

## Memo

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**To:** Sharon Segner  
**From:** Michael R. Engleman  
**Date:** June 13, 2014  
**Subject:** Analysis of Delaware Statutes Regarding Their Application to Independent Transmission Development (1)

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Legislation has been introduced in Delaware to clarify language in Section 203B(g), Title 26 of the Delaware Code, regarding the scope of retail electric service territories. Reading the statutory provision as a whole, as Delaware law requires, it is clear that there is no ambiguity as the statutory provision was not intended to create exclusive service territories for transmission development in Delaware, only exclusive retail service territories. The statutory provisions creating exclusive retail territories do not apply to restrict the developer of projects approved by PJM to address regional transmission needs.

Delaware law on statutory construction is well settled.

First, [the court] must determine whether the statute is ambiguous. If it is unambiguous, then there is no room for judicial interpretation and the plain meaning of the statutory language controls. The statute is ambiguous if it is susceptible of two reasonable interpretations or if a literal reading of its terms would lead to an unreasonable or absurd result not contemplated by the legislature. If the statute is ambiguous, then [the court] consider[s] it as a whole and ... read[ s] each section in light of all the others to produce a harmonious whole. CML V, LLC v. Bax, 28 A.3d 1037, 1041 (Del. 2011) (citations and internal quotation marks omitted).

Further, the Delaware Legislature itself has instructed that, for the purposes of interpreting its statutes, "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." 1 Del. C. § 303. Applying these principles to Title 26 indicates that Section 203B is intended to restrict activities related to retail service, nothing else.

Section 203 is in Chapter 1, Public Service Commission, Subchapter II. Jurisdiction and

(1) Author Not Admitted in Delaware

Powers. The Subchapter addresses the Commission's jurisdiction, or lack of jurisdiction, over various activities. Section 202 titled "Limitations on jurisdiction of Commission" addresses a restriction on jurisdiction on municipally-owned utilities but in referring to Section 203B provides a useful preliminary indication of the scope of that section. Subsection (a) of Section 202 provides: "Except insofar as may be necessary to implement §§ 203A and 203B of this **title regarding the establishment and administration of retail electric service territories . . .**" [emphasis added] While this reference is not dispositive because Section 203A covers more than just "establishment and administration of retail electric service territories" it supplies context for in reading "each section in light of all the others to produce a harmonious whole." (CML V, LLC v Bax).

Likewise, Section 203B itself must be read as a whole, and not just with reference to Subsection (g). Section 203 B is titled "Service territories for electric utilities" but the very first sentence of Section 203B (a) provides "(a) Subject to the provisions of § 202 of this title, the Commission shall, upon notice and after hearing, establish boundaries throughout the State within which public utilities providing retail electric service shall have the obligation and authority **to provide retail electric service.**" Subsection (b) details how the Commission should establish the retail boundaries. Subsection (d) grandfathered retail customer who "was receiving retail electric service from a public utility other than the public utility within whose service territory such customer is located. . . ." Subsection (e) addresses inadequate service to such retail customers." Subsection (f) provides that "After the establishment of retail electric service territories under this section, 2 or more public utilities subject to Commission jurisdiction may from time to time hereafter apply to the Commission for adjustment of their adjoining retail electric service territories. . . ." And (g) provides "the exclusive **retail electric service** territories heretofore established by the Commission pursuant to this section shall continue as exclusive service territories for the transmission and distribution of electricity." [emphasis added] The remainder of Section 203(g) provides additional context and confirms that the reference to "transmission" was in the context of serving specific retail customers.

Except as otherwise provided herein, each electric distribution company shall have the **exclusive right to furnish** transmission and distribution services **located within its service territory to all electricity-consuming facilities** and **shall not furnish**, make available, render or extend its transmission and distribution services **to a consumer located within the service territory of another electric distribution company**; provided that **any electric distribution company may extend or construct its facilities in or through the service territory of another electric distribution company, if such extension or construction is necessary for such company to connect any of its facilities or to serve its customers within its own service territory.** As of the implementation dates as set forth in § 1003(b)(1) and (2) of this title [repealed], there shall be no exclusive service territories for the supply of electricity, except as otherwise herein provided. [emphasis added].

The provision makes it clear that the territory defined is a retail territory. The provision further establishes that the "transmission" referenced is transmission related only to that retail service as a retail entity can put transmission in another's service territory if "such extension or construction is necessary for such company to connect any of its facilities or to serve its customers within its own service territory." Thus, the territory is not "exclusive" as to

transmission, even among retail providers. This language clearly suggests that if a transmission project is not to service the specific retail customers in the exclusive territory, there is NO restriction on the entity that may develop it.

Finally, subsection (c) does not reference retail service territories but confirms that the references in 203B (g) regarding transmission were only relevant to supplying the retail customers because the statute notes that transmission assets are not relevant to determining the retail boundary. The provision states “In acting under subsection (b) of this section, the Commission shall give no consideration to the location or existence of transmission facilities.”

Based on the foregoing and applying Delaware law regarding statutory construction, the provisions of Section 203B cannot be read to apply a right of first refusal to build transmission which is unrelated to any specific retail customers. In the context of the Artificial Island RFP, the need being addressed is a regional reliability need, caused in part by conditions not only outside a particular Delaware retail service territory, but outside the state of Delaware as a whole. No fair reading of the statutory provisions indicates an intent to mandate an exclusive territory to build the Delaware portions of a multi-state project selected in a regional transmission plan addressing FERC jurisdictional transmission in interstate commerce.

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June 13, 2014

Via E-Mail

Sharon K. Segner  
Vice President  
LS Power Development, LLC  
400 Chesterfield Center, Suite 110  
St. Louis, MO 63017

**Re: House Bill 387**

Dear Ms. Segner:

This firm is Delaware counsel to LS Power Development, LLC ("LS Power"). On behalf of LS Power, you have asked us to review House Bill 387 recently introduced into the Delaware General Assembly in conjunction with the memorandum of law issued today by Squire Patton Boggs (the "SPB Memo"). The purpose of your request is to obtain our view, as Delaware counsel, with respect to whether the SPB Memo accurately characterizes the state of Delaware law on the question of whether legislation is required to allow LS Power or any affiliates to engage in the construction and operation of transmission lines as contemplated by the Artificial Island RFP. We understand that the Artificial Island RFP contemplates the construction and operation of multistate transmission lines designed to enhance regional reliability, and that it does not involve the supply of electric service to retail customers.

The SPB Memo analyzes relevant Delaware law and opines that § 203B does not restrict independent electric transmission companies that are not providing retail electric service, and it concludes that HB 387 is not needed. We have reviewed relevant Delaware law and the SPB Memo, and we concur with the analysis and conclusions set forth therein. Specifically, we agree that the provisions of 26 *Del. C.* § 203B apply only to providers of retail electric service, and therefore do not apply to activities contemplated by the Artificial Island RFP.

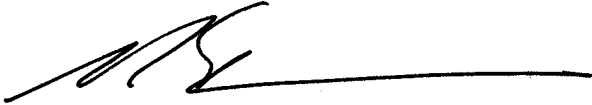
Sharon K. Segner

June 13, 2014

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Please contact me if you have questions or need additional information.

Very truly yours,

A handwritten signature in black ink, consisting of a stylized 'M' and 'T' followed by a long horizontal line.

MICHAEL W. TEICHMAN

MWT:bfd

cc: F. Michael Parkowski, Esquire  
Christine P. Schiltz, Esquire  
Elio Battista, Esquire  
Michael R. Engleman, Esquire