

**March 7, 2014**

**LS Power Comments re: PJM's 2-18-14 Posting Draft of Designated Entity Agreement**

LS Power has reviewed the most recent PJM "Posting Draft" of the Designated Entity Agreement (DEA), which is dated February 18, 2014, and has some follow-up comments, as discussed below. LS Power is proposing certain modifications to the DEA to address each of these comments – see "LS Power's Proposed Revisions to Designated Entity Agreement" attached as Exhibit A.

1. Coordination and Interconnection Agreement. Section 5.0 of the DEA requires the Designated Entity to execute a Coordination and Interconnection Agreement (CIA) or request that such agreement be filed unexecuted with FERC. In some cases, a Project's ability to stay on its agreed schedule will be dependent upon the Transmission Owner actually executing the CIA and then fulfilling its obligations under the CIA to coordinate certain actions with the Designated Entity. Given the importance of the CIA, LS Power believes that the DEA needs to provide that the failure by a Transmission Owner to timely execute, or provide the coordination required under, the CIA will not trigger a breach under or termination of the DEA, so long as the Designated Entity is doing everything it can to mitigate the impact of the Transmission Owner's action or inaction. See Exhibit A for proposed revision to Section 5.0.
2. Termination Following Force Majeure. LS Power continues to believe that Section 8.0 of the DEA might be read to permit PJM to terminate the DEA following the occurrence of a Force Majeure event, once that event causes the Designated Entity to miss any of the listed Development Schedule milestones. (Note that Sections 4.0 and 4.1 of the DEA require the Designated Entity to comply with the Development Schedule and, as currently drafted, Section 8.0 of the DEA permits termination if a Force Majeure event "prevents the Designated Entity from satisfying *its obligations* under [the DEA].") LS Power does not believe this is a result intended by PJM and therefore is again proposing to clarify that the termination right would exist only in the event the Required Project In-Service Date would be impacted – see Exhibit A for proposed language. If, as other stakeholders have suggested, the DEA can be modified to permit the Development Schedule milestone dates to be extended if and so long as a Force Majeure event occurs, this change may not be required.
3. Project Finance Entity Rights. LS Power appreciates the changes made to Article 11 of the DEA addressing assignment of the DEA to a Project Finance Entity, but continues to have concerns that the DEA's assignment provisions will not be workable for lenders in the following respects:

- a. Granting of Security Interests. LS Power believes the new partial assignment language added by PJM to Section 11.0 of the DEA was intended to permit the Designated Entity to grant a security interest in the DEA in favor of Project Finance Entities (so long as no rights or obligations under the DEA were actually assigned to the Project Finance Entity). However, since it's not clear that the granting of a security interest is a "partial assignment" (as opposed to the creation of a mere lien), LS Power proposes to add language to Section 11.1.1 that would expressly permit the granting of a security interest in the DEA – see Exhibit A. If this language is incorporated, LS Power does not believe that PJM's change to the second sentence of Section 11.0 of the DEA would be necessary – i.e., the DEA could prohibit all forms of partial assignments.
- b. Cure Rights. As noted previously, LS Power expects that any lender involved in financing the construction of a Project will need to have the ability to attempt to cure breaches of the DEA by the Designated Entity, in order to have some way to prevent the possible termination of the DEA (without which the lender may not have a source of repayment of its loan). In PJM's latest draft of the DEA, there is a reference to cure by a Project Finance Entity, but only with PJM's prior consent. LS Power does not believe such a blanket consent right will be acceptable to a lender. At the same time, LS Power appreciates that PJM may be concerned about providing a lender with the ability to perform work related to the construction, maintenance or operation of the Project without first obtaining PJM's prior approval. Exhibit A contains new language LS Power proposes to add to Section 11.1.1 to the DEA which would generally permit lender cures, but maintains the requirement of PJM pre-approval if a new entity is proposed to be brought in to perform work involving the construction, maintenance or operation of the Project.
- c. PJM Approvals "Not to be Unreasonably Withheld". As noted previously, the requirement that PJM approve any assignment to a lender or a lender's designee will be viewed negatively by lenders and will be a point of focus for them. While LS Power believes that the requirement for PJM approval is reasonable and appropriate in light of the nature of the facilities that will be constructed pursuant to the DEAs, lenders will need to develop an understanding of the PJM approval process and will need to have some kind of assurance that PJM's approval right will not be exercised in an arbitrary manner. This point is typically addressed through inclusion of "not to be unreasonably withheld" language, and LS Power is proposing that here. This type of language is often seen in other public/private power and infrastructure program agreements that require some form of public agency approval of a transfer to a lender.
- d. DEA Breach Trigger. Section 11.1.2 provides that a Project Finance Entity may assign the DEA to a new entity (with PJM's approval), but only "upon the Breach of [the DEA] by the Designated Entity". In the unlikely event a Designated Entity has defaulted under its financing agreements due to circumstances not involving a breach

of the DEA, the lender will still need to have the ability to transfer the Project (including the DEA) to a third party. In the revised version of Section 11.1.2 included on Exhibit A, LS Power has deleted the DEA breach requirement. PJM's interests are protected under all circumstances by virtue of the PJM consent right, which has been left in.

Thank you for your consideration of these comments.