



Order 1000 Agreements Update:

PJM Response to DEA and CIA Stakeholder Comments

RPPTF 03/25/2014

- *Process*

- First draft of DEA provided on November 18, 2013
- First round of comments received and posted
- Posting of revised DEA on 12/16/13, 2/19/14
- Posting of revised CIA on 1/4/2014, 2/19/2014
- Second round of comments received and posted:
 - AEP
 - LS Power
 - PHI
 - ITC
 - Dominion
 - Duquesne
 - Atlantic Wind
- Review of comments and PJM approach



DEA Stakeholder Comments

- Section 4.1.0 Milestone Dates:
Comment requested that consent for extensions of milestone dates ‘shall not be unreasonably withheld’
- PJM Response:
 - At the time of the request, PJM will consider the facts at hand and evaluate milestone extension requests in the context of the circumstances.

- Section 4.3.0 Project Modification Process:
Stakeholder question: Can the Scope of Work be changed absent FERC filing (EQR, eTariff, or regular)? If the filing is determined to be needed, would a change of scope be an amendment or a cancelation and new agreement?
- PJM Response:
 - It depends upon the request. PJM will amend or cancel the agreement as appropriate based upon the facts and circumstances and will make a FERC filing if necessary.

- Section 5.1 Connection with Entities Not a Party to the Consolidated Transmission Owners Agreement:
Stakeholder question "What happens if project has multiple DEAs?"
- PJM Response:
 - PJM recognizes that there is the potential for there to be a case where two Designated Entities are required to interconnect to one another
 - PJM proposes the following language: (Red –added text)
 - Designated Entity shall not permit any part of the Project facilities to be connected with the facilities of any entity which is not (i) a Party to the Consolidated Transmission Owners Agreement without an interconnection agreement that contains provisions for the safe and reliable ~~initial~~ interconnection and operation of such interconnection in accordance with Good Utility Practice, and principles, guidelines and standards of the Applicable Regional Reliability Council and NERC or comparable requirements of an applicable retail tariff or agreement approved by appropriate regulatory authority; or (ii) **a party to a separate Designated Entity Agreement.**

- Section 7.5 Remedies:
Stakeholder Comment – “there should be customary provisions specifically addressing Transmission Provider’s call on the letter of credit, draw should be amount of damages reasonably expected to be incurred.”
- Section 7.6 Remedies Cumulative:
Stakeholder Comment - A drawing under the Designated Entity Letter of Credit should be an exclusive remedy
- PJM Response:
 - Distribution of the Designated Entity Letter of Credit proceeds to be subject to filing at FERC.
 - PJM Operating Agreement, Schedule 6, Section 1.5.8(f) states that the letter of credit is to “cover the incremental costs of construction resulting from reassignment of the project”. The security requirement is not intended to foreclose the seeking of any other remedies in the event of a Default.

- Section 8.0(iii) Termination by Transmission Provider:

Commenter is proposing to limit the applicability of the Section 8.0 (iii) (which permits Transmission Provider to terminate the DEA if a Force Majeure event or other circumstance outside of the DE's control that the DE cannot alleviate occurs) to only when the Required Project In-Service Date is delayed, rather than when such occurrence "prevents the Designated Entity from satisfying its obligations under this Agreement."

- PJM Response:
 - PJM requires the flexibility to examine projects on a case-by-case basis. It is impossible to envision and account for in an agreement all the possible Force Majeure scenarios.

- Section 11.0 Assignment: (Red – proposed additional text)
"No Party may assign its rights or delegate its duties under this Agreement without prior written consent of **each** other Party **which shall not be unreasonably withheld or delayed, provided that the criteria set below for permitting an assignment have been satisfied**"
- Section 11.0 Assignment: (Red – proposed additional text)
"Assignment by the Designated Entity shall be contingent upon, prior to the effective date of the assignment: (i) the Designated Entity or assignee demonstrating to the **reasonable** satisfaction of Transmission Provider that the assignee has the technical competence and financial ability to comply with the requirements of this Agreement and to construct the Project consistent with the assignor's cost estimates for the Project;"
- PJM Response:
 - The proposed language is in conflict with the OA pre-qualification and company evaluation language and could hinder PJM's ability to implement the RTEP effectively. PJM will retain the language as drafted because PJM needs the latitude to deny assignment to entities not deemed qualified to construct, own, operate, and maintain the Project.

- Section 11.0 Assignment:
Stakeholder question: “How about partial assignments resulting from shared ownership of the project?”
- PJM Response:
 - Shared ownership of a Project should be handled in agreements between the co-owners, not in the DEA. PJM anticipates only dealing with one Designated Entity per project.

- DEA Breach Trigger. Section 11.1.2 provides that a Project Finance Entity may assign the DEA to a new entity (with PJM’s approval), but only “upon the Breach of [the DEA] by the Designated Entity”. In the unlikely event a Designated Entity has defaulted under its financing agreements due to circumstances not involving a breach of the DEA, the lender will still need to have the ability to transfer the Project (including the DEA) to a third party. Stakeholder suggests deleting the DEA breach requirement as PJM’s interests are protected under all circumstances by virtue of the PJM consent right, which has been left in.
- PJM Response:
 - The DEA milestone for project financing states “Project financing must be maintained for the term of this Agreement”, so a breach of a financing agreement where the Designated Entity lost their financing will result in a breach of the DEA.
 - PJM has revised Section 7.0 to explicitly state that loss of financing or breach of financing documents constitutes a breach of the DEA.

- Granting of Security Interests. Stakeholder believes the new partial assignment language added by PJM to Section 11.0 of the DEA was intended to permit the Designated Entity to grant a security interest in the DEA in favor of Project Finance Entities (so long as no rights or obligations under the DEA were actually assigned to the Project Finance Entity). However, since it's not clear that the granting of a security interest is a "partial assignment" (as opposed to the creation of a mere lien), the stakeholder proposes to add language to Section 11.1.1 that would expressly permit the granting of a security interest in the DEA.
- PJM Response:
 - If the "security interest" does not grant to the finance entity any rights, duties, or obligations that the Designated Entity has assumed under the DEA then it is not an assignment. This does not need to be specified in the DEA.

- Cure Rights. As noted previously, Stakeholder expects that any lender involved in financing the construction of a Project will need to have the ability to attempt to cure breaches of the DEA by the Designated Entity, in order to have some way to prevent the possible termination of the DEA (without which the lender may not have a source of repayment of its loan). In PJM's latest draft of the DEA, there is a reference to cure by a Project Finance Entity, but only with PJM's prior consent. Stakeholder does not believe such a blanket consent right will be acceptable to a lender. At the same time, Stakeholder appreciates that PJM may be concerned about providing a lender with the ability to perform work related to the construction, maintenance or operation of the Project without first obtaining PJM's prior approval. Stakeholder proposes to add language to Section 11.1.1 to the DEA which would generally permit lender cures, but maintains the requirement of PJM pre-approval if a new entity is proposed to be brought in to perform work involving the construction, maintenance or operation of the Project.
- PJM Response:
 - PJM believes that the language as drafted does not prevent the lender from assisting the DE in curing breaches of the DEA. The proposed language is in conflict with the OA pre-qualification and company evaluation language and could hinder PJM's ability to implement the RTEP effectively. PJM will retain the language as drafted because PJM needs the latitude to deny assignment to entities not deemed qualified to construct, own, operate, and maintain the Project.

- PJM Approvals “Not to be Unreasonably Withheld”. As noted previously, the requirement that PJM approve any assignment to a lender or a lender’s designee will be viewed negatively by lenders and will be a point of focus for them. While the Stakeholder believes that the requirement for PJM approval is reasonable and appropriate in light of the nature of the facilities that will be constructed pursuant to the DEAs, lenders will need to develop an understanding of the PJM approval process and will need to have some kind of assurance that PJM’s approval right will not be exercised in an arbitrary manner. This point is typically addressed through inclusion of “not to be unreasonably withheld” language, and Stakeholder is proposing that here. This type of language is often seen in other public/private power and infrastructure program agreements that require some form of public agency approval of a transfer to a lender.
- PJM Response:
 - PJM will retain the language as drafted to provide the latitude to deny assignment to entities not deemed qualified to construct, own, operate, and maintain the Project.



CIA Stakeholder Comments

- CIA Signatories
 - Questions were raised as to what entities would sign the CIA.
- PJM Response:
 - PJM envisions that there will be a separate CIA for each Transmission Owner to which the Designated Entity's project interconnects.

- CIA Indemnity and Liability

Stakeholder comment: Protections under the CIA should survive for events/actions occurring up until that date.

- PJM Response:

- Indemnity and liability protections survive the termination of this agreement per Section 12.0.

- Whereas Section: Stakeholder comment – “Additional detail from PJM regarding the specifics of what aspects of engineering, design, construction, and technical standards need coordination under the CIA is needed. As per section 4.2 of the draft DEA between the DE and PJM, the DE agrees to construct the project to required standards. If a CIA is determined necessary, coordinated activities should be limited to items such as outages, relay coordination, and final connection/commissioning.”
- PJM Response:
 - PJM has modified the Whereas Section of the CIA to better conform to Article 4 as follows:

“WHEREAS, the Project will interconnect to the Transmission Owner’s(s)’ system(s), and therefore **Designated Entity and Transmission Owner shall coordinate with each other to facilitate the interconnection of the Project to the Transmission Owner facilities in a reliable, safe, and timely manner to enable the Project to meet its Required Project In-Service Date**~~Designated Entity and Transmission Owner(s) must coordinate certain activities, including but not limited to engineering, design, construction, and technical standards to facilitate such interconnection(s);~~”

- Section 1.1.3 Project: Comment – “PJM should clarify what “Project” refers to. As per the draft DEA “Project” appears to be defined as both the TO portion and the DE portion. PHI suggests that there should be a delineation between the portion of work the TO is responsible for and the portion of work the DE is responsible for. PHI furthers that the TO portion of the “Project” is under the authority of PJM, and should not be subject to requirements set forth by the DE.”
- PJM Response:
 - The definition of “Project” in the CIA and DEA has been revised to refer only to the facilities that the Designated Entity will be responsible for constructing. The Transmission Owner upgrades necessary to interconnect the Designated Entity’s “Project” will be defined in the construction responsibility letter and will be reflected on the single line diagram in Schedule B of the CIA.

- Section 1.1.4 Reasonable Efforts: Comment - "Since the TO is obligated to make every effort to complete projects as per the required PJM in-service dates, and the TO portion of the project will fall under the Construction Responsibility process, it does not seem appropriate for the TO to pledge this to the DE. The DE should adhere to the ISD (in-service date) set forth in the DEA, and the TO should adhere to the ISD set forth via the Construction Responsibility Letter."
- PJM Response:
 - PJM confirms that the upgrade to the Transmission Owner's facilities will be set forth in the construction responsibility letter, however the purpose of the CIA is to set forth the coordination responsibilities of the parties to facilitate the Required In-Service Date of the DE's Project.

- Section 1.1.5 Required Project In-Service Date: Comment - "Does Schedule B of the DEA refer only to the DE portion of the work? It seems inappropriate for the TO scope of work to be outlined in the agreement between PJM and the DE. Today, if a TO has an issue and cannot meet a required RTEP date, they work with PJM to develop a mitigation plan. Within the draft DEA, Schedule D appears to be PJM Planning Requirements and Criteria. The TO is already obligated to adhere to these requirements. PHI suggests it may not be appropriate to supplement that process with additional milestones contained in a CIA."
- PJM Response:
 - Schedule B of the DEA will only include the Designated Entities description of work.

- Section 1.2 Consolidated Transmission Owners Agreement

Stakeholder commented that the CTOA reference in section 1.2 was overly broad.

- PJM Response:

- Upon review of the CTOA, those sections required to coordinate interconnection of the Designated Entity's project and the Transmission Owner facilities have been captured in the CIA and the obligation of the DE and the Transmission Owner to sign the CIA will be set forth in Schedule 6 of the Operating Agreement.

- Section 3.0 Obligation to Provide Security:
Stakeholder comment: The Designated Entity will have to post a letter of credit (specifics referenced in Schedule 6 of the Operating Agreement) or a cash deposit of 3% of project costs. This could be a significant expense. Note that SPP allows the novated party to provide parent guaranties instead.
- PJM Response:
 - It is not a PJM practice to accept parental guarantees. Security, fixed at 3% in the form of LOC or cash, balances multiple factors including: cost to rate payers, adequate protection in the event of default, range of reasonableness of cost, administrative practicality, and similar practices.

- Section 4.0 Designated Entity and Transmission Owner Responsibilities:
(Red – proposed additional text)

The Designated Entity and Transmission Owner shall coordinate with each other to ensure that the interconnection of the Project to the Transmission Owner facilities is reliable, safe, and completed in a timely manner to permit the Project to meet its Required Project In-Service Date. **In addition, the Designated Entity and the Transmission Owner shall coordinate operations and maintenance of the project once in-service until the project is decommissioned.**

- PJM Response:
 - The CIA does not cover ongoing maintenance, operations, and decommissioning. It will terminate once the project is in-service and the Designated Entity has executed the CTOA.
 - The wires-to-wires interconnection agreement is the appropriate document to address maintenance, operations, and decommissioning.

- Section 4.0 Designated Entity and Transmission Owner Responsibilities
Stakeholder proposed to modify the ‘ensure’ language in this section.
- PJM Response:
 - PJM has modified the Section to read as follows: (Red – added text; Blue – deleted text)

The Designated Entity and Transmission Owner shall coordinate with each other to ~~ensure that~~ **facilitate** the interconnection of the Project to the Transmission Owner facilities **in a** ~~is~~ reliable, safe, and ~~completed in a~~ timely manner to **enable** ~~permit~~ the Project to meet its Required Project In-Service Date.

- Section 4.3 Outage Coordination: Stakeholder comment - "The language should be tightened up to include the "nuts and bolts" of how this "Coordination" will work. The specific language should be vetted at the committee level especially SOS and OC to discuss how this will work. Will additional language in PJM Manuals be needed around "Outage Coordination" to support this document? We've discussed timeline for MRC approval; however, will this document need approval from any of the PJM committees? "
- PJM Response:
 - PJM is not changing the existing outage request process. PJM anticipates that Transmission Owners will coordinate with Designated Entities in a similar fashion as is currently done with Interconnection Customers on PJM Queue based projects.

- Stakeholder requested that the following section be added to the CIA

4.4 New Delivery Points:

The Designated Entity and Transmission Owner(s) acknowledge and agree that during the course of time new delivery points may be added to the project. The Designated Entity and the Transmission Owner(s) will coordinate with the Transmission Provider in accordance with the PJM Tariff to add delivery points as needed.

- Further clarification supplied by the stakeholder: “These would be new step-downs to support the underlying transmission and distribution systems or to interconnect new transmission customers and loads. For example, a new 138/12 kV distribution substation may need to tap the new 138 kV greenfield project that resulted from the competitive process.”

- 4.4 New Delivery Points (continued)
- PJM Response:
 - If a situation occurs where a new facility could be served from a greenfield project, PJM anticipates that the process would be consistent with current practices where the entities would negotiate the terms and conditions of that interconnection.

- Section 5.0 Breach.

Stakeholder comment: Section 5.0 of the DEA requires the Designated Entity to execute a Coordination and Interconnection Agreement (CIA) or request that such agreement be filed unexecuted with FERC. In some cases, a Project's ability to stay on its agreed schedule will be dependent upon the Transmission Owner actually executing the CIA and then fulfilling its obligations under the CIA to coordinate certain actions with the Designated Entity. Given the importance of the CIA, Stakeholder believes that the DEA needs to provide that the failure by a Transmission Owner to timely execute, or provide the coordination required under, the CIA will not trigger a breach under or termination of the DEA, so long as the Designated Entity is doing everything it can to mitigate the impact of the Transmission Owner's action or inaction.

- PJM Response:

- PJM envisions using a similar process to the ISA execution timeframe now in place that provides the Transmission Owner with 15 days upon receipt to execute the ISA. Similar to the ISA process, the Transmission Owner will be provided with a sufficient review period prior to receiving the CIA for execution.
- If for some reason, the failure of the Transmission Owner to execute the CIA causes Designated Entity to breach its DEA, this would be an event beyond the Designated Entity's control and would be handled accordingly.

- Section 5.4 Remedies.
(Blue – proposed text to be deleted)

Upon the occurrence of an event of Default, the non-defaulting Party shall be entitled to: (i) commence an action to require the Defaulting Party to remedy such default and specifically perform its duties and obligations hereunder in accordance with the terms and conditions hereof; (ii) suspend performance hereunder; and (iii) exercise such other rights and remedies as it may have in equity or at law. **Nothing in this Section 5.4 is intended in any way to affect the rights of a third-party to seek any remedy it may have in equity or at law from the Designated Entity resulting from Designated Entity's default of this Agreement.**

- PJM Response:
 - The agreement should not be used as a shield against third party lawsuits
 - Designation does not change the liability of a Designated Entity to safely construct facilities and meet all legal obligations.

- **Section 5.5 Remedies Cumulative.**
(Blue – proposed text to be deleted)

No remedy conferred by any provision of this Agreement is intended to be exclusive of any other remedy and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies shall not constitute a waiver of the right to pursue other available remedies.

- **PJM Response:**
 - This Section is consistent with current ‘Remedies Cumulative’ language used in other interconnection agreements

- Section 6.1 Breach
(Red – proposed additional text)

Except as otherwise provided in Article 7 of this Agreement, a breach of this Agreement shall include the failure **of any Party** to comply with any term or condition of this Agreement, including the Schedules attached hereto.

- PJM Response:
 - The requested change has been implemented.

- Section 6.1 Breach.: Comment – “Clarity regarding what the TO is agreeing to here is necessary. If an RTEP milestone is missed, the accountability is to PJM regardless of if the milestone is missed by the TO or the DE.”
- PJM Response:
 - PJM confirms that the upgrade to the Transmission Owner’s facilities will be set forth in the construction responsibility letter, however the purpose of the CIA is to set forth the coordination responsibilities of the parties to facilitate the Required In-Service Date of the DE’s Project.
 - Failure to coordinate by any party will be a Breach of the CIA.

- Section 5.3 Cure of Breach: (Red – proposed additional text; Blue – proposed text to be deleted)
- "A breaching Party ~~may~~ **must** (i) cure **a material** ~~the~~ breach within thirty days from the receipt of the notice of breach or other such **later** date as determined by Transmission Provider **as reasonably necessary to position to ensure that** the Project to meets its Required Project In-Service Date; or, (ii) if the **material** breach cannot be cured within thirty days but may be cured in a manner that **puts ensures that** the Project **in a position** to meets its Required Project In- Service Date, the breaching Party, within such thirty day time period, commences in good faith steps that are reasonable and appropriate to cure the breach and thereafter diligently pursue such action to completion.
- PJM Response:
 - PJM is not going to distinguish between a material and non-material obligation of this agreement.

- Section 8.0 Force Majeure: (Red – proposed additional text; Blue – proposed text to be deleted)

“... Force Majeure does not include: (i) a failure of performance that is due to an affected Party’s own negligence or intentional wrongdoing **or**; (ii) any removable or remedial causes (other than settlement of a strike or labor dispute) which an affected Party fails to remove or remedy within a reasonable time **and in compliance with applicable laws**, ~~or (iii) economic hardship of an affected Party.~~”

- PJM Response:
 - If the Force Majeure is not able to be remedied within the law then the cure is not reasonable.
 - Economic hardship cannot be a reason for Force Majeure under an RTEP project.

- Section 16.2 Standard of Review: Stakeholder comment – “This appears to be a new addition to the process. Clarity regarding why PJM thinks this is valuable is necessary, as it appears to allow easier modification.”
- PJM Response:
 - The DEA and CIA will be integral to the RTEP process, which is a plan that is studied and updated at least annually. The just and reasonable standard is appropriate for a planning process that necessitates flexibility to make future changes when needed.

- Section 16.0 Notices: (Red – proposed additional text; Blue – proposed text to be deleted)

“Any notice or request made to or by any Party regarding this Agreement shall be made to the Parties **by U.S. mail or reputable overnight courier to the addresses set forth below,** ~~as indicated below.~~”

- PJM Response:
 - The requested change has been implemented.



Stakeholder Comments Common to the CIA and DEA

- DEA Section 7.3 and CIA Section 6.4 Cure of Breach:
 - Several parties commented that 7.3 of the DEA and Section 6.4 of the CIA, which are the Cure of Breach Sections should contain language indicating that if the Party complies with those sections, they will not be deemed in Default of the agreement.
- PJM Response:
 - The Sections provide the ways a Party may cure a breach and are consistent with current 'Cure of Breach' language used in other interconnection agreements.



DEA Section 9.0, CIA Section 6.0 Liability

Sections 9.0 of the DEA and 6.0 of the CIA have been revised to limit PJM's liability consistent with the PJM Tariff.

Revised Language:

For the purposes of this Agreement, Transmission Provider's liability to the Designated Entity, any third party, or any other person arising or resulting from any acts or omissions associated in any way with performance under this Agreement shall be limited in the same manner and to the same extent that Transmission Provider's liability is limited to any Transmission Customer, third party or other person under Section 10.2 of the PJM Tariff arising or resulting from any act or omission in any way associated with service provided under the PJM Tariff or any Service Agreement thereunder.



DEA Section 9.1, CIA Section 6.1 Indemnity

Sections 9.1 of the DEA and 6.1 of the CIA have been revised to make the Designated Entity's obligation to indemnify PJM consistent with Transmission Owners' indemnification obligations under the PJM Tariff.

Revised Language:

For the purposes of this Agreement, Designated Entity shall at all times indemnify, defend, and save Transmission Provider and its directors, managers, members, shareholders, officers and employees harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's acts or omissions associated with the performance of its obligations under this Agreement to the same extent and in the same manner that a Transmission Customer is required to indemnify, defend and save Transmission Provider and its directors, managers, members, shareholders, officers and employees harmless under Section 10.3 of the PJM Tariff.