

LS Power Comments to North Carolina Transmission Planning Collaborative
July 30, 2012

NCTPC Response to LS Power Comments – August 22, 2012

LS Power July 30, 2012 Opening Statements:

LS Power appreciates the opportunity to provide feedback on the **thoughtful** and detailed NCTPC proposal. LS Power provides feedback on the June 19th NCTPC Strawman here, as well as the July 17th feedback to LS Power document.

NCTPC Response:

The NCTPC appreciates the comments that were submitted by LS Power. The NCTPC is responding to the comments submitted within this document as indicated below.

1. NCTPC Oversight Steering Committee Role:

- a. The draft documents point to considerable authority and discretion that the NCTPC Oversight Steering Committee (“OSC”)¹ has in making significant governance decisions.
 - i. A few examples of role of OSC observed by LS Power in proposal:
 1. OSC determines if Developer is sufficiently qualified to finance, license, and construct the facility and operate and maintain it for the life of the project
 2. OSC reviews Planning Working Group (“PWG”) technical recommendations on a project’s future
 3. OSC determines if a Regional Project solves the same issues as alternative Local Projects
 4. OSC reviews Developer’s analysis to ensure a project meets a 1.25 Benefit/ Cost ratio
 5. OSC issues a report on screening analysis results
 6. OSC seeks written stakeholder comments on proposals, including the qualification of Developers and the proposed cost allocation
 7. OSC determines which regional projects should result in a more efficient and cost-effective transmission system.

¹ http://www.nctpc.org/nctpc/document/OSC/2010-02-23/Scope/OSC%20SCOPE%202_23_2010_final.pdf

http://www.nctpc.org/nctpc/document/OSC/2012-02-15/Roster/OSC%20Roster%2002_15_2012.pdf

8. OSC issues a draft report indicating which regional projects are approved
 9. OSC identifies public policy needs, and issues a decision whether public policy is driving a particular solution
- b. The draft document also states that the NCTPC committee structures will not be changed in conjunction with Order 1000.
 - c. Paragraph 328 of Order 1000 requires “each public utility transmission provider to amend its **OATT to describe a transparent and not unduly discriminatory process** for evaluating whether to select a proposed transmission facility in the regional plan for purposes of cost allocation.
 - i. LS Power observes various measures that NCTPC proposes on the transparency of the evaluation process.
 - ii. LS Power, however, is concerned there are no specific measures outlined on how the OSC plans to administer a not unduly discriminatory and preferential selection process, only transparency
 - iii. Order 1000, Paragraph 328 requires that the “not unduly discriminatory process” in evaluation **be specifically described**. Given the role of the OSC, it seems to LS Power that the NCTPC burden at FERC will be proving that the OSC, given its proposed decision-making role, will not make decisions in a discriminatory or preferential manner. LS Power sees no clear non-discriminatory process proposed at the OSC level outlined in the draft proposal.

NCTPC Response:

The NCTPC appreciates LS Power’s recognition of the transparency of the evaluation process reflected in the draft NCTPC’s June 19, 2012 Order No. 1000 Strawman (“Strawman”).

The current proposal provides a process under which the OSC is tasked with fulfilling the above articulated duties in a not unduly discriminatory or preferential manner. Although some of the above OSC duties are new, many of these duties are natural extensions to the work that is already being performed by the OSC. The OSC will have to make decisions using criteria identified in the OATT and typically support those decisions in writing, explaining the basis for its decisions.

The history and past evolution of the NCTPC may help provide some context under which to better understand why the OSC of the NCTPC is the most appropriate body for making decisions. The NCTPC was established in 2005 by the major Load Serving Entities (LSEs) in North Carolina (Duke Energy Carolinas, Progress Energy Carolinas, the North Carolina Electric Membership Corporation and ElectriCities of North Carolina) to create integrated long-term transmission expansion plans that result in a reliable and cost effective transmission system. The NCTPC participants also represent the major network customers within the NCTPC transmission planning region. The creation of the NCTPC was encouraged by the North Carolina Utilities Commission to support the

provision of reliable and cost effective power in North Carolina. The current NCTPC governance framework was created at that time and has evolved over time. This framework includes the OSC which includes representatives from the LSEs as well as an independent third-party to help facilitate the process and ensure that the interest of all stakeholders is fairly and meaningfully represented. A Transmission Advisory Group (TAG) was also established to provide stakeholders with a mechanism to provide input into the planning process.

The NCTPC's role was further enhanced as the NCTPC members implemented the Order No. 890 compliance requirements related to transmission planning. The basic NCTPC governance framework continued to be an appropriate structure for the Order No. 890 implementation. The NCTPC believes that the Order No. 1000 compliance requirements are an extension of the previous FERC transmission planning requirements that can be accommodated within the basic NCTPC governance framework.

Specifically, the NCTPC believes that the OSC, which as stated above represents the major LSEs in the NCTPC transmission planning region, along with the independent third party, is the appropriate body to determine the needs and cost effectiveness of transmission solutions for the region. As identified in the OSC Scope document, each OSC member receives one vote. In the event of a tie vote, the independent third party will vote to break the tie. Two things should be duly noted regarding the OSC voting. There is great effort within the NCTPC to reach consensus decisions in the OSC and there is a significant outreach to the TAG to receive their input on transmission planning issues. This environment has resulted in no formal votes being taken to-date given that all decisions have been reached through consensus.

Given all of the above, the NCTPC believes that the OSC will continue to perform its existing duties and will perform its new duties in a transparent and not unduly discriminatory process.

2. Cost Recovery

- a. LS Power is concerned that the proposed NCTPC provider does not provide a clear methodology for a non-incumbent to receive cost recovery for a regional project.
- b. Paragraph 332, Order 1000
 - i. "The Commission also requires that a non-incumbent transmission developer must have the same eligibility as an incumbent transmission developer to use a regional cost allocation method or methods for any sponsored transmission selected in the regional transmission plan for purposes of cost allocation".
- c. NCTPC conditions the non-incumbent cost recovery contingent upon the following case-by-case negotiation:

- i. Non-incumbent Development Interconnection Agreement² execution, which includes the following agreements³:
 - 1. A successfully negotiated interconnection provision with the Transmission Provider
 - 2. A successfully negotiated provision for responsibility for meeting NERC standards
 - 3. A successfully negotiated agreement with Duke and/or Progress on operational control of facilities
 - 4. A successfully negotiated agreement on allocation of costs between Transmission Providers
 - 5. A successfully negotiated agreement regarding O&M responsibility
 - 6. A successfully negotiated agreement regarding assignment to a new owner
 - 7. A successfully negotiated agreement related to liability and indemnification
 - 8. A successfully negotiated provision over facilities will be provided to Duke and/or Progress OATT and delineation of which facilities are subject to which OATT.
- ii. Duke/ Progress enter into agreement with Developer to pay FERC-determined TRR of Developer
- d. Eligibility for Non-incumbent cost recovery proposed is not the **SAME** as incumbent in the NCTPC proposal, as its eligibility is contingent on the above case-by-case negotiation agreements being executed **PRIOR** to cost recovery approval.

NCTPC Response:

Both Order No. 1000 and 1000-A state that cost recovery was not being addressed in the orders. (Order No. 1000 P 563, Order No. 1000-A at P 616). Therefore, it is not required that cost recovery be addressed within the Order No. 1000/1000-A compliance filings. Because Order No. 1000 does not address cost recovery it does not address whether cost recovery for Non-Incumbent and Incumbent Developers must be identical. While the Strawman touches on cost recovery, it appears that LS Power has misconstrued the NCTPC proposal with regard to cost recovery

First, NCTPC does provide the same eligibility for both Incumbent and Non-Incumbent Developers to “use” the regional cost allocation methodologies. Specifically, Non-Incumbent Developers and Transmission Providers may propose and be selected to build

² LS Power believes that the nature of some of these Non-incumbent Development Interconnection agreement items would need to be standardized and litigated at FERC. *LS Power would appreciate further discussion with NCTPC on this issue.*

³ Incumbents have no such Non-Incumbent Interconnection Agreement to execute prior to cost recovery in the draft NCPTC proposal.

Regional Projects whose costs will be allocated pursuant to the cost allocation methodologies. That said, the NCTPC will review its language to ensure that this compliance requirement is appropriately articulated in the draft OATT language, which will be distributed to the stakeholders, including LS Power, before it is filed with FERC.

Second, the NCTPC has decided to address what happens once a decision has been made to allocate costs using a regional methodology, i.e., how the cost allocation is implemented. Implementation and cost recovery *has* to differ as to Non-Incumbent Developers because they are differently situated than Transmission Providers. As a point of clarification, however, Duke Energy Carolinas and Progress Energy Carolinas will be classified as Non-Incumbent Developers to the extent they build a regional project in the other Transmission Provider's service territory. Ultimately, the vehicle for implementation will be a contract between the Transmission Providers and the Non-Incumbent Developer. This contract serves much of the same role as a Transmission Owner Agreement (TOA) in an RTO. The NCTPC expects that once a Developer is selected, it would want to quickly memorialize the contours of that contract so that it can obtain financing and begin work as quickly as necessary. Thus, the MOU concept was developed, with the expectation that it would be the basis for a final contract, in the form of an interconnection agreement. Nothing prohibits the parties, however, from skipping the MOU step and negotiating only a final interconnection agreement or entering into a series of contracts addressing necessary issues.

The Strawman thus identifies a number of elements that the Transmission Providers and Non-Incumbent Developer(s) would negotiate once a Non-Incumbent Developer's project had been selected to be included within the NCTPC transmission plan. The NCTPC believes that the identified elements are necessary elements to be addressed before a Non-Incumbent Developer could realistically begin to implement a project. The NCTPC did not intend for the elements listed for inclusion within an MOU to be an exhaustive list or a prescriptive process, but rather would merely provide assurances that each side would be obtaining certain rights and subjecting itself to certain basic obligations. Most basically, the Transmission Providers are obligating themselves to pay a particular share of costs, while the Developer is promising to turn over the completed facility for open access purposes. The listed elements also provide helpful clarifications as to the nature of the relationship of the Non-Incumbent Developer and the Transmission Providers.

The NCTPC recognizes that the introduction and formalization of the ability of Non-Incumbent Developers to build transmission in regions without RTOs is a new concept and understands that this will be a learning process for all parties. In contrast, regions with RTOs can simply require a developer to accept the terms of a TOA, with no ability to negotiate at all. Given the novelty of the concept, the fact that Non-Incumbent Developer projects may encompass unique circumstances and arrangements with the Transmission Providers that cannot be fully envisioned at this point in time, the NCTPC choose to include the key elements of the MOU that the NCTPC believe would be important for inclusion rather than the other obvious alternatives: 1) spend the extensive resources to develop a pro forma interconnection agreement that provides little if any

flexibility; 2) omit all mention of what happens after a project is selected for regional cost allocation.

3. Cost-Effective Solution Selection

- a. NCTPC proposal fails to outline what COST EFFECTIVE SELECTION really means in the selection process. This is a key deficiency of the NCTPC proposal.
 - i. LS Power agrees that cost-effective selection is key to regional cost allocation under Order 1000.

NCTPC Response:

The NCTPC does not use the terminology “cost effective selection” in the Strawman. The NCTPC assumes that LS Power is referring to a cost effective selection of Regional Projects that would be subject to regional cost allocation. The Strawman outlines the process that would be used to select these projects.

- b. OSC determines which Regional Projects should result in a more efficient and cost-effective transmission system. Attachment 3 identifies factors that **may** be considered in such determination.
 - i. These factors outlined are similar to factors being discussed in SPP. In addition, these factors originally came from California’s competitive bid process.
 1. Prior FERC Orders provide no explicit or implicit grandfathering of its competing bidding process in CAISO Order 1000 Filing. FERC did not rule that the CA ISO process resulted in most efficient or cost-effective selection for purposes of Order 1000.
 2. It could be a foundation to build on it, but LS Power believes the current CAISO competitive bidding framework is not compliant with Order 1000. More detail on the competitive bidding selection process and additional requirements are required under Order 1000.
 - ii. Proposal by NCTPC says that NCPTC **“may”** use the selection factors, but provides no certainty on the evaluation process. Order 1000 requires that the process that the region **“WILL”** use, not **“may”** use, be clearly articulated.
 - iii. LS Power objects to the highly subjective selection process being suggested currently, as inconsistent with Paragraph 315 of Order 1000.

b. KEY LS POWER FEEDBACK ITEM:

- i. **NCPTC proposal establishes no nexus between the factors in selection and how those factors**

will translate into picking the most efficient or cost-effective solution.

- c. **ORDER 1000 REQUIRES CLARITY AND TRANSPARENCY IN HOW WINNERS WILL BE SELECTED. A LIST OF FACTORS IS NOT A CONCLUSIVE FILING.**
- i. Paragraph 315, FERC Order 1000: "...To ensure comparable treatment of all resources, the Commission has required public utility transmission providers to include in their OATT, language that identifies **how they will evaluate** among competing solutions and resources. This includes identification of the criteria by which the public utility provider will evaluate the relative economics and effectiveness of performance for each alternative offered for consideration... The Commission concludes that (additional) requirements are necessary."
 - ii. **NCTPC MUST OUTLINE IN THEIR FILING:**
 - 1. **HOW THEY WILL EVALUATE AMONG COMPETING SOLUTIONS AND RESOURCES.** It is not enough to just list factors. There must be clarity in the NCTPC filing on HOW OSC will compare the individual factors and **THEN, importantly, HOW OSC will "pull the various comparative factor analysis all together" and make a selection of the more cost-effective and efficient solution.**

NCTPC Response (to 3.b. (two "b"s above) and 3c.):

The NCTPC has drawn on other industry work to help craft criteria it would use in analyzing whether to select a Regional Project. NCTPC fully acknowledges that no such criteria have been approved by FERC in the Order No. 1000 setting. NCTPC has not developed a formula (e.g., assigning weighting factors to each criteria) for choosing projects or developers. A formulaic approach simply is not mandated by Order No. 1000. (To ensure clarity as to the NCTPC proposal, the NCTPC is not proposing a competitive bid process where many Developers will be competing for the projects identified by the region.) The NCTPC simply does not view the Regional Project selection process as a cookie-cutter process that can be pre-determined by a set of factors that can be identified and weighed in the abstract. The NCTPC thus purposely used the word "may" in the current NCTPC Strawman.

- d. **FERC HAS RULED THAT COST CAN BE THE DECIDING FACTOR**
- i. **RECENT PRIMARY POWER ORDER FROM FERC SENDS A POWERFUL NATIONAL MESSAGE ON THE IMPORTANCE OF COST IN THE SELECTION PROCESS**

1. FERC RULED THAT INCUMBENT UTILITIES WON ON THE BASIS THAT PRIMARY POWER WAS NOT THE LOW-COST ALTERNATIVE
- ii. LOW-COST WAS THE KEY DECIDING FACTOR IN FERC DECISION
- iii. FERC set a powerful precedent in *Primary Power* on the determining importance of low-cost in the final selection process

NCTPC Response:

As NCTPC understands the facts, the *Primary Power* case focuses on a situation where alternate projects were proposed that would be mutually exclusive due to the fact the benefits provided would be substantially similar. In a situation where all other factors are held constant, cost could be a significant factor in choosing among competing projects. Again, the NCTPC is not proposing a competitive solicitation approach and thus the role and importance of cost may vary from project to project, which is why the NCTPC has decided not to “weight” factors. For example, a key component of the determination of a cost efficient and effective Regional Project will be the evaluation of not only the cost of the project but the projected benefits of the project. A higher-cost project may provide greater benefits than a different, lower-cost project. The reliability of the power system grid is of paramount importance and any Regional Project evaluation must include an evaluation of the potential impact to reliability to ensure that the reliability of the grid would not be adversely impacted by the selection of a Regional Project. For example, a tower design that is higher-cost but more likely to withstand hurricane-force winds than an alternate design could drive a decision regarding a project in a coastal region.

- e. OSC’s decision making process should outline the role of cost in selection

NCTPC Response:

The NCTPC believes that the currently defined process adequately identifies the role of cost within the selection process – it is one of many factors.

- f. LS Power does not believe that the proposed NCPTC selection process is compliant with Order 1000

NCTPC Response:

The NCTPC believes that the proposed NCTPC Regional Project selection process is compliance with Order No. 1000.

- g. NCTPC proposal also needs more detail on how it will insure that the selection process is fair and non-discriminatory

NCTPC Response:

The NCTPC believes that its proposed Regional Project selection process is adequately articulated and identifies a fair, non-discriminatory and transparent process for Regional Project proposal submittals, evaluation and selection.

4. REASSIGNMENT OF PROJECTS

- a. FERC requires “each public utility transmission provider to amend its OATT to describe the circumstances and procedures under which public utility transmission providers in the regional transmission planning process will reevaluate the regional transmission plan to determine if delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation require evaluation of alternative solutions, including those proposed by the incumbent transmission provider, to ensure the incumbent transmission provider can meet its reliability needs or service obligations”. (Paragraph 329, FERC Order 1000)
- b. LS Power believes that reassignment of reliability projects applies to both incumbents and non-incumbent projects under Order 1000. Any project reassignment language should make it clear that the milestone requirements and reassignment provisions apply to both incumbents and non-incumbents under Order 1000. Reassignment provisions apply to regional projects, as Paragraph 329 refers to “delays in the development of a transmission facility selected in a regional plan for purposes of cost allocation...including those proposed by the incumbent transmission provider”
- c. LS Power would oppose a ROFR for the incumbent utility for projects that need to be re-assigned. Such notion is inconsistent with the Order, especially given that Order 1000 was explicit that re-assignment language applies to both incumbents and non-incumbents.

NCTPC Response (to 4a. through 4c. above):

The Strawman includes a provision that provides Transmission Providers an option to try and complete the abandoned Regional Project needed for reliability or to propose solutions within their retail distribution service territory or footprints that will enable them to meet its reliability needs or service obligations. Paragraph 267 of Order No. 1000 states that “a situation may arise where an incumbent transmission provider is called upon to complete a transmission project that another entity has abandoned.” Order No. 1000 Paragraph 329 states in part: “...As we have explained elsewhere in this Final Rule, (footnote omitted) nothing herein restricts an incumbent transmission provider from developing a local transmission solution that is not eligible for regional cost allocation to meet its reliability needs or service obligations in its own retail distribution service territory or footprint.” The NCTPC Transmission Providers fully intend to retain this right in order to ensure power system reliability for their customers. The Strawman simply provides the Transmission Provider facing the need to mitigate a reliability issue options as to mitigation, such as continuing with a Regional Project or developing local

solutions. Nothing in Order No. 1000 indicates that Transmission Providers must re-start what may be a multi-year project selection process whenever a Regional Project needed for reliability is abandoned and it expressly contemplates a Transmission Provider being permitted to try and complete an abandoned project.

d. Specific LS Power Proposal on Reassignment:

- i. NCPTC process should outline the reassignment process for regional reliability projects of both incumbents and non-incumbents
- ii. Immediately prior to NCPTC assignment of a project, the Qualified Project Developer and OSC should meet to revisit the proposed Development Schedule and to establish Critical Path Milestones. Any independent cost estimate and feasibility study commissioned by OSC can also recommend Critical Path Milestones for consideration. The Project Developer should update any proposed Development Schedule at time of assignment. NCTPC Board materials should reflect realistic and current development projections.
- iii. After project assignment, the assigned Project Developer should regularly provide quarterly status updates to OSC on permitting and development progress.
- iv. For reliability projects with a delay of more than six months of a Critical Path Milestone, notice should be given of the delay to OSC and the incumbent utility.
- v. **For reliability projects with a delay of more than six months of a Critical Path Milestone and there is material evidence of abandonment or lack of commercially reasonable competence by the Project Developer to advance the project, then the project could be taken to the OSC for possible reassignment.**

NCTPC Response:

The NCTPC's OATT language will outline the process for addressing both abandonment of and delays relating to the various categories of Regional Projects. The NCTPC also agree that once a Regional Project is included within the NCTPC transmission plan, the Developer would need to identify the development schedule and provide periodic updates to the schedule. The NCTPC would review all Regional Project development schedules and updates to determine if any potential project delays would cause reliability concerns. The NCTPC may not choose to adopt all of the above LS Power suggestions, but the basic elements will be identified within the upcoming OATT language.

5. Regional Projects

- a. NCPTC states in its response to LS Power, page 2 (7/17/2012 Strawman):
"The NCPTC believes that these parameters are consistent with what should be considered to be a regional project in the NCPTC region

- because it is the decision not to allocate the costs of any projects below 230 kV and \$10 million regionally which is driving the definition.”
- b. LS Power requests clarity on whether this explanation will be clearly defined in its OATT (and FERC Order 1000 filing) that projects below 230 kV or \$10 million will never be regionally allocated for incumbent or non-incumbent projects.
 - c. Order 1000 is clear that a LOCAL project must be **SOLELY within** a retail distribution territory or footprint, regardless of cost allocation. If it is in two retail distribution territories, it is a regional project regardless of cost allocation. Regional definition proposed by NCTPC should also clarify this.

NCTPC Response:

The NCTPC has not finalized its definition of Local Project, but expects that it will reflect the Commission’s definition. Duke sought and received clarification in Order No. 1000-A at P 424 that “[i]f the cost of a new transmission facility is allocated entirely to an area consisting of one transmission provider that has one or more smaller transmission providers within its borders, this might qualify as a local cost allocation, not a regional cost allocation.” Thus, to be clear, a definition that states that a Local Project is one *solely* within the retail distribution service territory of a public utility transmission provider does not exclude a project that spans the service territory of a public utility transmission provider and the service territory of one or more non-public utilities.

The NCTPC Order 1000 submitted OATT language will clearly identify the threshold criteria to be used for Regional Projects whose costs will be allocated regionally. The threshold criteria will include projects that are 230 kV and above and cost \$10 million or more. Therefore transmission projects that fall short of these criteria would not be available for regional cost allocation and would not be classified as a Regional Project.

6. The Developer Proposing Cost Allocation

- a. LS Power does not believe it is the burden of the new entrant to propose cost allocation for regional projects, rather it is the burden of the Order 1000 compliance process. LS Power objects to this requirement.

NCTPC Response:

The NCTPC Order No. 1000 compliance proposal provides for Developers to submit Regional Project proposals. As part of these project submittals, the Developer will need to submit information that will provide appropriate information such that the project can be evaluated. This information will include both the estimated cost of the project as well as the estimated project benefits, in accordance with the cost allocation methodologies for the various types of regional projects (reliability, economic, public policy or a combination of the categories for a project). The absence of this requirement would mean that the NCTPC would have to analyze projects whose own sponsors have

absolutely no basis for believing that their projects are a cost-effective or efficient solution for the NCTPC region. That said, such analysis is merely a preliminary showing that the proposal merits further analysis; a final cost allocation will be made by the OSC based on further analysis. Thus, this requirement is appropriate to be included in the Order No. 1000 compliance filing.

7. Proposed Financial and Technical Qualification Criteria:

- a. There should be an adequate cure period for any entity not originally qualified. Adequate explanation and discussion should be provided to applicant.

NCTPC Response:

The NCTPC Strawman indicates that the NCTPC Independent Third Party (ITP) will review the Regional Project proposals that are submitted. If the ITP finds that any of the submittals are incomplete, the Developers would be given 14 days to resubmit their proposals. The NCTPC intends for the ITP to explain the deficiencies and will reflect this in its tariff language.

- b. Financial Criteria must be met.
 - i. Demonstrated capability of a parent company, affiliate, or project company financing U.S. energy projects equal or greater than the lesser of \$300 million dollars or the capital cost of the proposed transmission project
 - ii. Material degradation of the financial condition of the entity once qualified can be grounds for termination of qualification status and project re-assignment
 - iii. LS Power does not believe that a credit rating evaluation is the best way to evaluate financial ability, and it arbitrarily discriminates against special purpose project financing companies. LS Power would suggest the removal of Credit rating from Moody's and Standard and Poors.
 - iv. It is LS Power's understanding that SERTP is proposing language similar to the following:
 1. Demonstrated capability of a parent company, affiliate, or project company financing U.S. energy projects equal or greater than the capital cost of the proposed transmission project

2. While this is not LS Power's preferred language, this language is more acceptable than financial criteria based solely on a credit rating from S&P and Moody's
- c. Technical Criteria must be met.
 - i. Demonstrated capability of a parent company, affiliate, or project company developing, constructing, operating and maintaining U.S. energy projects of similar or larger complexity, size and scope of the proposed project

NCTPC Response to above b. and c.:

The NCTPC will consider the above suggestions.