168 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

PJM Interconnection, L.L.C. Docket Nos. ER18-1647-001
ER18-1647-002

ORDER ON REHEARING AND COMPLIANCE

(Issued August 27, 2019)

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 for certain transmission projects. PJM proposed to: (1) exempt the Designated Entity[3] for a transmission project approved as part of PJM's Regional Transmission Expansion Plan (RTEP) that PJM must designate to the incumbent transmission owner under Schedule 6, Section 1.5.8(l) of the Operating Agreement (Transmission Owner Designated Project),[4] from the requirement to execute a

[1] 16 U.S.C. § 824d (2012).

[2] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, Schedule 6, § 1.5.8(j) (Acceptance of Designation) (20.0.0).

[3] A Designated Entity is defined as "[a]n entity, including an existing Designated Entity Agreement Transmission Owner or non-incumbent 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." PJM, Intra-PJM Tariffs, OA, Definitions, OA Definitions C – D (14.0.0).

[4] Under Schedule 6, Section 1.5.8(l), for projects proposed in a competitive proposal window, PJM is required to identify the incumbent transmission owner as the Designated Entity for: (1) Transmission Owner Upgrades; (2) selected transmission solutions located solely within a transmission owner's zone for which the costs are allocated solely to that zone; (3) transmission solutions located solely within a transmission owner's zone that are not selected in the RTEP for purposes of cost *(continued ...)*

Designated Entity Agreement;[5] and (2) increase the time period for a transmission developer that PJM has identified as the Designated Entity for a Transmission Owner Designated Project to accept its designation as a Designated Entity.

2. On July 13, 2018, the Commission accepted PJM's proposed tariff revisions in part and rejected them in part.[6] The Commission rejected PJM's proposal to exempt the incumbent transmission owner for Transmission Owner Designated Projects from the requirement to execute a Designated Entity Agreement. The Commission also rejected PJM's related proposal for the Designated Entity for Transmission Owner Designated Projects to alternatively provide acknowledgement of designation within 90 days of receiving notification from PJM, consistent with the Consolidated Transmission Owners Agreement. The Commission accepted PJM's 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 required PJM to submit a compliance filing within 30 days of the July 2018 Order.[7]

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allocation; (4) transmission projects proposed to be located on a transmission owner's existing right of way that would alter the transmission owner's use and control of its existing right of way under state law; and (5) enhancements or expansions located within a state when required by state law, regulation, or administrative agency order. PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA, Schedule 6, § 1.5.8(l) (Transmission Owners Required to be the Designated Entity) (20.0.0). A Transmission Owner Upgrade is defined as "an upgrade to a Transmission Owner's own transmission facilities, which is an improvement to, addition to, or replacement of a part of, an existing facility and is not an entirely new transmission facility." *See* PJM, Intra-PJM Tariffs, OA, S–T, OA Definitions S–T, (13.0.0).

[5] A Designated Entity Agreement defines the rights and obligations of the Designated Entity with regard to the construction of an RTEP Project and sets forth security, milestones, insurance, and assignment requirements, among other things. *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at P 10 (2014) (PJM Designated Entity Agreement Order). PJM, Intra-PJM Tariffs, Attachment KK (Form of Designated Entity Agreement) (0.1.0).

[6] *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,021 (2018) (July 2018 Order).

[7] *Id.* P 2.

(continued ...)

3. On August 13, 2018, PJM[8] and the Indicated PJM Transmission Owners (Indicated Transmission Owners)[9] separately requested rehearing of the July 2018 Order. On August 13, 2018, PJM also submitted proposed Operating Agreement revisions to comply with the July 2018 Order.[10] In this order, we deny PJM and Indicated Transmission Owners' (jointly, Rehearing Parties) requests for rehearing and accept PJM's compliance filing, as discussed below.

I. Background

4. To comply with the regional transmission planning and cost allocation requirements of Order No. 1000, PJM proposed an RTEP process through which it selects the more efficient or cost effective transmission projects for the purposes of cost allocation, and then identifies a Designated Entity to develop the selected transmission project.[11] Pursuant to its RTEP process, PJM identifies transmission needs and opens

[8] Request for Rehearing of PJM Interconnection L.L.C. (PJM Request for Rehearing).

[9] The Indicated Transmission Owners are: American Electric Power Service Corporation (on behalf of its affiliates, Appalachian Power Company, Indiana Michigan Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Indiana Michigan Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, and AEP West Virginia Transmission Company); Dominion Energy Services, Inc. on behalf of Virginia Electric and Power Company d/b/a/ Dominion Energy Virginia; Exelon Corporation; Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, and American Transmission Systems, Incorporated (collectively, "the FirstEnergy Companies"); PPL Electric Utilities Corporation; and Public Service Electric and Gas Company.

[10] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OA Schedule 6 Sec 1.5, OA Schedule 6 Sec 1.5 Procedure for Development of the Regional Transmission Expansion Plan, 18.1.0.

[11] The Commission found that PJM's RTEP process complies with Order No. 1000. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 (2013) (PJM First Compliance Order), *order on reh'g and compliance*, 147 FERC ¶ 61,128 (2014), *order on reh'g and compliance*, 150 FERC ¶ 61,038, and *order on reh'g and compliance*, 151 FERC ¶ 61,250 (2015). *See also Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 13 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC

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competitive proposal windows for transmission developers to submit solutions to resolve those transmission needs. PJM then analyzes all the submitted proposals and selects the more efficient or cost-effective transmission solution in its regional transmission plan for purposes of cost allocation.[12]

5. For certain selected transmission projects, i.e., Transmission Owner Designated Projects, PJM must identify the incumbent transmission owner as the Designated Entity under Schedule 6, Section 1.5.8(1) of the Operating Agreement. For all other selected transmission projects having a regional cost allocation, PJM will identify the transmission developer who proposed the project, whether incumbent or nonincumbent, as the Designated Entity.

6. To accept a project designation and become a Designated Entity, the incumbent or nonincumbent transmission developer must notify PJM of its acceptance and provide a development schedule with the milestones necessary to develop and construct the project by the needed in-service date. Within 15 days of such acceptance, PJM must provide to the transmission developer a Designated Entity Agreement setting forth the rights and obligations of the Designated Entity and PJM. Under PJM's current process, both nonincumbent and incumbent transmission developers execute the Designated Entity Agreement.[13] The Designated Entity Agreement terminates once construction is complete and the Designated Entity has met all of the requirements in Section 2.1 of the Designated Entity Agreement, including, for a Designated Entity that is not already a Transmission Owner, execution of the Consolidated Transmission Owners Agreement. Upon execution of that Agreement, the nonincumbent Designated Entity becomes a Transmission Owner.[14]

7. In the July 2018 Order, the Commission rejected as unjust, unreasonable, and unduly discriminatory or preferential PJM's proposal to exempt the Designated Entity for Transmission Owner Designated Projects from the requirement to execute a Designated Entity Agreement on the grounds that the terms and conditions of its Designated Entity

¶ 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).

[12] For further background, *see* July 2018 Order, 164 FERC ¶ 61,021 at PP 3-4.

[13] *See* PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at PP 1, 46.

[14] *Id.* P 46.

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Agreement are not comparable to the terms and conditions to which an incumbent transmission owner is subject under the Consolidated Transmission Owners Agreement.[15]

8. The Commission explained that, as part of the Order No. 1000 compliance proceedings, the Commission requires public utility transmission providers that proposed to use *pro forma* development agreements, such as PJM's Designated Entity Agreement, to file such agreements for the Commission's review.[16] The Commission has found such agreements for transmission projects selected in the regional transmission planning process to be just and reasonable and not unduly discriminatory or preferential under two circumstances: either (1) both the incumbent transmission owners and the nonincumbent transmission developers are subject to the agreement;[17] or (2) to the extent that only a nonincumbent transmission developer must execute the agreement, the public utility transmission provider(s) has demonstrated that the terms and conditions of that agreement are comparable to the terms and conditions to which an incumbent transmission owner is subject under the applicable Regional Transmission Organization (RTO) or Independent System Operator (ISO) governing documents and agreements.[18] Consistent with the first option, revisions to PJM's Operating Agreement approved in 2013 required both incumbent transmission owners and nonincumbent transmission developers to be subject to the Designated Entity Agreement.[19]

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[15] July 2018 Order, 164 FERC ¶ 61,021 at P 27.

[16] *Id*. P 28 (citing PJM First Compliance Order, 142 FERC ¶ 61,214 at P 280; *South Carolina Electric & Gas Company*, 143 FERC ¶ 61,058, at P 208 (2013); *Louisville Gas & Elec. Co.*, 144 FERC ¶ 61,054, at P 229 (2013)).

[17] July 2018 Order, 164 FERC ¶ 61,021 at P 28 (citing *N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,341 (2015) (NYISO 2015 Order); *Cal. Indep. Sys. Operator Corp.*, Docket No. ER14-2824-001 (Feb. 12, 2015) (delegated order); *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,107 (2014); PJM First Compliance Order, 142 FERC ¶ 61,214 at P 280; PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at PP 46-47; *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,168, at PP 85, 100 (2015)).

[18] July 2018 Order, 164 FERC ¶ 61,021 at P 28 (citing *ISO New England Inc.*, 150 FERC ¶ 61,209, *order on reh'g and compliance*, 153 FERC ¶ 61,012, at PP 20-29 (2015) (*ISO New England*)).

[19] *See* PJM First Compliance Order, 142 FERC ¶ 61,214 at P 280; *see also* PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at PP 46-47) (stating that, although incumbent transmission owners are signatories of the Consolidated Transmission Owners Agreement, acceptance of the Designated Entity Agreement was based on the Designated Entity Agreement applying in full to all Designated Entities, *(continued ...)*

9. Turning to PJM's proposal in this proceeding, the Commission explained that, because PJM proposed to eliminate the requirement for incumbent transmission owners and nonincumbent transmission developers to execute the same development agreement, the Commission examined whether the terms and conditions of the Designated Entity Agreement are comparable to the terms and conditions of the Consolidated Transmission Owners Agreement.[20] The Commission explained that "[i]n order for similarly situated transmission developers to be treated comparably, the Commission stated that the terms of the agreement to which the incumbent owner were subject should not be 'less stringent' than those contained in the designated development agreement."[21]

10. Applying this approach, the Commission found in the July 2018 Order that incumbent transmission owners and non-incumbent transmission developers are similarly situated, but that the terms and conditions of the Designated Entity Agreement are *not* comparable to those of the Consolidated Transmission Owners Agreement. In support, the Commission provided several examples of terms and conditions of the Consolidated Transmission Owners Agreement that are less stringent than those of the Designated Entity Agreement and would, accordingly, give competitive advantage to incumbent transmission owners in the RTEP project selection process.[22]

II. Discussion

A. Procedural Matters

11. On August 28, 2018, American Municipal Power (AMP) filed a motion for leave to answer and limited answer, in response to the rehearing requests filed by PJM and Indicated Transmission Owners. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2018), prohibits an answer to a request for rehearing. Accordingly, we deny AMP's motion to answer and reject AMP's answer to the rehearing requests.

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whether an incumbent transmission owner or a nonincumbent transmission developer, that are designated an RTEP project).

[20] July 2018 Order, 164 FERC ¶ 61,021 at P 29.

[21] *Id.* P 31 (citing *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 12 (2018) (NYISO 2018 Order)).

[22] July 2018 Order, 164 FERC ¶ 61,021 at PP 29-33.

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B. Substantive Matters

1. Incumbent Transmission Owners and Nonincumbent Transmission Developers Are Not Similarly Situated

a. The July 2018 Order

12. The July 2018 Order found that incumbent transmission owners designated to develop Transmission Owner Designated Projects are similarly situated to the transmission developers for other proposed regional transmission projects.[23] The July 2018 Order explained that PJM's arguments for exempting incumbent transmission owners because they are not similarly situated were similar to those raised in a proceeding addressing NYISO's proposal to not require a Responsible Transmission Owner (i.e., an incumbent transmission owner) providing a regulated backstop solution[24] to sign the NYISO development agreement if its solution was selected.[25] In that proceeding, the filing parties argued that because the Responsible Transmission Owner was already obligated to develop and construct the regulated backstop solution under both state law and an agreement between NYISO and the New York transmission owners, the Responsible Transmission Owner should not be required to sign the NYISO

[23] The Commission explained that its determinations in the July 2018 Order applied only to those Transmission Owner Designated Projects that were selected in the regional transmission plan as the more efficient or cost effective transmission solution for the purposes of cost allocation. July 2018 Order, 164 FERC ¶ 61,021 at P 33 n.61.

[24] In NYISO's reliability transmission planning process, NYISO identifies reliability needs and solicits, from both incumbent transmission owners and nonincumbent transmission developers, regulated solutions (i.e., proposed solutions that are eligible for selection in the regional transmission plan for purposes of cost allocation) and market-based solutions (i.e., proposed solutions that are not eligible for selection in the regional transmission plan for purposes of cost allocation). In NYISO, the Responsible Transmission Owner is required to provide a regulated backstop solution, while nonincumbent transmission developers may propose alternative regulated transmission solutions. If no market-based solution satisfies NYISO's reliability needs, NYISO will select either a regulated backstop solution or an alternative regulated transmission solution as the more efficient or cost-effective solution. If NYISO selects an alternative regulated solution, it may also require a designated Responsible Transmission Owner to develop the regulated backstop solution in parallel. *See N.Y. Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,044, at PP 18-20 (2014).

[25] July 2018 Order, 164 FERC ¶ 61,021 at P 31 (citing NYISO 2015 Order, 153 FERC ¶ 61,341; NYISO 2018 Order, 162 FERC ¶ 61,124).

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development agreement.[26] The Commission found that, "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," NYISO must revise its tariff and development agreement to require all Responsible Transmission Owners developing regulated backstop solutions to execute the agreement if NYISO selects the Responsible Transmission Owner's regulated backstop solution as the more efficient or cost-effective solution to a reliability need.[27]

13. In determining in the July 2018 Order that incumbent transmission owners designated to develop Transmission Owner Designated Projects are similarly situated to the transmission developers for other proposed regional transmission projects, the Commission explained that, like regulated backstop solutions in NYISO, some categories of Transmission Owner Designated Projects are evaluated for selection in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission solution using the same criteria that PJM applies to all other proposed regional transmission projects.[28]

b. Rehearing Requests

14. Rehearing Parties claim the Commission "erred in basing its finding that [incumbent] [t]ransmission [o]wners and nonincumbent transmission developers are similarly situated solely on the fact that PJM uses the same selection criteria to select a Transmission Owner Designated Project as the more efficient or cost-effective solution

[26] NYISO 2015 Order, 153 FERC ¶ 61,341 at P 40.

[27] *Id.* P 48.

[28] July 2018 Order, 164 FERC ¶ 61,021 at P 32. 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).

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because the same criteria appl[y] to all other proposed regional transmission projects."[29] Specifically, Rehearing Parties argue that an incumbent transmission owner is "obligated by law to serve its customers by providing safe and reliable electric service,"[30] and has an obligation to build requirement, under the terms of the Consolidated Transmission Owners Agreement, while nonincumbent transmission developers do not.[31] Rehearing Parties also contend that a transmission owner that fails to meet its obligations under the Consolidated Transmission Owners Agreement is subject to "more wide ranging penalties" including loss of its PJM member voting rights and penalties for violating the Federal Power Act or reliability standards.[32] In light of these asserted differences, Rehearing Parties contend that the Commission erred in determining that nonincumbent and incumbent transmission developers are similarly situated.[33]

15. In addition, Indicated Transmission Owners charge that the July 2018 Order erred in relying on the NYISO 2015 Order because the Commission failed to recognize relevant differences between the regional transmission planning processes of NYISO and PJM.[34] Specifically, in NYISO, after the alternative regulated transmission solution is selected in the regional transmission plan as the more efficient or cost-effective solution for the purposes of cost allocation, both the selected alternative regulated solution and a regulated backstop solution proceed in parallel past the signing of a development agreement. As a result, Indicated Transmission Owners state that in NYISO, the rules of competition apply to both the incumbent and nonincumbent transmission developers equally, precisely because the competition continues beyond the signing of the development agreement.[35] On the other hand, Indicated Transmission Owners assert that

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[29] PJM Request for Rehearing at 5, 11-12.

[30] *Id.*

[31] *Id*. at 4; Indicated Transmission Owners Request for Rehearing at 10-12 (citing PJM, Intra-PJM Tariffs, Operating Agreement, Schedule 6, § 1.7 and PJM, Transmission Owners Agreement, § 4.2.1).

[32] PJM Request for Rehearing at 5, 11-12; Indicated Transmission Owners Request for Rehearing at 17-18.

[33] PJM Request for Rehearing at 7; Indicated Transmission Owners Request for Rehearing at 11-15.

[34] Indicated Transmission Owners Request for Rehearing at 3, 10-12 (citing NYISO 2015 Order, 153 FERC ¶ 61,341).

[35] *Id*. at 11-12.

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PJM picks a clear winner at the end of the competitive proposal window process and only the proponent of the winning proposal is required to enter into the development agreement with PJM.

16. Indicated Transmission Owners argue that the Commission should have instead "relied on its well-reasoned determination of this issue in ISO New England" (ISO-NE), approving ISO-NE's proposal to utilize a separate nonincumbent transmission development agreement that exempts incumbents.[36]

c. Commission Determination

17. We deny rehearing. Rehearing Parties argue that the Commission erred by finding that incumbent and nonincumbent transmission developers are similarly situated based solely on the fact that PJM uses the same selection criteria to evaluate their respective projects in PJM's competitive proposal window process. Rehearing Parties argue that incumbent and nonincumbent transmission developers are not similarly situated because only incumbent transmission owners are signatories to Consolidated Transmission Owner Agreement[37] and are subject to its obligation to build and penalty provisions, and thus may be treated differently. We disagree. The Commission has explained that "to say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences that are material to the inquiry at hand."[38] Likewise, the courts have explained that entities are similarly situated if they are in the same position with respect to the ends that the law seeks to promote or the abuses that it seeks to prevent, even if they are different in many other respects.[39]

18. As explained in the July 2018 Order, in these circumstances "the relevant inquiry in determining whether the two categories of transmission developer[s] were similarly situated is whether [the transmission provider] will evaluate the proposed transmission

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[36] *Id.* at 11-12 (citing *ISO New England, Inc*., 153 FERC ¶ 61,012).

[37] As noted above, a nonincumbent transmission developer signs the Consolidated Transmission Owners Agreement when its transmission facility is placed into service. *See supra* P 6; *see also* Indicated Transmission Owners Request for Rehearing at 11-12.

[38] NYISO 2018 Order, 162 FERC ¶ 61,124 at P 10.

[39] *Id*. (citing *Florida v. Long*, 487 U.S. 223, 227 (1988) (finding that "[t]he normal retirement benefit is therefore equal for similarly situated male and female employees"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 98 (1983) (citing allegations "that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life")).

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projects of these entities using the same criteria for the purpose of identifying the more efficient or cost-effective solution and thus for selection in the regional transmission plan for purposes of cost allocation."[40]

19. In other words, when transmission developers, here both incumbent and nonincumbent transmission developers, are competing for the same opportunity subject to the same set of criteria, those developers should be subject to comparable rules for the entirety of that competitive process. Further, the Commission's purpose is "to ensure that similarly situated transmission developers, whether incumbent transmission owners or non-incumbent transmission developers, will be processed in a not unduly discriminatory manner consistent with Order No. 1000."[41] Execution and implementation of the terms of a development agreement, here PJM's Designated Entity Agreement, are part of the processing of proposed transmission projects. Thus, in considering PJM's proposal to exempt incumbent transmission owners for Transmission Owner Designated Projects from the requirement to execute a Designated Entity Agreement, the Commission properly considers whether the terms of any agreement could result in undue discrimination "both in seeking selection in the regional transmission plan for purposes of cost allocation and remaining selected."[42]

20. Rehearing Parties claim that because incumbent transmission owners are signatories to the Consolidated Transmission Owners Agreement, while nonincumbent transmission developers do not become signatories until their transmission facilities go into service, they are not similarly situated to nonincumbent transmission developers; i.e., they argue that PJM thus "does not need" incumbent transmission owners to execute the Designated Entity Agreement.[43] Further, they argue that certain provisions of the Consolidated Transmission Owners Agreement render signatories to that agreement not

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[40] July 2018 Order, 164 FERC ¶ 61,021 at P 31 (citing NYISO 2015 Order, 153 FERC ¶ 61,341, *order on reh'g*, NYISO 2018 Order, 162 FERC ¶ 61,124 at P 11).

[41] July 2018 Order, 164 FERC ¶ 61,021 at P 30 (quoting NYISO 2015 Order, 153 FERC ¶ 61,341 at P 48).

[42] *See* NYISO 2018 Order, 162 FERC ¶ 61,124 at P 12 ("If Responsible Transmission Owners developing regulated backstop solutions are not required to execute a Development Agreement, they will have an advantage over nonincumbent transmission developers both in seeking selection in the regional transmission plan for purposes of cost allocation and remaining selected.").

[43] Indicated Transmission Owners Request for Rehearing at 4-5; *see also* PJM Request for Rehearing at 6.

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similarly situated to non-signatories: (1) the "obligation to build" requirement;[44] and (2) the penalty provisions.[45]

21. We find that Rehearing Parties' assertions regarding the obligation to build requirement are "not material to the evaluation and selection of the more efficient or cost-effective solution."[46] Indeed, this determination follows directly from the Commission's finding, in Order No. 1000 and Order No. 1000-A, that "obligations to build placed on [incumbent transmission owners] under RTO and ISO member agreements" do not undercut the determination that incumbent and nonincumbent transmission developers are similarly situated for purposes of the transmission planning process.[47] Rehearing Parties offer no persuasive reason to depart from this analysis here.

22. With respect to the penalty provisions of the Consolidated Transmission Owners Agreement, we likewise find that these provisions are not factored into PJM's evaluation and selection of the more efficient or cost-effective solution and thus do not demonstrate that incumbent transmission owners are similarly situated to nonincumbent transmission developers.[48] For example, unlike the security requirement in the Designated Entity Agreement, which is necessarily reflected in the costs of a proposed project subject to that agreement, neither PJM nor Indicated Transmission Owners explain whether or how the Consolidated Transmission Owners Agreement's penalty provisions impact cost estimates evaluated during the selection process, and the re-evaluation process. Indicated Transmission Owners' arguments that, as a "regulated utility subject to the FPA" they are subject to penalties associated with violations of the FPA, are not material to the requirement of Order No. 1000 that there be a just and reasonable and not unduly discriminatory competitive selection process for both incumbent and nonincumbent transmission developers seeking to develop regional transmission facilities.[49]

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[44] PJM Request for Rehearing at 9-10.

[45] *Id*. at 4.

[46] NYISO 2018 Order, 162 FERC ¶ 61,124 at P 11.

[47] Order No. 1000-A, 139 FERC ¶ 61,132 at PP 364-65; *see also* Order No. 1000, 136 FERC ¶ 61,051 at P 265.

[48] *See* PJM Rehearing Request at 12; Indicated Transmission Owners Request for Rehearing at 17-18.

[49] Order No. 1000 required each public utility transmission provider to amend its tariff to describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for *(continued ...)*

23. We further note that the Commission's application of the similarly-situated analysis in this proceeding, looking to whether the entities are competing for the same opportunity, is consistent with Commission precedent in other contexts. "[T]he Commission, has, for example, determined that new and existing generators were similarly situated for 'reactive power compensation purposes' because they were equally capable of providing that service, notwithstanding other significant differences."[50] Moreover, the Commission has held that "non-federal renewable resources are similarly situated to federal hydroelectric and thermal resources for purposes of transmission curtailments because they all take firm transmission service."[51]

24. Finally, we disagree with Rehearing Parties' claims that the July 2018 Order improperly applied the Commission's decisions concerning transmission development agreements in NYISO, and should have instead followed the approach taken in ISO-NE. As Indicated Transmission Owners recognize, in NYISO, the Commission has required incumbent transmission owners to execute the same development agreement as nonincumbent transmission developers, following the selection of the more efficient or cost-effective solution.[52] Indicated Transmission Owners assert that differences between the PJM and NYISO transmission planning processes make this requirement inappropriate here.[53] But as the Commission explained in the July 2018 Order, NYISO's regulated backstop solutions are not unlike some categories of transmission projects that PJM must designate to the incumbent transmission owner, in that they are evaluated for selection in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission solution using the same criteria PJM applies to all

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purposes of cost allocation. Order No. 1000, 136 FERC ¶ 61,051 at P 328; Order No. 1000-A, 139 FERC ¶ 61,132 at P 452. Order No. 1000 also required each public utility transmission provider to participate in a regional transmission planning process that provides that a nonincumbent transmission developer has an opportunity comparable to that of an incumbent transmission developer to allocate the cost of a transmission facility through a regional cost allocation method or methods. Order No. 1000, 136 FERC ¶ 61,051 at P 332.

[50] NYISO 2018 Order, 162 FERC ¶ 61,124 at P 10.

[51] *Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185, at P 62 (2011), *reh'g denied*, 141 ¶ FERC 61,233 (2012).

[52] *See* July 2018 Order, 164 FERC ¶ 61,021 at P 30 n.54 (describing NYISO's reliability transmission planning process).

[53] Indicated Transmission Owners Request for Rehearing at 10-12. PJM does not offer this argument.

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other proposed regional transmission projects, including those proposed by nonincumbent transmission developers.[54] Indicated Transmission Owners essentially claim that the Commission's consideration of the potential for undue discrimination should not extend past the point of PJM's selection of the more efficient or cost-effective solution. However, as explained in the next section, concerning comparability of development agreements, the terms of the applicable development agreement "could provide the incumbent transmission owner with an advantage in PJM's evaluation process"[55] or, as is also important, impact the selected transmission project's ability to remain selected in the re-evaluation process.[56]

25. Specifically, we disagree with Indicated Transmission Owners' argument that PJM's competitive process is distinguishable from NYISO's competitive process because in PJM, the rules of competition do not apply once the nonincumbent transmission developer signs the Designated Entity Agreement.[57] Under NYISO's regional transmission planning process, if NYISO determines that there are not sufficient market-based solutions to meet the identified reliability need by the need date and selects an alternative regulated transmission solution as the more efficient or cost-effective transmission solution to address that reliability need, NYISO will review the status of the alternative regulated transmission solution to determine, for example, whether the developer has signed the development agreement or whether the project is timely progressing against milestones or obtaining the needed permits or authorizations. If, based on its review, NYISO determines by the trigger date for the regulated backstop solution that it is necessary for the incumbent transmission owner to proceed with a regulated backstop solution in parallel with the selected alternative regulated transmission solution to ensure the identified reliability need is satisfied by the need date, then NYISO will trigger the regulated backstop solution.[58] This process is similar to PJM's project reevaluation process, which also occurs *after* the Designated Entity Agreement is signed. For example, if a nonincumbent developer is the Designated Entity of a project selected in the RTEP, and the project

> fails to meet a milestone in the development schedule set forth in the Designated Entity Agreement that causes a delay of the project's in-service

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[54] July 2018 Order, 164 FERC ¶ 61,021 at P 32.

[55] *Id.* P 34.

[56] *See supra* PP 19-21.

[57] Indicated Transmission Owners Request for Rehearing at 11-12.

[58] NYISO, OATT, Attach. Y, § 31.2.8.1.3 (0.0.0).

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> date, the Office of the Interconnection shall re-evaluate the need for the Short-term Project or Long-lead Project, and *based on that re-evaluation may: (i) retain the [project] in the Regional Transmission Expansion Plan; (ii) remove the [project] from the Regional Transmission Expansion Plan; or (iii) include an alternative solution in the Regional Transmission Expansion Plan.* If the Office of the Interconnection retains the [project] in the Regional Transmission Expansion Plan, it shall determine whether the delay is beyond the Designated Entity's control and whether to retain the Designated Entity or to designate the Transmission Owner(s) in the Zone(s) where the project is located as Designated Entity(ies) for the [project].[59]

Thus, we disagree with arguments that NYISO's regional transmission planning process is distinguishable on this basis.

26. Finally, Indicated Transmission Owners incorrectly suggest that the Commission should have relied on the reasoning in *ISO New England*.[60] As noted in the July 2018 Order, the Commission has found development agreements to be just and reasonable and not unduly discriminatory or preferential under two circumstances: (1) both the incumbent transmission owners and the nonincumbent transmission developers are subject to the development agreement; or (2) to the extent that only a nonincumbent transmission developer must execute the development agreement, the public utility transmission provider(s) has demonstrated that the terms and conditions of that agreement are comparable to the terms and conditions to which an incumbent transmission owner is subject under the applicable RTO/ISO governing documents and agreements.[61] In *ISO New England*, the Commission did not require incumbent transmission owners to execute ISO-NE's proposed Nonincumbent Transmission Developer Agreement,[62] but rather directed revisions to resolve differences in hold harmless provisions applicable to nonincumbent transmission developers under the Nonincumbent Transmission Developer Agreement, as compared to provisions

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[59] PJM, Intra-PJM Tariffs, Operating Agreement, Schedule 6, Section 1.5.6 (k) Development of the Recommended Regional Transmission Expansion Plan, ver. 20.0.0 (emphasis added).

[60] *See* Indicated Transmission Owners Request for Rehearing at 12 (citing *ISO New England*, 153 FERC ¶ 61,012).

[61] July 2018 Order, 164 FERC ¶ 61,021 at P 28.

[62] *ISO New England*, 153 FERC ¶ 61,012 at PP 27-29.

(continued ...)

applicable to incumbent transmission owners under the ISO-NE Operating Agreement.[63] In response, ISO-NE proposed to modify the Operating Agreement to add a hold harmless provision.[64] Ultimately, the Commission found that ISO-NE's proposed change would address the Commission's concerns regarding undue discrimination, noting that the provisions were "substantively identical," and determined that incumbent transmission owners need not execute the Nonincumbent Transmission Developer Agreement.[65] Thus, contrary to Indicated Transmission Owners' assertions, the Commission's decision in *ISO New England*, relying on "substantively identical" provisions in finding that separate agreements would not be unduly discriminatory, is in keeping with the comparability standard discussed in the July 2018 Order. We note that, as discussed below,[66] PJM and the parties to the Consolidated Transmission Owners Agreement may also pursue modifications to that Agreement and/or the Designated Entity Agreement to satisfy the comparability standard, which would, upon Commission approval, alleviate the need for incumbent transmission owners to execute the Designated Entity Agreement.

2. The Agreements Are Not Comparable

a. The July 2018 Order

27. In the July 2018 Order, the Commission explained that in order for similarly situated transmission developers to be treated comparably, the terms of the agreements applicable to the incumbent transmission owners should not be "less stringent" than the terms of the development agreement applicable to nonincumbent transmission developers.[67] The Commission found that imposing less stringent requirements on

[63] *Id.* P 20. In contrast, PJM submitted its proposal here pursuant to FPA section 205, under which Commission may accept or reject a proposal, but may not make changes to the proposal "without the consent of the utility." *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 (D.C. Cir. 2017).

[64] *ISO New England*, 153 FERC ¶ 61,012 at P 22.

[65] *Id.* PP 27, 28.

[66] *See infra* P 46.

[67] July 2018 Order, 164 FERC ¶ 61,021 at PP 30-31 (citing NYISO 2018 Order, 162 FERC ¶ 61,124 at P 12).

(continued ...)

incumbent transmission developers could result in undue discrimination against similarly situated nonincumbent transmission developers.[68]

28. Applying this standard here, the Commission found that the terms and conditions of the Consolidated Transmission Owners Agreement are less stringent than those of the Designated Entity Agreement.[69] The Commission provided several examples of those less stringent requirements, including breach of contract standards and remedies, security requirements, milestones in the development schedule, and assignment provisions.[70] The Commission found that these less stringent requirements could provide incumbent transmission owners with an advantage in PJM's evaluation process.[71]

b. Rehearing Requests

29. Rehearing Parties claim that the Commission erred in finding that the Designated Entity Agreement and the Consolidated Transmission Owners Agreement are not comparable.[72]

30. PJM first acknowledges that there are a number of differences between the Consolidated Transmission Owners Agreement and the Designated Entity Agreement regarding security, breach, default, and milestones.[73] However, PJM contends that the Commission erroneously determined that the Consolidated Transmission Owners Agreement is less stringent than the Designated Entity Agreement based on a finding that the Designated Entity Agreement has a specific security requirement and the Consolidated Transmission Owners Agreement does not.[74]

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[68] July 2018 Order, 164 FERC ¶ 61,021 at PP 30-31 (citing NYISO 2018 Order, 162 FERC ¶ 61,124 at PP 11-12).

[69] July 2018 Order, 164 FERC ¶ 61,021 at PP 33, 35.

[70] *See id.* PP 34-55.

[71] *Id*. P 34, n.62.

[72] PJM Rehearing Request at 6; Indicated Transmission Owners Rehearing Request at 9.

[73] PJM Rehearing Request at 9; Indicated Transmission Owners Request for Rehearing at 17-18.

[74] PJM Request for Rehearing 13.

(continued ...)

31. Noting that no incumbent transmission owner has defaulted on or abandoned responsibility for a designated RTEP project, Indicated Transmission Owners argue that Consolidated Transmission Owners Agreement signatories are subject to severe penalties for failing to abide by the obligation to build provisions in that Agreement, whereas the penalty for failing to comply with the Designated Entity Agreement is loss of the security deposit.[75] Accordingly, they assert that it would be nonsensical to replace the Consolidated Transmission Owners Agreement obligations with the relatively lesser penalties in the Designated Entity Agreement for projects subject to competition which also fall within the Consolidated Transmission Owners Agreement "obligation to build" category of projects, or to require incumbent transmission owners to bear the additional burden of the security deposit required by the Designated Entity Agreement.[76] In addition, Indicated Transmission Owners deny that this is "a case of PJM affording preferential treatment to incumbent transmission owners or erecting obstacles in the way of non-incumbent developers' selection to build projects to satisfy needs that PJM identifies in its planning."[77]

32. Indicated Transmission Owners also argue that there are existing mechanisms in place that obviate the need for incumbent transmission owners to execute Designated Entity Agreements in addition to the Consolidated Transmission Owners Agreement. Specifically, they note that, to the extent that a nonincumbent Designated Entity will be interconnecting to the grid, the incumbent transmission owner at the point of interconnection must sign an Interconnection Coordination Agreement with the nonincumbent Designated Entity to make sure that the timelines imposed in the Designated Entity Agreement can be met insofar as they involve interactions with the incumbent transmission owner.[78] Thus, Indicated Transmission Owners state that the

[75] Indicated Transmission Owners Request for Rehearing at 13-15 ("The potential penalties include loss of PJM member voting rights, loss of [Consolidated Transmission Owners Agreement] party status, and pursuant to the Energy Policy Act of 2005, imposition of $1,238,271 a day per violation for FPA violations by a regulated utility subject to the FPA (when adding in the inflation adjustment factor of Order No. 839).") (citations omitted).

[76] Indicated Transmission Owners Request for Rehearing at 15.

[77] *Id*. at 9.

[78] *Id*. at 16.

(continued ...)

incumbent transmission developer is equally responsible for facilitating these milestones by coordinating with the nonincumbent Designated Entity.[79]

33. Finally, Indicated Transmission Owners argue that the Commission erroneously interprets the Consolidated Transmission Owners Agreement's assignment provisions as not requiring PJM approval. They argue that the Consolidated Transmission Owners Agreement assignment provisions refer to assignment of "Transmission Facilities," which can only be owned by signatories to the that Agreement, who would also be subject to the Operating Agreement.[80]

c. Commission Determination

34. We deny rehearing. We continue to find that the Designated Entity Agreement is more stringent than the Consolidated Transmission Owners Agreement in several relevant respects. For example, the Designated Entity Agreement includes specific requirements regarding security in the event the Designated Entity abandons a project. The Designated Entity Agreement requires that nonincumbent transmission developers obtain a letter of credit or other financial instrument equal to 3 percent of the incremental project cost in the event of a breach or default.[81] By contrast, the Consolidated Transmission Owners Agreement does not require incumbent transmission owners to provide such security. Instead, under PJM's proposal, only nonincumbent transmission developers would bear these costs, which could disadvantage a nonincumbent transmission developer's proposal in the competitive proposal window process, as incumbent transmission owners could reflect the cost savings associated with avoiding the security requirement in their proposals submitted in the competitive proposal window.[82] As explained in the July 2018 Order, the Commission has previously rejected as unduly discriminatory proposals where the security requirements of nonincumbent transmission developers were more onerous than that of incumbent transmission owners.[83] For instance, the Commission rejected a Southwest Power Pool (SPP) proposal to require only nonincumbent transmission developers proposing a project in SPP's competitive transmission development process to demonstrate their financial strength by

[79] *Id*. at 18.

[80] *Id*. at 18-19.

[81] July 2018 Order, 164 FERC ¶ 61,021 at P 36.

[82] *Id*. P 39.

[83] *Id*. P 37 (citing *Southwest Power Pool*, *Inc.*, 144 FERC ¶ 61,059, at P 245 (2013)).

(continued ...)

submitting a letter of credit from a financial institution or by otherwise "demonstrating financial security through [their] total capitalization."[84] The Commission found that only nonincumbent transmission developers would bear these costs, to their disadvantage, and thus held that the proposal was unduly discriminatory. Neither PJM nor Indicated Transmission Owners offer a persuasive reason for the Commission to find otherwise here.

35. In addition, as the Commission explained in the July 2018 Order, the Designated Entity Agreement is also more stringent with respect to project schedule milestones.[85] Under this agreement, a breach could result from a failure to meet any of a series of project milestones leading up to the in-service date. For example, the Designated Entity Agreement contains several milestones that must be met "[o]n or before" dates specified in the agreement to avoid breach of the agreement, including, but not limited to, requiring the developer to demonstrate: (a) "adequate project financing," (b) "all required federal, state, county and local site permits have been acquired," (c) "all major electrical equipment has been delivered," and (d) "at least 20% of Project site construction is completed."[86]

36. In contrast, the Consolidated Transmission Owners Agreement provides that breach is tied only to failure to meet the in-service date.[87] As a result, and as discussed in detail in the July 2018 Order, incumbent transmission owners would not be in breach or default for failing to meet any interim milestones before the in-service date, a less stringent approach.[88]

37. For related reasons, we disagree with Indicated Transmission Owners' assertion that the penalty provisions of the Consolidated Transmission Owners Agreement are more stringent than those of the Designated Entity Agreement.[89] Indicated Transmission

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[84] *Southwest Power Pool*, 144 FERC ¶ 61,059 at P 245.

[85] July 2018 Order, 164 FERC ¶ 61,021 at PP 43-49.

[86] PJM, Intra-PJM Tariffs, Attachment KK (Form of Designated Entity Agreement- Schedule C) (0.1.0).

[87] July 2018 Order, 164 FERC ¶ 61,021 at P 34; *see also* PJM Request for Rehearing at 9 (discussing differences in treatment of defaults on milestones).

[88] July 2018 Order, 164 FERC ¶ 61,021 at PP 46-49.

[89] Indicated Transmission Owners Request for Rehearing at 12-15 (citing Consolidated Transmission Owners Agreement, § 9.7.1).

(continued ...)

Owners assert that no transmission owner "has ever failed to comply with a CRL [Construction Responsibility Letter],"[90] but they fail to recognize that the penalties for such non-compliance are not comparable to the up-front costs associated with the security requirement in the Designated Entity Agreement. The penalty provisions of the Consolidated Transmission Owners Agreement are implicated only in the event of breach or other specified non-compliance, while the security requirement of the Designated Entity Agreement, as discussed above, necessarily increases a nonincumbent transmission developer's costs. Further, due to the potential number and frequency of breach events, Indicated Transmission Owners' comparison is inapt. Under the Designated Entity Agreement, as explained above, there are an increased number of milestones that may trigger breach; thus, they serve to increase the probability of breach of contract.[91]

38. Likewise, provisions of the agreements concerning the ability to cure breach refute Indicated Transmission Owners' claim that the penalty provisions of the Consolidated Transmission Owners Agreement are more stringent than the Designated Entity Agreement. The Designated Entity Agreement requires that, in order to cure a breach event, the project must go into service by its Required In-Service Date.[92] Upon the occurrence of default, the non-defaulting party may be entitled to suspend performance under the contract, and to exercise rights and equitable remedies.[93] Further, PJM may draw upon the Designated Entity's letter of credit.[94] Under the Consolidated Transmission Owners Agreement, the breaching party would have a similar period to

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[90] Indicated Transmission Owners Request for Rehearing at 13.

[91] "Failure to meet any of the milestone dates specified in Schedule C […] shall constitute a Breach of this Agreement." PJM, Intra-PJM Tariffs, Attachment KK (Form of Designated Entity Agreement – Article 4.1.0 Milestone Dates) (0.1.0).

[92] PJM, Intra-PJM Tariffs, Attachment KK (Form of Designated Entity Agreement Article 7.3 – Cure of Breach) ("The breaching Party may: (i) cure the Breach within thirty days from the receipt of the notice of Breach . . . to ensure that the Project meets its Required Project In-Service Date set forth in Schedule C; or, (ii) if the Breach cannot be cured within thirty days but may be cured in a manner that ensures that the Project meets the Required Project In-Service Date for the Project, 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.").

[93] PJM, Intra-PJM Tariffs, Attachment KK (Form of Designated Entity Agreement – Article 7.5 – Remedies) (0.1.0).

[94] *Id*.

(continued ...)

cure the breach. If it does not cure the breach in 30 days and is in default, the defaulting party would lose voting rights temporarily on the Administrative Committee[95] while the default continues. Only in instances where it is the transmission owner's second default in 24 months, or one that imperils the safety or reliability of the PJM region, would the Administrative Committee, in its discretion, determine whether to terminate Consolidated Transmission Owners Agreement party status.[96] Given the reduced likelihood of breach and both the temporary and discretionary nature of the default provisions for failure to cure breach under the Consolidated Transmission Owners Agreement, we disagree that that Agreement's penalty provisions are more stringent than those of the Designated Entity Agreement.

39. Further, we do not agree that Indicated Transmission Owners are uniquely situated because they are subject to potential penalties "of $1,238,271 a day per violation for FPA violations by a regulated utility subject to the FPA."[97] The relevant FPA provision referenced is section 316A,[98] which states that "any person who violates any provision of part II [of the Federal Power Act] or any provision of any rule or order thereunder shall be subject to a civil penalty . . . ." As such, "any person" that engages in Commission jurisdictional activities under part II of the FPA, including but not limited to participation

[95] The Administrative Committee is the committee consisting of representatives of each party to the Consolidated Transmission Owners Agreement. PJM, Rate Schedules, Consolidated Transmission Owners Agreement (Rate Schedule 42), Article 4, § 1.1. (0.0.0).

[96] "Any Party that fails to meet its financial or other obligations to another Party or to PJM under this Agreement shall be deemed to be in breach of this Agreement . . . . The notified Party may remedy such breach . . . . If, by the thirtieth (30th) day following receipt of the foregoing notice, a Party has not remedied the breach, then such Party shall be in default, and in addition to any other remedies then available: (a) Any representative of the defaulting Party on the Administrative Committee, or any other committee, subcommittee, working group or task force established pursuant to this Agreement, shall not be entitled to vote for so long as the default shall continue to exist. (b) If the default is the Party's second default within a period of twenty-four months, or is a default that imperils the safety or reliability of the PJM Region, the Administrative Committee may vote to terminate the Party's status as a Party to this Agreement." PJM, Rate Schedules, Consolidated Transmission Owners Agreement (Rate Schedule 42), Article 4, § 9.7.1. (0.0.0).

[97] Indicated Transmission Owners Request for Rehearing at 13 (citing *Civil Penalty Inflation Adjustments*, Order No. 839, 162 FERC ¶ 61,010 (2018)).

[98] 16 U.S.C. § 825o-1(b) (2012).

(continued ...)

in an Order No. 1000-compliant competitive transmission planning process[99] or the filing of agreements with the Commission, would be subject to the penalty provision in FPA section 316A. In addition, Indicated Transmission Owners suggest that the execution of an Interconnection Coordination Agreement between an incumbent transmission owner and a nonincumbent transmission developer assures that the incumbent transmission owner "is equally responsible under contract for facilitating these [Designated Entity Agreement] milestones by coordinating with the nonincumbent."[100] However, Indicated Transmission Owners offer no support for their claim that executing an Interconnection Coordination Agreement will assure that all parties to the agreement, including incumbents, will be "equally responsible" with regard to meeting project milestones.[101] Moreover, the Interconnection Coordination Agreement was intended to address instances where Designated Entities may not be signatories to the Consolidated Transmission Owners Agreement at the time they are designated to build an RTEP project.[102] In response, "PJM and its stakeholders determined that an agreement setting forth the coordination obligations of all affected parties was necessary to effectuate the interconnection of a Designated Entity's project to the Transmission Owner's facilities."[103]

40. Finally, Indicated Transmission Owners contend that the Commission incorrectly interpreted the assignment provisions of the Consolidated Transmission Owners Agreement, and thus erred in finding the provisions of the Designated Entity Agreement (which require PJM approval prior to an assignment) to be more stringent than the Consolidated Transmission Owners Agreement.[104] As the Commission explained in the July 2018 Order, "the assignment provisions of the Designated Entity Agreement could limit the opportunities for a transmission developer to assign its rights and obligations to an affiliate limited liability company or C-corporation should it choose to organize such

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[99] *See* Order No. 1000, 136 FERC ¶ 61,051 at P 112 (finding the rules governing the transmission planning process to be within the Commission's jurisdiction).

[100] Indicated Transmission Owners at 18. We note, in particular, that, under the Designated Entity Agreement, only the signatory Designated Entity is responsible for the security, which could be forfeited in the event of breach.

[101] *Id.*

[102] PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at P 6.

[103] *Id.*

[104] Indicated Transmission Owners Request for Rehearing at 18-19.

(continued ...)

ventures jointly or individually as financing vehicles" or for other transactions.[105] For example, limitations on assignment could compromise "the developer's ability to seek siting approval from that state, particularly if the state requires that the developer be incorporated as a public utility under state law."[106] In this light, Indicated Transmission Owners' general assertions that the obligations of the Consolidated Transmission Owners Agreement and the PJM Operating Agreement are comparable to the restrictions on assignments under the Designated Entity Agreement are unpersuasive. The Consolidated Transmission Owners Agreement and Operating Agreement may impose other obligations on incumbent transmission owners, including the must build requirement, but the Commission's undue discrimination analysis here is appropriately concerned with requirements imposed by the Designated Entity Agreement on nonincumbent transmission developers. As the Commission held in the July 2018 Order, we likewise find that the assignment provisions in the Designated Entity Agreement could disadvantage a nonincumbent transmission developer.[107]

3. Administrative Efficiency Concerns Do Not Undermine the Commission's Finding of Undue Discrimination

a. The July 2018 Order

41. In the July 2018 Order, the Commission responded to PJM's argument that "the proposal to exempt incumbent transmission owners from the requirement to execute a Designated Entity Agreement in certain cases will further administrative efficiency," by explaining that administrative efficiency "benefits do not overcome undue discrimination concerns."[108]

b. Rehearing Requests

42. Rehearing Parties claim that requiring Transmission Owners to execute a Designated Entity Agreement for Transmission Owner Designated Projects subjects incumbent transmission owners to terms and conditions that are inconsistent with and duplicative of those in the Consolidated Transmission Owners Agreement.[109] Rehearing

[105] July 2018 Order, 164 FERC ¶ 61,021 at P 54.

[106] *Id*.

[107] *Id*.

[108] July 2018 Order, 164 FERC ¶ 61,021 at P 34.

[109] PJM Request for Rehearing at 3-4.

(continued ...)

Parties also raise concerns regarding mutual enforcement and which agreement controls in the event of a conflict.[110]

43. Specifically, PJM alleges that if incumbent transmission owners are subject to the terms and conditions of both the Designated Entity Agreement and the Consolidated Transmission Owners Agreement, there will be "unreasonable uncertainty" in the competitive proposal window process due to inconsistencies and duplication.[111] PJM further alleges that the Consolidated Transmission Owners Agreement "does not provide PJM the authority to require Transmission Owners to execute another agreement (e.g., the Designated Entity Agreement) or provide security for those projects the Transmission Owners have the obligation to build"[112] Therefore, PJM asserts that the Commission's requirement that the incumbent transmission owners enter into the Designated Entity Agreement is unduly discriminatory, arbitrary, and fails to reflect reasoned decision-making.[113]

44. Indicated Transmission Owners also contend that the Consolidated Transmission Owners Agreement is "a mandatory agreement to be signed by every transmission owner that has energized a PJM facility and turned over the planning and operational control of its transmission to PJM as a Commission-approved RTO (and NERC-recognized transmission planning authority)."[114] Therefore, Indicated Transmission Owners assert that there "is no discretion; there is no alternative set of terms that can be negotiated."[115]

c. Commission Determination

45. We reiterate the Commission's statement in the July 2018 Order that "[a]lthough 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

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[110] *Id.* at 3-4, 9-10.

[111] *Id*. at 8-10.

[112] *Id.* at 9; Indicated Transmission Owners Request for Rehearing at 13.

[113] PJM Request for Rehearing at 6.

[114] Indicated Transmission Owners Request for Rehearing at 12-13.

[115] *Id*. at 13.

(continued ...)

concerns."[116] Rehearing Parties do not explain how administrative efficiency benefits could overcome a finding of undue discrimination. Therefore, we deny rehearing.

46. Moreover, Rehearing Parties assign too much weight to speculation regarding the potential difficulties associated with implementation of the Designated Entity Agreement, which has been effective since 2014.[117] We note that Indicated Transmission Owners acknowledge that, notwithstanding their administrative efficiency concerns, this "does not mean that the incumbent transmission owners are excused from any further contractual signing commitments with the non-incumbents."[118] This undermines Indicated Transmission Owners' allegation that PJM and others lack authority and discretion to resolve these differences. To the extent that PJM and the parties to the Consolidated Transmission Owners Agreement later determine that modifications to either the Designated Entity Agreement or the Consolidated Transmission Owners Agreement are appropriate to further harmonize the agreements, the appropriate filing may be made for acceptance by the Commission pursuant to FPA section 205.[119] Consistent with the Commission's framework for considering agreements for transmission projects selected in the regional transmission planning process,[120] if PJM demonstrates that the terms and conditions of the Consolidated Transmission Owners Agreement are comparable to the terms and conditions of the Designated Entity Agreement, only nonincumbent transmission developers will be required to execute the Designated Entity Agreement.[121]

47. Finally, we disagree with Indicated Transmission Owners' assertion that the July 2018 Order somehow adds to or "supplant[s]" the Consolidated Transmission Owners

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[116] July 2018 Order, 164 FERC ¶ 61,021 at P 34.

[117] PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at P 1.

[118] Indicated Transmission Owners Request for Rehearing at 15.

[119] 16 U.S.C. § 824d (2012).

[120] *See supra* P 8.

[121] *See ISO New England*, 153 FERC ¶ 61,012 at P 28 (rejecting, as moot, ISO-NE's compliance filing proposing to require incumbent transmission owners to execute the development agreement applicable to nonincumbent transmission developers, where the Commission accepted ISO-NE's proposal to modify the agreement applicable to incumbent transmission owners (i.e., the Operating Agreement) to render it comparable to the agreement applicable to nonincumbent transmission developers); *see also supra* P 26 (discussing *ISO New England*).

(continued ...)

Agreement.[122] In rejecting PJM's proposal to eliminate the requirement for Transmission Owners to execute the Designated Entity Agreement, the Commission is not modifying the Consolidated Transmission Owners Agreement, it is retaining the status quo.[123]

III. Compliance

A. Procedural Matters

48. Notice of PJM's compliance filing was published in the *Federal Register*, 83 Fed. Reg. 42,115 (2018), with interventions and protests due on or before September 4, 2018. The Delaware Division of the Public Advocate filed a notice of intervention. No protests or comments were filed. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the Delaware Division of Public Advocate's notice of intervention serves to make it a party to this proceeding.

B. Compliance Filing

49. In compliance with the July 2018 Order, PJM submitted revisions to the Operating Agreement, Schedule 6, Section 1.5.8(j) to include language permitting a transmission developer 60 days from the date of receiving an executable Designated Entity Agreement to accept its designation. In addition, PJM submitted revisions to Section 1.5.8(j) to remove: (i) the reference to Schedule 6, Section 1.5.8(l) proposing to clarify that a Designated Entity for a Transmission Owner Designated Project is exempt from executing a Designated Entity Agreement and following the related designation process steps; and (ii) language that would allow a transmission owner designated a project under Section 1.5.8(l) 90 days to acknowledge its designation, consistent with the Consolidated Transmission Owners Agreement.

C. Commission Determination

50. We find that PJM's revisions to the Operating Agreement comply with the requirements of July 2018 Order. Accordingly, we accept these revisions effective July 16, 2018.

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[122] Indicated Transmission Owners Request for Rehearing at 4.

[123] We further note that no party sought rehearing of the Commission's 2014 directive requiring both incumbent and nonincumbent transmission developers to execute the Designated Entity Agreement. *See* PJM Designated Entity Agreement Order, 148 FERC ¶ 61,187 at PP 47-49.

The Commission Orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order;

(B) PJM's compliance filing is hereby accepted, effective July 16, 2018, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.