

Designated Entity Agreement Review Issue Charge

Market Reliability Committee

June 29, 2022

Greg Poulos (on behalf of the office of the Delaware Public Advocate)

Background

We have worked with PJM/Transmission Owners quite exhaustively over the last few weeks to create a joint issue charge. After a handful of meetings and very thoughtful discussions we were not able to reach agreement on one issue charge with a few members of the transmission owner sector (EKPC, Exelon, and PSEG) and PJM.

We appreciate all of the discussions. In particular, Dave Anders and the PJM stakeholder team helped develop a framework for a possible solution. The new Delaware Public Advocate proposal is based extensively on the joint framework.

The Two Problems to be Addressed:

Problem #1: There are questions about whether PJM is complying with the clear language of the Operating Agreement – as discussed in subsequent sections – regarding projects approved as part of PJM’s Regional Transmission Expansion Plan (RTEP). In summary:

- Under Operating Agreement (O.A.) Schedule 6, Section 1.5.8, the entity approved with the responsibility to construct, own, operate, maintain, and finance a project within the RTEP is the **Designated Entity**.
- **As a Designated Entity (DE), the DE must sign and comply with the terms of the Designated Entity Agreement (DEA).**
- PJM is not requiring incumbent transmission owners to sign DEAs for all the identified situations in Section 1.5.8. How do we address this situation moving forward and for existing projects that have already been approved in the RTEP but are not in service yet?
- Perhaps this is simply an issue for FERC to decide?

Problem #2: The DEA provisions of O.A. Schedule 6, Section 1.5.8 are almost a decade old. These provisions were developed through a very lengthy stakeholder process between September 2013 and June 2014 time period. Based on numerous conversations over the last year it appears that there could be improvements and updates to the DEA provisions. We hope to preserve, if not enhance, customer protections while reviewing the applicability of the projects identified in Schedule 6, Section 1.5.8.

A Key Difference between the Issue Charges

- One of the key areas that the parties could not agree upon was whether stakeholders should focus on applying changes to all the projects in Schedule 6, Section 1.5.8 (applicability with the four corners of the governing documents) or applicability following PJM and incumbent transmission owner past practices (The way they have always done it).
- The Transmission Owners' issue charge includes language (designated as "out of scope") that would limit the applicability within Schedule 6, Section 1.5.8.
 - However, the language in Section 1.5.8 is clear and should be applied to all projects.
 - **Incorporating the out-of-scope language could eliminate discussion regarding the current, plain, reading of the Operating agreement. (*Status quo of the four corners of the document.*)**
 - The out-of-scope language could create more questions than answers during the stakeholder process about the applicability of projects and the impact of potential changes.
- The Designated Entity Agreement provisions are more stringent than the CTOA in certain provisions and incumbent transmission owners must comply with the more stringent DEA provisions. See PJM Interconnection, L.L.C. 164 FERC ¶ 61,021 (July 13, 2018).

Comply with the Clear Terms of the Governing Documents

Whether the Designated Entity (DE) is an incumbent transmission owner or a nonincumbent developer, they both must sign a designated entity agreement (DEA) and comply with the terms of the DEA if they are responsible for building a project approved in the RTEP.

The applicable section is PJM Schedule 6, Section 1.5.8:

(Development of Long-lead Projects, Short-term Projects, Immediate-need Reliability Projects, and Economic-based Enhancements or Expansions.)

*The five types of projects identified in this section are approved as part of the Regional Transmission Expansion Plan (RTEP) process.

* The projects can be competitive or exempt from competition.

Part 1: Defining a Designated Entity

Designated Entity:

“Designated Entity” shall mean an entity, including an existing Transmission Owner or Nonincumbent Developer, designated by the Office of the Interconnection with the responsibility to construct, own, operate, maintain, and finance Immediate-need Reliability Projects, Short-term Projects, Long-lead Projects, or Economic-based Enhancements or Expansions pursuant to Operating Agreement, Schedule 6, section 1.5.8.

Throughout O.A. Schedule 6, section 1.5.8 the term Designated Entity is used.

*The definition of “Designated Entity” was cut and pasted from the Operating Agreement, Definitions. (emphasis added.)

Part 2: Designated Entities Must Sign a DEA

PJM Operating Agreement Schedule 6, section 1.5.8 (j) (emphasis added):

(j) **Acceptance of Designation.** Within 30 days of receiving notification of its designation as a Designated Entity, the existing Transmission Owner or Nonincumbent Developer shall notify the Office of the Interconnection of its acceptance of such designation and submit to the Office of the Interconnection a development schedule, which shall include, but not be limited to, milestones necessary to develop and construct the project to achieve the required in-service date, including milestone dates for obtaining all necessary authorizations and approvals, including but not limited to, state approvals. For good cause shown, the Office of the Interconnection may extend the deadline for submitting the development schedule. The Office of the Interconnection then shall review the development schedule and within 15 days or other reasonable time as required by the Office of the Interconnection: (i) notify the Designated Entity of any issues regarding the development schedule identified by the Office of the Interconnection that may need to be addressed to ensure that the project meets its needed in-service date; and (ii) tender to the Designated Entity an executable Designated Entity Agreement setting forth the rights and obligations of the parties. To retain its status as a Designated Entity, within 60 days of receiving an executable Designated Entity Agreement (or other such period as mutually agreed upon by the Office of the Interconnection and the Designated Entity), the Designated Entity (both existing Transmission Owners and Nonincumbent Developers) shall submit to the Office of the Interconnection a letter of credit as determined by the Office of Interconnection to cover the incremental costs of construction resulting from reassignment of the project, and return to the Office of the Interconnection an executed Designated Entity Agreement containing a mutually agreed upon development schedule. In the alternative, the Designated Entity may request dispute resolution pursuant to the Operating Agreement, Schedule 5, or request that the Designated Entity Agreement be filed unexecuted with the Commission.

The Following FERC ORDER is Relevant.

164 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

PJM Interconnection, L.L.C.

Docket No. ER18-1647-000

ORDER ACCEPTING TARIFF REVISIONS IN PART AND REJECTING TARIFF
REVISIONS IN PART

(Issued July 13, 2018)

1. On May 16, 2018, PJM Interconnection, L.L.C. (PJM) submitted, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to Schedule 6 of the Amended and Restated Operating Agreement (Operating Agreement)² to modify aspects of its competitive proposal window process (May 16, 2018 Filing).³ Specifically, PJM proposes to: (1) exempt the Designated Entity⁴ for a transmission project approved as part of PJM's Regional Expansion Transmission Plan (RTEP) that PJM must designate to the incumbent transmission owner under Schedule 6, section 1.5.8(1) of the Operating

Note: PJM only sought revisions in 2018 for certain aspects of section 1.5.8 related to incumbent transmission owners in competitive situations. PJM did not request changes to the non-competitive aspects, and thus, FERC did not address those aspects.

The 2018 FERC Order – cont'd

#1. Transmission Owners must comply with the provisions of the DEAs.

2. In this order, we reject the proposal to exempt the Designated Entity for Transmission Owner Designated Projects from the requirement to execute a Designated Entity Agreement and follow the related designation process steps. We accept the proposal to allow a transmission developer to have 60 days from receiving an executable Designated Entity Agreement to accept its designation, effective July 16, 2018, as requested, and require PJM to submit a compliance filing within 30 days of the date of

Point #2: The DEAs are More Stringent than the CTOA

As part of the 2018 Order, FERC found that the DEAs are more stringent than the CTOA – and the incumbent Transmission Owners must comply with the provisions of the DEA in numerous situations (e.g. security provisions, milestones, and assignment provisions). For example:

35. Below, we identify several instances in which the Designated Entity Agreement is more stringent than the Consolidated Transmission Owners Agreement. As a result, not requiring incumbent transmission owners to sign the Designated Entity Agreement for Transmission Owner Designated Projects may provide a competitive advantage to incumbent transmission owners during the RTEP project selection process.⁶⁴

Contact information

Greg Poulos,
Executive Director, CAPS

Phone: 614-507-7377

E-mail: poulos@pjm-advocates.org

Appendix

(May MRC presentation)

Concerns over a DEA Quick Fix process

Market Reliability Committee

May 25, 2022

Greg Poulos

This topic is not appropriate for a quick fix – stakeholders should vote “no” on the proposal.

8.6.1 “Quick Fix”

From time to time, there may be issues identified by PJM, FERC, the Market Monitor, or Stakeholders that are urgent and/or very simple or straightforward to correct, and require no stakeholder engagement. Issues that meet these criteria may be brought before the appropriate committee in the form of a Problem Statement and Issue Charge along with a documented solution and implementation schedule, and may be voted upon at first read if timing requires it.

<https://www.pjm.com/-/media/documents/manuals/m34.ashx>. (Emphasis added.)

This topic is complicated and contentious

PJM included some Q&As as part of the PC presentation. Some of the responses create more questions. For example, PJM Q&A May #5, below:

5. Is PJM in compliance with the Operating Agreement DEA provisions today?

- Since issuance of the February 8 Order, PJM has been in communication with FERC Enforcement and FERC policy staff.
- In addition to projects selected through a proposal window and regionally allocated, PJM has begun the process set forth in OA Schedule 6, section 1.5.8(j) to issue DEAs to transmission owners designated projects selected through the proposal window that were not regionally allocated.
- PJM is proposing a Quick Fix approach because the current language is not sustainable.

<https://www.pjm.com/-/media/committees-groups/committees/pc/2022/20220510/item-07f---designated-entity-agreement-faq---05092022.ashx>

A comprehensive process is needed

- The Advocates have questions;
- The Advocates would like input into possible solutions;
- This process has been on PJM's radar for at least a year, yet, it has avoided stakeholder process; and
- Stakeholder have expressed significant concerns around this process – over seventy voters said “no” to the quick fix process at the PC.

Consumers have questions

Advocates need more information regarding the following:

1. Provide further education sessions on the status quo policies and expectations for DEAs and the ambiguities that might exist.
2. Provide a comparison of the application of any ambiguities in the rules for existing and planned resources.
3. Provide further education on the relevant FERC filings – include the Order 1000 compliance filing, July 13, 2018 Order Accepting Tariff Revisions in Part and Rejecting Tariff Revisions in Part (Docket No. ER18-1647-000), and the 2021 compliance filing material. For example, the July 13, 2018 FERC order found the DEAs to include more stringent:
 - Security requirements (paragraphs 36-42 of the 2018 Order)
 - Milestones/Development Schedule (paragraphs 43-49) – including the reporting of quarterly progress (paragraph 47)
 - Assignment (paragraphs 50 – 55)
4. Provide education on the relevant past stakeholder discussions where the current DEA policy was developed and any information regarding those discussions. (E.g. Why was three percent established as the appropriate amount for the letter of credit?)

Consumers would like to have input into the solutions

- Why is change necessary and important?
- What is the cost benefit analysis for the current process and changes?
- How will the proposals impact competition in the wholesale transmission space?
- Ensuring oversight of the grid is important. How do any proposals impact the expected oversight?.

Timeline of key events

- I initially raised questions about this language on May 11th, 2021 after discussions with concerned advocates. I received some answers in April, 2022. While helpful, some of those answers do not match answers from specific transmission owners.
- Timeline:
 - 1. May 11th – initial concerns raised by me.**
 2. June TOA_AC – PJM presents the issues at a TOA-AC meeting
 1. August PC – informational item (virtually the same as the TOA-AC)
 2. September PC - informational - this is what PJM will be doing
 3. PJM files solution at FERC as a compliance filing on September 1, 2021
 - Procedural and substantive objections were raised
 - FERC rejected the filing on procedural grounds on February 8, 2022
 4. April 12 – truncated - educational session focused on PJM’s Order no. 1000 compliance filing specific to the DEA and PJM’s use of the DEA. *Session was only two hours long and discussion had to be cut off.*
 5. PJM decides to go with a quick fix with their solution – the exact same solution filed on September 1, 2021:
 1. May PC meeting - almost an hour discussion prior to the vote.
 2. Seventy-two “no” votes were cast against a quick fix process during that vote.

DE Public Advocate Issue Charge

Quick Fix

- Leaves questions on the table.
- Leaves frustrations with implementation
- Ignores direct language from a FERC filing
- Provides a solution that would modify stakeholder positions without stakeholder engagement
- Provides a solution that impacts competition

Proposed Issue Charge

- Allows for further education to provide an understanding of the process and milestones
- Preserves competition in the transmission space
- Provides an opportunity for the stakeholder process to be utilized
- Encourages a swift process by utilizing a Sr. Task Force

Answers from PJM contradict FERC Order

2018 FERC order on the subject

PJM statement at April MRC

33. We find that the terms and conditions of the Consolidated Transmission Owners Agreement are less stringent than those of the Designated Entity Agreement, and accordingly, we find that PJM's proposal would provide an advantage to incumbent transmission owners that are the Designated Entity responsible for developing a transmission project selected in the RTEP for purposes of cost allocation pursuant to Schedule 6, section 1.5.8(l).⁶¹

⁵⁸ *Id.* P 12.

⁵⁹ *Id.* (internal citations omitted).

⁶⁰ Under the PJM tariff, incumbent and nonincumbent transmission developers may submit their proposed regional transmission solutions, including, for example, Transmission Owner Designated Projects, to address a regional transmission need in a PJM competitive proposal window. PJM uses the same process and criteria to select the more efficient or cost-effective transmission solution from the submitted proposed transmission solutions. If PJM selects a Transmission Owner Designated Project as the more efficient or cost-effective transmission solution, PJM then designates it to the incumbent transmission owner under Schedule 6, section 1.5.8(l). PJM Transmittal at 5; PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, Schedule 6, § 1.5.8 (Development of Long-lead Projects, Short-term Projects, Immediate-need Reliability Projects, and Economic-based Enhancements or Expansions) (16.0.0).

⁶¹ Not all of the transmission projects that PJM must designate to the incumbent transmission owner under Schedule 6, section 1.5.8(l) of the Operating Agreement, i.e.,

Document Accession #: 20180713-3047

Filed Date: 07/13/2018

Docket No. ER18-1647-000

- 17 -

34. PJM asserts that any different treatment of incumbent and nonincumbent transmission developers caused by its proposal occurs only after project proposals have been evaluated against each other and after applying the same criteria to select the more efficient or cost-effective solution. However, the less stringent requirements in the Consolidated Transmission Owners Agreement that would apply to an incumbent transmission owner that proposes a Transmission Owner Designated Project could provide the incumbent transmission owner with an advantage in PJM's evaluation process. The less stringent requirements in the Consolidated Transmission Owners Agreement also could spare an incumbent transmission owner from a breach (and the associated remedies) that would otherwise be triggered if it executed the Designated Entity Agreement.⁶² Although PJM argues that the proposal to exempt incumbent transmission owners from the requirement to execute a Designated Entity Agreement in certain cases will further administrative efficiency, any such benefits do not overcome



Rationale for PJM's Approach

- The DEA does not provide additional protection to consumers beyond that already covered under the provisions of the Consolidated Transmission Owners Agreement (CTOA).

PJM Planning Committee Meeting, May 10, 2022, Item 7a.
Application of Designated Entity Agreement, slide 3.

Answers from PJM contradict FERC Order, Cont'd

b. Milestones/Development Schedule

43. We find that the Consolidated Transmission Owners Agreement's milestones requirement are less stringent than the milestones requirements in the Designated Entity Agreement and could disadvantage a nonincumbent transmission development when

⁶⁹ PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6, § 1.7 (Obligation to Build) (2.0.0)) (covering exceptions and conditions of this obligation); Schedule 6, Section 1.5.8(k) (Failure of Designated Entity to Meet Milestones) (covering incumbent transmission owners failure to meet milestones); and PJM, Rate Schedules, TOA (Rate Schedule 42), Article 4, section 9.7.1. (0.0.0) (covering incumbent transmission owner breach and default).

⁷⁰ NYISO 2015 Order, 153 FERC ¶ 61,341 at P 40 (additional citation omitted).

⁷¹ *Id.* PP 45-46.

Document Accession #: 20180713-3047 Filed Date: 07/13/2018

Docket No. ER18-1647-000

- 21 -

competing for transmission projects. The Designated Entity Agreement requires a Designated Entity to submit a project development schedule that includes milestone dates.⁷²

44. As noted in Article 4.1 of the Designated Entity Agreement, failure to meet any milestone date shall constitute a breach under the agreement.⁷³ Under the Designated Entity Agreement, PJM has the option to reasonably extend the milestone date. Also, under the Breach and Default provisions of the Designated Entity Agreement, after providing an opportunity to cure the breach, PJM may conduct a reevaluation of the project, and PJM may retain both the project in the RTEP and the breaching party as the Designated Entity.⁷⁴ In all other cases, including where PJM decides to reassign the project to the transmission owner in whose zone the project is located, the breaching party will be in default,⁷⁵ and PJM may then draw upon the Designated Entity's letter of security.⁷⁶

45. In contrast, the Consolidated Transmission Owners Agreement only requires that a transmission owner provide "an acknowledgement of such designation or reasons why

Answers from PJM contradict FERC Order

2018 FERC order on the subject

PJM statement at April MRC

12. Are DEAs and their costs/requirements a factor in selecting a project through the Competitive Planning Process?

- In evaluating project proposals submitted by proposing entities, the DEA is not a decisional factor in selecting the project.
- When considering the project cost and cost commitments submitted by proposing entities, PJM does not include the cost of a letter of credit. The cost evaluation is based on the project cost estimate and any cost commitment, if submitted.

4

-
- When evaluating a project, the determination of whether or not a DEA is required occurs only after the project is selected and the cost allocation is determined and presented to the PJM Board for review and approval.
 - All RTEP projects are subject to the same project oversight during the construction phase, which is detailed in Manual 14C, regardless of whether the project is subject to a DEA or not.

34. PJM asserts that any different treatment of incumbent and nonincumbent transmission developers caused by its proposal occurs only after project proposals have been evaluated against each other and after applying the same criteria to select the more efficient or cost-effective solution. However, the less stringent requirements in the Consolidated Transmission Owners Agreement that would apply to an incumbent transmission owner that proposes a Transmission Owner Designated Project could provide the incumbent transmission owner with an advantage in PJM's evaluation process. The less stringent requirements in the Consolidated Transmission Owners Agreement also could spare an incumbent transmission owner from a breach (and the associated remedies) that would otherwise be triggered if it executed the Designated Entity Agreement.⁶² Although PJM argues that the proposal to exempt incumbent transmission owners from the requirement to execute a Designated Entity Agreement in certain cases will further administrative efficiency, any such benefits do not overcome undue discrimination concerns.⁶³ Accordingly, we reject PJM's proposal as unjust, unreasonable, and unduly discriminatory or preferential.