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May 1, 2018

**BY ELECTRONIC AND**  
**FIRST CLASS MAIL**

Joseph DeLosa  
Delaware Public Service Commission  
861 Silver Lake Boulevard  
Suite 100  
Dover, DE 19904

*RE: Comments of Northeast Transmission Development, LLC, to Proposed Regulation 3011 (Rules for the Certification of Electric Transmission Suppliers)*

Dear Mr. DeLosa:

Northeast Transmission Development, LLC respectfully submits these comments to proposed Regulation 3011 (“Regulation 3011”) published in the April, 2018, issue of the Delaware Register of Regulations establishing rules for the certification of electric transmission suppliers.

**STATEMENT OF INTEREST**

Northeast Transmission Development, LLC (“NTD”) is an affiliate of LSP Transmission Holdings, LLC, and a member of the LS Power Group (collectively “LS Power”). LS Power, through operating affiliates such as NTD, is engaged in cost of service and merchant transmission development throughout the United States. LS Power has successfully developed, constructed, managed and owns more than 565 miles of high-voltage electric transmission infrastructure.

NTD is focused on the development of transmission projects within the Eastern region of PJM Interconnection, the regional transmission organization that coordinates the movement of wholesale electricity in Delaware and all or parts of 12 other states and the District of Columbia. In 2013, PJM issued a request for technical solutions to address stability and reliability-related issues and improve operational performance at the Artificial Island nuclear complex in New Jersey (the “Artificial Island project”). Following a competitive solicitation process, PJM selected NTD to develop and construct a new 230 kV transmission line that will connect the Artificial Island nuclear complex with a new substation to be constructed near Odessa, Delaware, and be interconnected with existing Red Lion-Cartanza and Red Lion-Cedar Creek 230kv lines. PJM assigned additional transmission upgrades associated with the Artificial Island project to entities not affiliated with NTD.

NTD and PJM entered into a Designated Entity Agreement (“DEA”) in connection with NTD’s portion of the Artificial Island project which has been filed with FERC and assigned an effective date of October 29, 2015. Consistent with the project schedule contained in the DEA, NTD has for more than two years been actively developing its portion of the Artificial Island project. NTD’s activities include: (i) securing all private real estate rights necessary for the project; (ii) conducting all permitting-level environmental and engineering related field studies; (iii) submitting applications for all major permits and approvals; (iv) receiving certain major permits and approvals from Federal and New Jersey regulatory bodies; (v) entering into negotiations and in some cases final agreements for firm, fixed-price, schedule-guaranteed contracts for the engineering, procurement and construction of the transmission line, including supply and installation of the submarine cable crossing of the Delaware River; and (vi) supporting Delaware and other stakeholders as a party in proceedings before FERC (Docket

EL15-95-000) challenging the cost responsibility assignments associated with the Artificial Island project.<sup>1</sup> In addition, upon final adoption of Regulation 3011 by the Commission, NTD will promptly file for CPCN authority to become a Delaware-regulated electric transmission utility.

### NTD'S COMMENTS

House Bill 127<sup>2</sup> recently enacted by the 149<sup>th</sup> Delaware General Assembly creates a certificate of public convenience and necessity (“CPCN”) application and approval requirement, within the jurisdiction of the Public Service Commission (the “Commission”), for new public utilities seeking to own and operate high-voltage electric transmission facilities in the State of Delaware. Codified as §203E of Title 26, the statute prohibits an entity from engaging in the business of an electric transmission utility unless a CPCN has been granted by the Commission.<sup>3</sup> Section 203E is similar in material respects to the CPCN statutes governing water and wastewater utilities.<sup>4</sup> The factors the Commission must consider in determining whether to grant an electric transmission CPCN are set forth in the statute,<sup>5</sup> as are the timeframe in which the Commission must act on a CPCN application,<sup>6</sup> the bases upon which the Commission may

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<sup>1</sup> See Senate Joint Resolution No. 1, 149<sup>th</sup> General Assembly (Signed March 30, 2017) at lines 14-17, stating:

WHEREAS, Delaware’s Congressional delegation, the Delaware and Maryland Public Service Commissions, the Delaware Office of the Public Advocate, the Maryland Office of the People’s Counsel, Old Dominion Electric Cooperative, *LS Power*, and other stakeholders have challenged the current cost allocation for the Artificial Island project in proceedings pending before the FERC in Docket No. EL15-95-000 . . . .

(Emphasis supplied). The legislative history and full text of Senate Joint Resolution No. 1 may be accessed through the following URL: <http://legis.delaware.gov/BillDetail?LegislationId=25572>.

<sup>2</sup> 81 Del. Laws c. 205 (Feb. 12, 2018). The legislative history and full text of HB127 may be accessed through the following URL: <http://legis.delaware.gov/BillDetail?LegislationId=25630>.

<sup>3</sup> 26 Del. C. §203E(a).

<sup>4</sup> See 26 Del. C. §§203C and 203D.

<sup>5</sup> 26 Del. C. §203E(b).

<sup>6</sup> 26 Del. C. 203E(c).

revoke the CPCN,<sup>7</sup> and the manner in which proceedings related to a CPCN must be conducted.<sup>8</sup>

While Regulation 3011 is generally consistent with the governing statute, NTD respectfully submits that certain provisions of the regulation as proposed are inconsistent with §203E of Title 26 and should, therefore, be deleted or modified.

**A. References To “Business Day” Should Be Deleted:**

Section 203E(c) of Title 26 provides that the Commission “shall act” on a CPCN application within “90 days” of the submission of a completed application, but for “good cause” the Commission may extend its consideration and action on an application for an additional 90 days.<sup>9</sup> In setting the Commission’s application review period, the General Assembly used clear and unambiguous language that is essentially identical to analogous provisions in the water and wastewater CPCN statutes, both of which require the Commission to act on a CPCN application within “90 days.”<sup>10</sup> Regulation 3011, however, provides in §2.2.28 that the Commission “shall act on an application within ninety (90) Business days . . . .” Regulation 3011 further defines the term “Business Day” in Section 1 as “any calendar day except Saturdays, Sundays or legal holidays . . . .”

The inclusion of the term “Business Day” in Regulation 3011 is inconsistent with §203E(c) and unnecessarily prolongs the Commission’s review of a CPCN application beyond the time period set by the General Assembly. Under recognized principles of statutory construction, the General Assembly is presumed: (i) to mean what it says;<sup>11</sup> (ii) to have included

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<sup>7</sup> 26 Del. C. §203E(e).

<sup>8</sup> 26 Del. C. §203E(f).

<sup>9</sup> 26 Del. C. §203E(c).

<sup>10</sup> See 26 Del. C. §§203C(h)(1) and 203D(g)(1). The only difference between §203E(c) and the statutory time period for Commission action on a water or wastewater CPCN application is that 203E(c) allows the Commission to extend the review period for an additional 90 days whereas Commission action on a water or wastewater application may only be extended for an additional 30 days.

<sup>11</sup> *Stiftel v. Malarkey*, 384 A.2d 9, 13 (Del. 1977).

every term and phrase in a statute for some useful purpose and construction;<sup>12</sup> and (iii) to have been aware of prior and existing law at the time of a statute's enactment.<sup>13</sup> If the General Assembly had intended the CPCN application review period to consist of "business days" only, it would have said so. There are numerous examples in the Delaware Code where the General Assembly has used business days to establish a statutory time period.<sup>14</sup> Instead, in §203E(c) the General Assembly purposefully chose language mirroring the existing law governing Commission review and action on water and wastewater CPCN applications. In doing so, General Assembly is presumed to have been aware of not only the existing CPCN laws, but also to have known that the Commission's regulations implementing the water and wastewater CPCN statutes do not use the term "Business Day" to modify or extend the Commission's authorized 90 day review period.<sup>15</sup>

The General Assembly's use of the word "day" in §203E(c) rather than the more limiting term "Business Day" was intentional and intended to make Commission review and action on electric transmission CPCN applications consistent with existing Delaware law. There is no statutory basis to conclude that the General Assembly meant something other than what it said in §203E(c) and, consequently, no basis to include the term "Business Day" in Regulation 3011.<sup>16</sup> The definition of "Business Day" in §1 and the reference to "business days" in §2.2.28 of Regulation 3011 should, therefore, be deleted.

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<sup>12</sup> *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

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

<sup>14</sup> See, e.g., 31 *Del. C.* §344(e)(1)(providing that revocation of child care license becomes effective "30 business days" after receipt of notice by certified mail); 6 *Del. C.* §2203(b)(2)(requiring consumer reporting agency to place a freeze on a consumer's credit report no later than "5 business days" after a receiving a consumer's request).

<sup>15</sup> See 26 *Del. Admin. Code*. 2002 at §5.3; 26 *Del. Admin. Code* §6000 at §5.3.

<sup>16</sup> See *Nelson v. Frank E. Best Inc.*, 768 A.2d 473, 478-479 (Del. Ch. 2000)(stating, in an opinion written by now-Chief Justice Strine, "traditional rules of statutory construction require that [the Court] give effect to the normal meaning of "day" as including a Sunday – or Sun-day – unless there is a firm basis to conclude that the General Assembly intended otherwise. The text of [the statute under review] provides no basis for finding such a contrary intent, when the statute state "20 days" rather than "20 days excluding Sunday," "20 business days" or the like.").

**B. Section 2.2.32.3 Should Be Deleted:**

Section 2.2.32.3 should be removed for much the same reasons listed in Part A above. In adopting §203E, the General Assembly provided the Commission with authority to suspend or revoke an electric transmission CPCN for “good cause”, and specifically defined the two circumstances constituting such good cause. As enacted, Section 203E(e) provides that “good cause shall consist of”:

- (1) A finding by the Commission of material noncompliance by the holder of the certificate with any conditions imposed in the certificate by the Commission, or with any order or rule of the Commission related to the same; or
- (2) A finding by the Commission that the holder of the certificate has failed in a material manner to provide safe, adequate, and reliable transmission services.<sup>17</sup>

As with the statutory language used by the General Assembly in §203E(c), the circumstances constituting “good cause” set forth in §203E(e) are similar in material respects to the existing CPCN statutes for water and wastewater utilities.<sup>18</sup> Regulation 3011 incorporates the statutory bases for revoking an electric transmission CPCN in §2.2.32.1 and §2.2.32.2. Regulation 3011, however, also includes a third potential basis for revoking an electric transmission CPCN in §2.2.32.3<sup>19</sup> that is not part of the statute.

NTD respectfully submits that if the General Assembly intended the considerations listed in §2.2.32.3 to be a basis for suspending or revoking a transmission CPCN, it would have included those considerations in the statute. Instead, the General Assembly exclusively defined what constitutes “good cause”, by stating that “[g]ood cause shall consist of” the factors listed in

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<sup>17</sup> 26 *Del. C.* §203E(e)(1) and (2).

<sup>18</sup> See 26 *Del. C.* §203C(k) and 26 *Del. C.* §203D(j)(1) and (2).

<sup>19</sup> The provision at issue provides that “good cause” shall also consist of:

2.2.32.3. A finding by the Commission that the Certificate is resulting in material adverse impacts on the State’s economy, ratepayers, health, safety or welfare.

§203E(e)(1) and (2). Regulation 3011 cannot, therefore, engraft upon the statute provisions that the General Assembly chose not to include.<sup>20</sup> Consequently, §2.2.32.3 should be deleted.

**C. Section 2.2.18.1.2 Should Be Limited to Information Regarding the Applicant's and its Affiliates' Business as an Electric Transmission Utility:**

NTD also respectfully submits that one provision in Section 2.2.18 of Regulation 3011 should be narrowed in scope and limited to the applicant's and its affiliates' conduct as an electric transmission utility. Section 2.2.18 inquires about other jurisdictions where an applicant for an electric transmission CPCN conducts business and, in particular, requires the applicant to disclose information regarding judicial, regulatory and enforcement actions brought by other jurisdictions related to the applicant's (or its affiliates') electric transmission business. Section 2.2.18 contains five subsections, four of which involve appropriate disclosures related to the applicant's and its affiliates' historical conduct as an electric transmission utility. Specifically, §2.2.18.1.1 requires the applicant to disclose any states or federal jurisdictions where it or its affiliates have been denied approval to construct or operate electric transmission; §2.2.18.1.3 requires the applicant to disclose if its authority or its affiliates' authority to own or operate electric transmission facilities has been revoked, suspended or modified; §2.2.18.1.4 requires the applicant to disclose any other adverse judicial or regulatory action related to its or its affiliates' provision of electric transmission; and 2.2.18.1.5 requires the applicant to disclose any stipulations or consent decrees entered within the past 5 years in formal docketed proceedings related to the applicant's or its affiliates' electric transmission business.

All of the foregoing disclosures are relevant and directly related the Commission's statutory duty to assure that an applicant for a CPCN is capable of providing safe, adequate and

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<sup>20</sup> *Cantina v. Fontana*, 884 A.2d 468, 471 (Del. 2005).

reliable electric transmission service.<sup>21</sup> Section 2.2.18.1.2 of Regulation 3011, however, requires the applicant to disclose whether it or any of its affiliates have been found in “violation of a state’s laws, rules or regulations.” As written, §2.2.18.1.2 is not limited to information related to the applicant’s or its affiliates’ conduct as an electric transmission utility or the applicant’s ability to provide safe, adequate and reliable service. There are innumerable state and local laws and regulatory requirements for which an applicant or affiliate may have received a notice of violation or been found in violation – for instance employment, taxation, or land use statutes – that in no way bear upon the applicant’s ability to provide safe, adequate and reliable electric transmission service. Section 2.2.18.1.2, therefore, is a much broader disclosure that, particularly with the inclusion of Affiliated Interests that may not even fall within the energy industry, requires 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 electric transmission service. NTD respectfully submits that §2.2.18.1.2 should be modified to be consistent with the other requirements of §2.2.18.1 to focus on an applicant’s and its affiliates’ prior history of violations of state laws, rules or regulations as an electric transmission utility. NTD proposes §2.2.18.1.2 state as follows:

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;

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<sup>21</sup> See 26 *Del. C.* §203E(d), stating:

(d) Notwithstanding any other provision of this section, a certificate of public convenience and necessity for an electric transmission utility will not be granted if the Commission finds that the applicant is unwilling or unable to provide safe, adequate and reliable transmission services, or is currently subject to a Commission finding that the applicant is unwilling or unable to provide safe, adequate and reliable transmission services.

Comments of Northeast Transmission Development, LLC  
May 1, 2018

I appreciate the Commission's consideration of these comments. If you have any questions or would like additional information, I am available at your convenience.

Respectfully submitted,

*/S/ James D. Nutter*

James D. Nutter

JDN

cc: Delaware Division of Public Advocate

**CERTIFICATION OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of May, 2018, two copies of Northeast Transmission Development, LLC's, attached comments to proposed Regulation 3011 establishing rules for certification of electric transmission suppliers were served on the Division of the Public Advocate by first class mail, addressed as follows:

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820 N. French Street  
Wilmington, DE 19801

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DATED: May 1, 2018