in the Development Agreement through System Deliverability Upgrades<sup>222</sup> and System Upgrade Facilities<sup>223</sup> that may be required to complete the interconnection.

92. We reject NextEra’s and LS Power’s request, however, to require the Filing Parties to revise the Development Agreement to excuse non-performance due to delays caused by the action or inaction of NYISO.<sup>224</sup> Unlike the case of Connecting

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<sup>220</sup> *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 26. Section 5.8 of CAISO’s Approved Project Sponsor Agreement now provides that CAISO can terminate the Agreement for delays “other than a delay caused by the Interconnecting” Transmission Owner.

<sup>221</sup> *Id.* P 29 & n.36.

<sup>222</sup> The NYISO OATT defines “System Deliverability Upgrades” as “the least costly configuration of commercially available components of electrical equipment that can be used, consistent with Good Utility Practice and Applicable Reliability Requirements, to make the modifications or additions to Byways and Highways and Other Interfaces on the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Deliverability Interconnection Standard for Capacity Resource Interconnection Service.” NYISO, OATT, Attachment X, § 30.1 (4.0.0).

<sup>223</sup> The NYISO OATT defines “System Upgrade Facilities” as “the least costly configuration of commercially available components of electrical equipment that can be used, consistent with good utility practice and Applicable Reliability Requirements, to make the modifications to the existing transmission system that are required to maintain system reliability due to: (i) changes in the system including such changes as load growth and changes in load pattern, to be addressed in the form of generic generation or transmission projects; and (ii) proposed interconnections. In the case of proposed interconnection projects, System Upgrade Facilities are the modifications or additions to the existing New York State Transmission System that are required for the proposed project to connect reliably to the system in a manner that meets the NYISO Minimum Interconnection Standard.” *Id.*

<sup>224</sup> NextEra Protest at 7; LS Power Protest at 13-14.

Transmission Owners and operators or owners of Affected Systems, there should be no concern that NYISO “may have undue influence on [a developer] meeting its milestones.”<sup>225</sup> Moreover, NYISO has identified a Reliability Need and selected the Transmission Project as the more efficient or cost-effective solution to that Reliability Need. Therefore, NYISO should be motivated to see the Transmission Project completed and placed into service by the Required Project In-Service Date. In addition, NYISO is in the position to approve extensions of Critical Path Milestones and to decide whether to terminate the Development Agreement in the event of a default. If a delay in meeting a milestone is due to the action or inaction of NYISO, NYISO will take that into consideration when determining whether to extend the deadline to meet a milestone or extend the cure period to resolve a default.

93. We also reject NextEra’s request to require the Filing Parties to revise Article 8.1 to state that NYISO may terminate the Development Agreement when the developer “cannot complete the Transmission Project by the Required Project In-Service Date for any reason, except that termination shall not occur when there has been a Force Majeure event that can be resolved through an interim solution . . . .”<sup>226</sup> NextEra contends that NYISO should not be allowed to terminate the Development Agreement due to Force Majeure events “where actions other than termination could address the reliability need by the in-service date.”<sup>227</sup> First of all, for the reasons stated above, we find that allowing NYISO to terminate the Development Agreement due to Force Majeure events is just and reasonable. As for the suggested language excusing non-performance due to Force Majeure events when there is an interim solution that “could address the reliability need by the in-service date,” we agree with NYISO that the Development Agreement does not allow NYISO to terminate the agreement when an interim solution would result in the Transmission Project still being completed by the Required Project In-Service Date.<sup>228</sup> Therefore, NextEra’s proposed language is unnecessary.

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<sup>225</sup> *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 26.

<sup>226</sup> NextEra Protest at 7.

<sup>227</sup> *Id.* at 6.

<sup>228</sup> NYISO Answer at 10 n.30; Proposed NYISO OATT, Attachment Y, Appendix C, Article 8.1(iv) (stating that NYISO may terminate the Development Agreement if the developer “cannot complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event”).

94. With regard to the cost recovery provisions in Article 8.1,<sup>229</sup> and consistent with the discussion in paragraph 119 below, we require the Filing Parties to revise Article 8.1 to state that cost recovery may be permitted as determined by the Commission in the event of termination caused by the developer's inability to complete the Transmission Project by the Required Project In-Service Date for any reason, including the occurrence of a Force Majeure event, or by NYISO declaring a default pursuant to the default provisions.

**8. Article 7.2 – Time to Cure Breach**

**a. Fourth Compliance Filing**

95. Article 7.2 of the Development Agreement states that, upon a breach, the breaching party will have 30 days to cure the breach, or such other period agreed upon by the parties, unless the breach was caused by the developer's failure to meet a Critical Path Milestone.<sup>230</sup> If the breach was caused by the developer's failure to meet a Critical Path Milestone, the developer may cure the breach if it meets the Critical Path Milestone within the cure period and demonstrates to NYISO's satisfaction that the developer will still meet the Required Project In-Service Date, or if the developer requests in writing within the cure period, and NYISO consents to, a change in the Critical Path Milestone itself. The failure of the breaching party to cure the breach, such that the Transmission Project will not be in service by the Required Project In-Service Date, triggers the non-breaching party's right to declare a default and terminate the Development Agreement.<sup>231</sup>

**b. Comments and Protests**

96. NextEra asserts that Article 7.2 should allow additional time to cure a breach when 30 days is not sufficient.<sup>232</sup> According to NextEra, it is unreasonable for NYISO to terminate the Development Agreement if the breach can be cured outside of the 30-day period and it does not threaten the in-service date of the Transmission Project. NextEra asks the Commission to require NYISO to revise Article 7.2 to state that the breaching

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<sup>229</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 8.1 (“In the event of termination under Articles 8.1(iv) or (v), the Developer must seek any cost recovery from FERC.”).

<sup>230</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 7.2.

<sup>231</sup> *Id.*

<sup>232</sup> NextEra Protest at 5.

party will have 30 days to cure the breach, or such other period of time to which the parties may agree, but if the breaching party cannot cure the breach in 30 days, it “shall commence such cure within thirty (30) calendar days after notice and continuously and diligently complete such cure within ninety (90) calendar days from receipt of the Default notice; and, if cured within such time, the Breach specified in such notice shall cease to exist.”<sup>233</sup> NextEra states that extending the cure period will help prevent unjust and unreasonable terminations of the Development Agreement and will not jeopardize the Transmission Project’s ability to achieve a timely in-service date.<sup>234</sup>

**c. Answer**

97. NYISO asks the Commission to reject NextEra’s request to extend the cure period in Article 7.2 because this provision already permits NYISO and the developer to agree to extend the cure period: “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.”<sup>235</sup> NYISO states that the Commission should not modify the Development Agreement to incentivize developers to address delays through a lengthy breach and cure process. NYISO points out that the developer has the option to seek an extension of a Critical Path Milestone during the 30-day cure period.<sup>236</sup>

**d. Commission Determination**

98. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions discussed below. Although we recognize that other similar agreements provide additional time to cure a breach,<sup>237</sup> we agree with NYISO that Article 7.2 of the Development Agreement already permits NYISO and the developer to agree to a

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 6.

<sup>235</sup> NYISO Answer at 16 (citing NextEra Protest at 5-6; Proposed NYISO OATT, Attachment Y, Appendix C, Article 7.2).

<sup>236</sup> *Id.* at 16-17.

<sup>237</sup> NYISO, OATT, Attachment X, Appendix 6, § 17.1.1 (6.0.0) (NYISO’s *pro forma* LGIA); PJM, Intra-PJM Tariffs, OATT, Attachment KK, § 7.3 (0.1.0); CAISO, OATT, Appendix X, § 14.1 (5.0.0).

different cure period.<sup>238</sup> We therefore reject NextEra’s request to require the Filing Parties to revise the cure period in Article 7.2. However, consistent with other provisions in the Development Agreement, we require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to Article 7.2 to state that NYISO will not unreasonably withhold, condition, or delay consent to a longer cure period if it would not threaten the ability of the developer to complete the Transmission Project by the Required Project In-Service Date.<sup>239</sup>

## 9. Article 9 – Liability

### a. Fourth Compliance Filing

99. Article 9 of the Development Agreement provides for NYISO’s limited liability under the Development Agreement.<sup>240</sup> The Filing Parties state that Article 9 is consistent with the liability provisions included in sections 2.11.2 and 2.11.3(b) of the NYISO OATT.<sup>241</sup> Article 9.1 provides: “Notwithstanding any other provision in the NYISO’s tariffs and agreements to the contrary, the NYISO shall not be liable, whether based on contract, indemnification, warranty, equity, tort, strict liability, or otherwise, to the Developer or any Transmission Owner, NYISO Market Participant, third party or any other person for any damages whatsoever . . . arising or resulting from any act or omission in any way associated with this Agreement . . . .”<sup>242</sup>

### b. Commission Determination

100. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to Article 9.1 to make its terms mutual and to revise the language “in any

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<sup>238</sup> NYISO Answer at 16; Proposed NYISO OATT, Attachment Y, Appendix C, Article 7.2.

<sup>239</sup> *See, e.g.*, Proposed NYISO OATT, Attachment Y, Appendix C, Article 3.3.4 (“NYISO’s consent to extending the Critical Path Milestone date will not be unreasonably withheld, conditioned, or delayed.”), Article 3.4 (“NYISO’s consent to the Significant Modification will not be unreasonably withheld, conditioned, or delayed).

<sup>240</sup> *Id.* Article 9.

<sup>241</sup> Fourth Compliance Filing at 15.

<sup>242</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 9.1.

way associated with this Agreement” to state “under this Agreement,” as discussed below. In Order No. 2003, the Commission found that “construction of Interconnection Facilities may expose both a Transmission Provider and an Interconnection Customer to liability for acts taken on the other Party’s behalf.”<sup>243</sup> We similarly find that the construction of a Transmission Project under the Development Agreement may expose both the developer of the project and NYISO to liability for acts taken on the other party’s behalf.<sup>244</sup> We therefore require that the liability provision in Article 9.1 of the Development Agreement protect both parties. In making this finding, we note that the liability provisions in NYISO’s *pro forma* LGIA, the NYISO OATT, CAISO’s Approved Project Sponsor Agreement, and PJM’s Designated Entity Agreement are mutual, meaning both parties are protected.<sup>245</sup>

101. We also require the Filing Parties to revise Article 9.1 to replace the language “in any way associated with this Agreement” with “under this Agreement.” We find the language “in any way associated with this Agreement” to be overly broad. Limiting the liability provision to acts or omissions *under* the Development Agreement appropriately balances the risks of the parties to the Development Agreement.

#### **10. Article 9 – Indemnification**

102. Article 9 also provides for the developer’s indemnification obligations under the Development Agreement. Article 9.2 provides:

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<sup>243</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 637 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

<sup>244</sup> Although the Filing Parties state that NYISO has no responsibility to develop and construct the Transmission Project, but is rather only monitoring the development of the Transmission Project, NYISO maintains a right to inspect the Transmission Project (Article 3.7), agrees to cooperate in providing information for the developer to obtain approvals and authorizations for the Transmission Project (Article 3.8), and provides operating protocols for the Transmission Project for nonincumbent transmission developers (Article 5), among other things. Fourth Compliance Filing at 8.

<sup>245</sup> See NYISO, OATT, Attachment X, Appendix 6, § 18.2 (6.0.0); NYISO, OATT, § 2.11.3 (0.0.0); CAISO, OATT, Appendix X, § 15.2 (5.0.0); PJM, Intra-PJM Tariffs, OATT, § 10.2 (1.0.0).

Notwithstanding any other provision in the NYISO's tariffs and agreements to the contrary, the Developer shall at all times indemnify and save harmless, as applicable, the NYISO . . . from any and all damages . . . , losses, claims, . . . , liabilities, judgments, demands, suits, recoveries, costs and expenses, court costs, attorney and expert fees, and all other obligations by or to third parties, arising out of, or in any way resulting from, or associated with, this Agreement, *provided, however*, that the Developer shall not have any indemnification obligation under this Article 9.2 with respect to any loss to the extent the loss results from the gross negligence or intentional misconduct of the NYISO . . . .<sup>246</sup>

### Commission Determination

103. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions to make Article 9.2 mutual, to remove the "or associated with" language, and to remove the modifier "gross" before negligence, as discussed below. First, like the liability provision in Article 9.1 discussed above, we find that the indemnity provision in Article 9.2 must be mutual. In Order No. 888-A, the Commission stated that the purpose of indemnification "is to allocate the risks of a transaction, and the costs associated with those risks, to the party on whose behalf the transaction has been conducted, the transmission customer;" given that the *pro forma* OATT "does not obligate the customer to perform services on behalf of the transmission provider," the Commission found that there was no reason to impose "an indemnification obligation on the transmission provider."<sup>247</sup> On the other hand, in Order No. 2003, the Commission found that, "[b]ecause construction of Interconnection Facilities may expose both a Transmission Provider and an Interconnection Customer to liability for acts taken on the other Party's behalf," the bilateral indemnification provision is appropriate.<sup>248</sup> We find that the

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<sup>246</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Article 9.2 (emphasis added).

<sup>247</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,301, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>248</sup> Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 637.

construction and interconnection of a Transmission Project under the Development Agreement “presents a greater risk of liability than exists for the provision of transmission service and that, therefore, the OATT indemnity provision is not suitable” in this context because the construction of the Transmission Project may expose both NYISO and the developer to liability for acts taken on one another’s behalf;<sup>249</sup> both parties should indemnify the other party. We therefore require the Filing Parties to revise Article 9.2 to make its terms mutual.

104. Second, we require the Filing Parties to revise Article 9.2 to remove the language “or associated with” because it is overly broad and could be interpreted to require the parties to indemnify one another for claims too far removed from the development of the Transmission Project.<sup>250</sup> Removing this language is consistent with NYISO’s *pro forma* LGIA, the NYISO Transmission Owners Agreement, the NYISO/TO Reliability Agreement, and CAISO’s Approved Project Sponsor Agreement.<sup>251</sup> We therefore require the Filing Parties to revise the indemnity provision in Article 9.2 of the Development Agreement to remove the language “or associated with.”

105. Third, we require the Filing Parties to revise Article 9.2 to remove the modifier “gross” before “negligence,” such that ordinary negligence is also exempt from indemnification. Although section 18.1 of the *pro forma* LGIA uses this language, in CAISO, citing *Northeast Utilities Service Co.*,<sup>252</sup> the Commission required CAISO to

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<sup>249</sup> *Id.* PP 636-638 (noting that the mutual indemnification provision in the *pro forma* LGIA “covers construction activities as well as all other activities performed on behalf of the other Party”).

<sup>250</sup> In CAISO, the Commission required CAISO to change its indemnification provision because it was “overly broad and could be read to require project sponsors to indemnify CAISO for claims arising generally from project construction, and not only from claims arising out of or resulting from that party’s obligations under the *pro forma*” Approved Project Sponsor Agreement. *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 95.

<sup>251</sup> NYISO, OATT, Attachment X, Appendix 6, § 18.1 (6.0.0); LS Power Protest, Exhibit A, § 5.02 (including a copy of the NYISO/TO Reliability Agreement); NYISO Transmission Owners Agreement § 5.03 (Apr. 8, 2012), [http://www.nyiso.com/public/webdocs/markets\\_operations/documents/Legal\\_and\\_Regulatory/Agreements/NYISO/nyiso\\_to\\_agreement.pdf](http://www.nyiso.com/public/webdocs/markets_operations/documents/Legal_and_Regulatory/Agreements/NYISO/nyiso_to_agreement.pdf); CAISO, OATT, Appendix X, § 15.1 (5.0.0).

<sup>252</sup> 111 FERC ¶ 61,333 (2005) (*Northeast*).

change its Approved Project Sponsor Agreement to exempt from indemnification a party's own ordinary negligence.<sup>253</sup> In *Northeast*, the Commission stated that indemnification for ordinary negligence would fail to incentivize a party to avoid negligent actions.<sup>254</sup> The Commission stated that allowing a gross negligence exception in the *pro forma* LGIA was justified by the increased risk with interconnection over other transmission, the concern about increasing interconnection costs if ordinary negligence was the standard instead, and the explicit bilateral nature of the indemnity provision in the *pro forma* LGIA.<sup>255</sup> We find that ordinary negligence should be exempted from the indemnity provision in the Development Agreement because this change will incentivize the parties to avoid negligent actions. This is particularly important given that the Development Agreement applies to projects selected in NYISO's regional transmission planning process to resolve an identified Reliability Need.

## 11. Article 10 – Assignment/Change of Control

### a. Fourth Compliance Filing

106. Article 10 of the Development Agreement limits assignment of the Development Agreement, such that a party seeking to assign the Development Agreement must have the prior written consent of the other party, except that the developer may assign the Development Agreement without NYISO's consent for collateral security purposes to aid in financing the Transmission Project. Any attempt to assign the Development Agreement that violates Article 10 will be void and constitute a breach of the Development Agreement. Article 10 specifies that "Change of Control," defined as "a change in ownership of more than 50% of the membership or ownership interests or other voting securities of the Developer to a third party in one or more related transactions, or any other transaction that has the effect of transferring control of the Developer to a third party," will be considered an assignment under the Development Agreement.<sup>256</sup>

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<sup>253</sup> *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 at P 96.

<sup>254</sup> *Northeast*, 111 FERC ¶ 61,333 at P 27.

<sup>255</sup> *Id.* P 28. Section 15.1 of CAISO's Approved Project Sponsor Agreement now provides that "Each Party" will indemnify the other for actions "arising out of or resulting from" actions under the Agreement, except in cases of "negligence or intentional wrongdoing."

<sup>256</sup> Proposed NYISO OATT, Attachment Y, Appendix C, Articles 1, 10.

107. The Filing Parties explain that Article 10 prevents a developer from using a transfer of control of the developer to a third party as a means of avoiding the assignment provisions. The Filing Parties contend that this is reasonable because it requires the developer to demonstrate that any new party, affiliated or unaffiliated, taking over the construction of the Transmission Project is qualified and capable of constructing the project in a timely manner consistent with the parameters of the project that the NYISO Board approved.<sup>257</sup>

**b. Comments and Protests**

108. LS Power argues that NYISO's definition of "Change of Control," which triggers the assignment provisions of Article 10, is overly broad.<sup>258</sup> According to LS Power, this subjects nonincumbent transmission developers developing a Transmission Project through a single-purpose entity to inappropriate hurdles that provide no corresponding benefits to NYISO or ratepayers. LS Power explains that section 31.2.4.1 of the NYISO OATT allows an entity seeking qualification to rely on other entities, including affiliates, to meet the qualification requirements. Given that a single-purpose ownership entity may not have employees and may have been created solely to develop projects in the region through the employees and experience of others, LS Power continues, NYISO is aware that the developer is relying on the participation of others, such that a change in the organization of such a developer may not actually be a change in the developer behind the Transmission Project.<sup>259</sup>

109. LS Power proposes the following addition to the definition of "Change of Control": "For purposes of the preceding sentence, 'third party' means an entity or other person other than Developer's parent company identified in Section 31.2.4.1 of the NYISO tariff (or an entity or other person controlled by such parent company)."<sup>260</sup> LS Power states that this addition will only exempt those parent companies that have affirmatively accepted the obligations of a developer and which wish to reorganize themselves or the developer. LS Power admits that NYISO opposed this exemption during the stakeholder process, but contends that NYISO was unable to articulate a commercial or regulatory reason for its objection. LS Power represents that its proposal is consistent with the assignment provision in section 4.02 of the NYISO Transmission

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<sup>257</sup> Fourth Compliance Filing at 16 & n.34.

<sup>258</sup> LS Power Protest at 9.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 10.

Owners Agreement. LS Power contends that the limitations on assignments should be no more stringent for nonincumbent transmission developers than for incumbent Transmission Owners.<sup>261</sup>

**c. Answer**

110. NYISO asks that the Commission reject LS Power's proposed change to the definition of "Change of Control" because NYISO must have the capability to evaluate and determine whether any new entity seeking to replace the developer of a selected Transmission Project, whether affiliated or not, is qualified and capable of constructing the Transmission Project consistent with the proposal NYISO selected.<sup>262</sup> According to NYISO, this requirement does not establish a heavy burden for a qualified entity—particularly one in which its parent company is prepared to demonstrate support for the new entity, as in the scenario provided by LS Power. NYISO points out that its consent will not be unreasonably withheld and that the Commission has found similar qualification-related conditions on assignment to be reasonable.<sup>263</sup>

**d. Commission Determination**

111. We reject LS Power's request to revise the definition of "Change of Control." As the Filing Parties explain, NYISO must have the ability to determine whether any new entity that will develop a Transmission Project selected as the more efficient or cost-effective solution to resolve an identified Reliability Need has the ability to complete the project consistent with the way in which it was proposed.<sup>264</sup> We agree with NYISO that this is not too heavy of a burden to place on the developer and that the proposed revisions are consistent with language the Commission required in PJM and Southwest Power Pool, Inc. (SPP) that consent would not be unreasonably withheld, conditioned, or delayed.<sup>265</sup> Moreover, the Commission approved a similar provision in SPP that requires affiliates to meet the same qualification criteria as other project developers submitting

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<sup>261</sup> *Id.*

<sup>262</sup> NYISO Answer at 14 (citing LS Power Protest at 9-10).

<sup>263</sup> *Id.* at 14-15 (citing *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 45).

<sup>264</sup> Fourth Compliance Filing at 16; NYISO Answer at 14.

<sup>265</sup> See *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187 at P 45; *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,210, at P 4 (2015).

bids in the Order No. 1000 regional transmission planning process.<sup>266</sup> Although LS Power points to section 4.02 of the NYISO Transmission Owners Agreement as support for implementing its proposed change to the definition of “Change of Control,”<sup>267</sup> we are requiring above that both incumbent Transmission Owners and nonincumbent transmission developers sign the Development Agreement. Therefore, the distinction between the NYISO Transmission Owners Agreement and the Development Agreement will not result in limitations on assignments for nonincumbent transmission developers being more stringent than for incumbent Transmission Owners.

**E. Conforming Tariff Revisions**

**a. Fourth Compliance Filing**

112. The Filing Parties also propose certain conforming revisions to section 31.2 of Attachment Y of the NYISO OATT that they contend are required to accommodate the inclusion of the Development Agreement.<sup>268</sup> Specifically, they propose to revise section 31.2.8.1.6 to set forth the process by which NYISO and the developer of a Transmission Project will negotiate and enter into the Development Agreement.<sup>269</sup> This process involves NYISO tendering a draft Development Agreement to the developer, with draft appendices completed by NYISO to the extent practicable, including the Required Project In-Service Date, and the developer executing the Development Agreement within three months of receiving the draft from NYISO. NYISO will file any non-conforming Development Agreements with the Commission for approval within 30 days of execution. If the parties are at an impasse in negotiating the terms of the Development Agreement, the developer may request that NYISO file the Development Agreement unexecuted with the Commission. The Filing Parties state that this process is

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<sup>266</sup> In SPP, the Commission approved a provision that allows the developer of a selected transmission project to assign development of the project to an affiliate, but only with SPP’s consent after the affiliate “follow[s] the same process to qualify as any other potential transmission developer that wishes to submit a bid.” *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,210 at PP 4-5; SPP, OATT, Attachment Y, § VII.2 (0.1.0).

<sup>267</sup> LS Power Protest at 10.

<sup>268</sup> Fourth Compliance Filing at 18.

<sup>269</sup> Proposed NYISO OATT, Attachment Y, § 31.2.8.1.6.

consistent with NYISO's process for negotiating and entering into an LGIA in section 30.11 of Attachment X of the NYISO OATT.<sup>270</sup>

113. In addition, the Filing Parties propose to insert a new section 31.2.8.1.7 that states that, upon execution or filing of an unexecuted version of the Development Agreement, NYISO and the developer will perform their respective obligations under the Development Agreement that are not in dispute. Also, this provision requires that Connecting or Affected Transmission Owners must act in good faith in timely performing their obligations that are required for the developer to satisfy its obligations under the Development Agreement.<sup>271</sup>

114. The Filing Parties further propose to insert a new section 31.2.10.1 to address the consequences of the developer not executing the Development Agreement or not requesting that it be filed unexecuted with the Commission, or of an effective Development Agreement being terminated prior to the completion of the term of the Agreement.<sup>272</sup> Pursuant to this proposed section, NYISO may revoke its selection of the Transmission Project and the eligibility of the developer to recover its costs under NYISO's tariffs, except to the extent explicitly provided for in sections 31.2.8.2.2, 31.2.8.2.5, or 31.2.8.2.6 of the NYISO OATT, or as otherwise determined by the Commission.<sup>273</sup> If NYISO must identify a new solution to satisfy the identified Reliability Need prior to its approval of the Comprehensive Reliability Plan for the next planning cycle, NYISO may direct the Responsible Transmission Owner to proceed with its regulated backstop solution if it has not yet been halted, request that the Responsible Transmission Owner complete the selected Transmission Project, or proceed with a Gap Solution.<sup>274</sup> Section 31.2.10.1.4 provides the requirements of a Responsible Transmission Owner that agrees to complete the selected Transmission Project, including the requirement to cooperate with the original developer.<sup>275</sup>

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<sup>270</sup> Fourth Compliance Filing at 18-19.

<sup>271</sup> Proposed NYISO OATT, Attachment Y, § 31.2.8.1.7.

<sup>272</sup> *Id.* § 31.2.10.1.

<sup>273</sup> *Id.* § 31.2.10.1.1-2.

<sup>274</sup> *Id.* § 31.2.10.1.3.

<sup>275</sup> *Id.* § 31.2.10.1.4. The Filing Parties note that the Commission has approved a similar approach in CAISO. Fourth Compliance Filing at 20.

115. Lastly, the Filing Parties propose to move section 31.2.8.2.1 to section 31.2.10.2 and to make certain revisions to the requirements for how NYISO will address a potential delay in the development of a Transmission Project, whether an alternative regulated transmission solution or a regulated backstop solution.<sup>276</sup> The Filing Parties state that these provisions are more appropriately located in section 31.2.10 than in the halting provisions in section 31.2.8.2.<sup>277</sup>

**b. Commission Determination**

116. We conditionally accept the Fourth Compliance Filing and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with the revisions discussed below. Other than as noted below, we find these provisions to be consistent with Order No. 1000 and the Commission's prior directives in this proceeding. They provide clarity and transparency by establishing the process by which NYISO and the developer of a Transmission Project will negotiate and enter into the Development Agreement, the rights and obligations of the parties when NYISO files an unexecuted Development Agreement, the consequences of a developer not executing a Development Agreement or not requesting that it be filed unexecuted or of an effective Development Agreement being terminated prior to the completion of the term of the Development Agreement, and how NYISO will address potential delays in the development of a Transmission Project.

117. Section 31.2.8.1.6 of the Filing Parties' proposed conforming revisions provides that NYISO "will provide the Developer with the date by which the selected project must be in-service to satisfy the Reliability Need."<sup>278</sup> We require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions stating that this date will have been provided to the developer of a selected alternative regulated transmission solution earlier in the process than the tendering of the Development Agreement. This date is a significant Critical Path Milestone and one of which the developer should be aware before NYISO has selected and triggered the alternative regulated transmission solution (i.e., when the Development Agreement must be executed). We therefore require the Filing Parties to confirm that this date is provided earlier than when NYISO tenders the Development Agreement to the selected project developer to ensure proposed section 31.2.8.1.6 of the NYISO OATT is just and reasonable.

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<sup>276</sup> Proposed NYISO OATT, Attachment Y, § 31.2.10.2.

<sup>277</sup> Fourth Compliance Filing at 21.

<sup>278</sup> See also *id.* at 9.

118. Section 31.2.8.1.6 also states that NYISO will file any Development Agreement with the Commission that “does not conform with the Commission-approved standard form in Appendix C in Section 31.7 of this Attachment Y.” We note that NYISO is also expected to include any conforming Development Agreements (i.e., those Development Agreements not otherwise filed with the Commission) in its quarterly reports.

119. Section 31.2.10.1.2 allows NYISO to revoke its selection of the Transmission Project and the eligibility of the developer “*to recover its costs for the project; provided, however, the [developer] may recover its costs to the extent provided in Sections 31.2.8.2.2, 31.2.8.2.5, and 31.2.8.2.6 or as otherwise determined by the Commission.*”<sup>279</sup> We find the phrase “to recover its costs for the project” to be overly broad and vague. Therefore, we require the Filing Parties to replace the phrase “to recover its costs for the project” with a statement that allows NYISO to revoke the developer’s eligibility to recover the developer’s costs *pursuant to the NYISO regional cost allocation mechanism.*<sup>280</sup>

120. Section 31.2.10.1.4 provides the requirements of a Responsible Transmission Owner that agrees to complete the selected Transmission Project, including cooperating with the original developer, in the event the original developer is no longer developing the Transmission Project. In particular, section 31.2.10.1.4(ii) states that the transfer is subject to “any requirements or restrictions on the transfer of Developer’s rights-of-way under law, conveyance, or contract.” We find this language in section 31.2.10.1.4(ii) to be unclear and require the Filing Parties to submit, within 30 days of the date of issuance of this order, a compliance filing with revisions providing clarification.

The Commission orders:

(A) The Filing Parties’ compliance filing is hereby conditionally accepted, effective January 1, 2014, as discussed in the body of this order.

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<sup>279</sup> Proposed NYISO OATT, Attachment Y, § 31.2.10.1.2 (emphasis added).

<sup>280</sup> NYISO, OATT, Attachment Y, § 31.5 (8.0.0).

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(B) The Filing Parties are hereby directed to submit, within 30 days of the date of issuance of this order, a compliance filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

Document Content(s)

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