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May 16, 2017

MEMORANDUM

TO: Members of the Commission

FROM: Joseph DeLosa, Public Utilities Analyst ^{JDS}

SUBJECT: IN THE MATTER OF THE DELAWARE PUBLIC SERVICE COMMISSION STAFF TO ESTABLISH REGULATIONS FOR CERTIFYING NEW ELECTRONIC TRANSMISSION UTILITIES IN THE STATE OF DELAWARE (FILED MARCH 6, 2018). - PSC DOCKET NO. 18-0148

Background

On February 14, 2018, House Bill No. 127, as amended by House Amendment 1 (“HB 127”), was signed into law.¹ HB 127 updates Title 26 relating to the requirements for applications to obtain a certificate of public convenience and necessity (“CPCN”) to operate in Delaware as a new electric transmission utility.² HB 127 provides the Delaware Public Service Commission (“Commission”) the authority to evaluate these applications and promulgate regulations prescribing the form of a CPCN application.³

In furtherance of these new responsibilities, Commission Staff (“Staff”) petitioned the Commission to establish the necessary certification requirements for new electric transmission utilities.⁴ On March 13, 2018, the Commission granted Staff’s Petition in Order

¹ 81 Del. Laws, c. 205, § 1 (Feb. 14, 2018).

² HB 127 Bill Summary. Delaware General Assembly. <https://bit.ly/2wLFDjP>.

³ 26 Del. C. § 203E(b). HB 127 also provides the criteria by which the Commission may evaluate an application. See 26 Del. C. § 203E(b)(1)-(3).

⁴ Petition Of The Delaware Public Service Commission Staff To Establish Certification Requirements For New Electric Transmission Utilities In The State Of Delaware. Docket No. 18-0148. Mar. 6, 2018. (“Staff Petition”)

No. 9193, which opened the docket, ordered the publishing of preliminary regulations, and requested public comments through April 30, 2018. As directed, those preliminary regulations were published in the April Register of Regulations.⁵

Only one public comment was received.⁶ This Memo summarizes NTD's requested changes. Staff's resulting recommendations are memorialized in the "Proposed Final Rules," attached as Exhibit A to Proposed Order No. 9223 for the Commission's consideration.

NTD Comments

In its submission, NTD requested three changes to the Proposed Regulations. As discussed below, Staff supports NTD's recommendations.

1. Business Day

The Proposed Regulations state that the Commission "shall act on an application within ninety (90) Business days[,]"⁷ and further defines the term "Business Day" as "any calendar day except Saturdays, Sundays, or legal holidays."⁸ NTD contends that this provision is inconsistent with HB 127, which mandates that the Commission "shall act" on an application within "90 days."⁹

NTD's comment is persuasive that the General Assembly's unambiguous construction of "days" intended to mean "calendar days," in contrast to the Proposed Regulation.¹⁰ As such, the Proposed Final Rules were revised to reflect the General Assembly's intended definition of "days" and its mandate that the Commission "shall act on an application within ninety (90) days."¹¹

2. Subsection 2.2.32.3

NTD asserts that the Proposed Regulations "include[]" a third potential basis for revoking an electric transmission CPCN in [subsection] 2.2.32.3 that is not part of the statute."¹² NTD contends that the Proposed Regulation should not "engraft upon the statute

⁵ 21 DE Reg. 793 (Prop.) (Apr. 1, 2018). ("Proposed Regulations")

⁶ Comments of Northeast Transmission Development, LLC, ("NTD") to Proposed Regulation 3011 (Rules for the Certification of Electric Transmission Suppliers). Docket No. 18-0148. May 1, 2018. ("NTD Comments").

⁷ Proposed Regulations at § 2.2.28.

⁸ *Id.* at § 1.0.

⁹ 26 *Del. C.* § 203E(c).

¹⁰ NTD Comments at 4-5.

¹¹ The Proposed Final Rules delete the definition of "Business Days" in Section 1.0 Definitions, and deletes both uses of the word "Business" in subsection 2.2.28.

¹² NTD Comments at 6 (internal citation omitted)

provisions that the General Assembly chose not to include.”¹³ NTD therefore recommends that “§ 2.2.32.3 should be deleted.”¹⁴

Upon further review, Staff agrees. NTD provides persuasive argument to support its position that only the two bases currently codified in determining “good cause” for revoking a CPCN should be included in the regulations. This is in contrast to the Proposed Regulation,¹⁵ which includes a third potential circumstance for revocation of the CPCN in subsection 2.2.32.3. Accordingly, the Proposed Final Rules have been altered to delete subsection 2.2.32.3.¹⁶

3. Subsection 2.2.18.1.2

The Proposed Regulations require certain disclosures regarding the historical conduct of the entity applying for a CPCN.¹⁷ Subsection 2.2.18.1.2 requires disclosure of any “violation[s] of a state’s laws, rules or regulations.” NTD contends that such disclosures, particularly when considered in the context of the applicant’s affiliates, “may not even fall within the energy industry, requir[ing] the applicant to provide information that is not relevant to the applicant’s conduct as an electric transmission utility or its ability to provide safe, adequate and reliable transmission service.”¹⁸ To illustrate this point, NTD references the multitude of state and local laws under which an affiliate may have received a notice of violation or been found to have violated an employment or land use statute. Thus NTD recommends the following edit to “focus on an applicant’s and its affiliates’ prior history of violations of state laws, rules or regulations *as an electric transmission utility*.”¹⁹

2.2.18.1.2 Been found to be in violation of a state’s laws, rules or regulations related to the provision of electric transmission service;²⁰

Staff believes NTD’s proposed revision properly narrows the required disclosures by improving the efficiency of the Commission’s inquiry while maintaining procedural integrity. The relevant information for the CPCN application rules are rightfully limited to conduct concerning the provision of electric transmission service. As such, the Proposed Final Rules have been altered to include NTD’s proposed revision to subsection 2.2.18.1.2.²¹

¹³ *Id.* at 7 (citing *Cantina v. Fontana*, 884 A.2d 468, 471 (Del. 2005)).

¹⁴ *Id.*

¹⁵ *Id.* at 6-7.

¹⁶ See Proposed Final Rules, § 2.2.32.

¹⁷ Proposed Regulations at § 2.2.18 *et seq.*

¹⁸ NTD Comments at 8.

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* Underlined sections are suggested additions.

²¹ See Proposed Final Rules, subsection 2.2.18.1.2.

Final Regulations

The foregoing changes are reflected in the proposed final regulations attached as Exhibit A to Proposed Order No. 9223 for the Commission's consideration. To approve the Proposed Regulations as final, the Administrative Procedures Act ("APA") requires that there be no substantive changes between the versions.²² The APA vests the "agency head" with statutory authority to determine "whether a change constitutes substantive or nonsubstantive matter."²³ Here, the Acting Executive Director has determined that the described changes only affect administrative procedural safeguards. There is no substantive impact upon any applicant.

Staff Recommendation

For the reasons discussed above, Staff recommends that the Commission adopting the proposed order approving the publication of proposed final regulations as final.

²² 29 *Del. C.* § 10118(c).

²³ *Id.*