

153 FERC ¶ 61,168
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Tony Clark,

Midcontinent Independent System Operator, Inc. Docket Nos. ER15-2657-000
ER15-2658-000

ORDER ON PROPOSED TARIFF CHANGES

(Issued November 13, 2015)

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1. On September 16, 2015, Midcontinent Independent System Operator, Inc. (MISO) submitted, pursuant to section 205 of the Federal Power Act (FPA),¹ proposed revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) and the Agreement of Transmission Facilities Owners to Organize the Midcontinent Independent System Operator, Inc., a Delaware Non-Stock Corporation (MISO Transmission Owners Agreement). The proposed revisions modify MISO’s competitive transmission developer qualification and selection process and also include a new *pro forma* Selected Developer Agreement. In this order, we accept MISO’s filing, subject to condition.

I. Background

2. To comply with the regional transmission planning and cost allocation requirements of Order No. 1000,² MISO proposed a regional transmission planning process that includes a competitive transmission developer qualification and selection process. The Commission found that MISO’s regional transmission planning process

¹ 16 U.S.C. § 824d (2012).

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

complies with Order No. 1000.³ Under MISO's regional transmission planning process, MISO first follows procedures outlined in Attachment FF of its Tariff that ultimately lead to the MISO Board of Directors selecting transmission projects in the MISO regional transmission plan for purposes of cost allocation. MISO then issues Requests for Proposals soliciting proposals from qualified transmission developers that wish to develop those selected transmission projects that are eligible for competitive bidding. In order to submit a proposal, a transmission developer must first become qualified under MISO's developer qualification process. MISO then evaluates the proposals it receives from qualified transmission developers using its developer selection process and chooses a transmission developer to develop each selected transmission project subject to the competitive bidding process.

II. Proposed Changes to Tariff and Transmission Owners Agreement

3. On September 16, 2015, in Docket No. ER15-2657-000, MISO submitted: (1) proposed revisions to the competitive transmission developer qualification and selection process contained in Attachment FF of its Tariff; (2) a *pro forma* Selected Developer Agreement as Appendix 1 to Attachment FF; and (3) revisions to definitions in Module II of its Tariff. On the same day, in Docket No. ER15-2658-000, MISO

³ *Midwest Indep. Transmission Sys. Operator, Inc. and the MISO Transmission Owners*, 142 FERC ¶ 61,215 (2013) (MISO First Compliance Order); *Midwest Indep. Transmission Sys. Operator, Inc. and the MISO Transmission Owners*, 147 FERC ¶ 61,127 (2014) (MISO Second Compliance Order); *Midwest Indep. Transmission Sys. Operator, Inc. and the MISO Transmission Owners*, 150 FERC ¶ 61,037 (2015) (MISO Third Compliance Order); and *Midcontinent Indep. Sys. Operator, Inc.*, Docket No. ER13-187-010 (Mar. 31, 2015) (delegated letter order).

submitted changes to the Transmission Owners Agreement.⁴ MISO states that the purposes of the proposed revisions are to clarify and enhance MISO's Order No. 1000-compliant competitive transmission developer qualification and selection process and to propose a *pro forma* Selected Developer Agreement to delineate the rights and responsibilities of MISO and transmission developers—both nonincumbent and incumbent—who are selected to develop competitive transmission projects pursuant to MISO's Commission-approved process. MISO requests an effective date of November 16, 2015 for the proposed changes to its Tariff and the Transmission Owners Agreement.⁵

III. Notice and Responsive Pleadings

4. Notices of the filings were published in the *Federal Register*, 80 Fed. Reg. 57,350 (2015), with interventions and protests due by October 7, 2015.

5. Timely motions to intervene were filed by: Ameren Services Company (on behalf of Ameren Illinois Company, Ameren Transmission Company of Illinois and Union Electric Company); Consumers Energy Company; International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC; Madison Gas and Electric Company, Missouri Joint Municipal Electric Utility Commission, and WPPI Energy; NRG Power Marketing LLC and GenOn Energy Management, LLC; Organization of MISO States; Wisconsin Public Service Corporation and Wisconsin Electric Power Company; and Midwest Power Transmission Arkansas, LLC.

6. Timely motions to intervene and comments or protests were filed by: Edison Transmission, LLC (Edison); Midcontinent MCN LLC (Midcontinent MCN); MISO Transmission Owners;⁶ NextEra Energy Transmission, LLC (NextEra); Republic

⁴ MISO requests that both filings be treated as one because eTariff filing constraints are the sole reason why they are being submitted separately. Docket No. ER15-2658-000 Transmittal at 1.

⁵ MISO Filing at 1 (references to the MISO Filing are to Docket No. ER15-2657-000, unless otherwise noted).

⁶ MISO Transmission Owners for this filing consist of: Ameren Services Company (for Union Electric Company, Ameren Illinois Company and Ameren Transmission Company of Illinois); American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Dairyland Power Cooperative; Duke Energy Business Services, LLC (for Duke Energy Indiana, Inc.); East Texas Electric Cooperative; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Gulf States

(continued ...)

Transmission, LLC (Republic); Transource Energy, LLC (Transource); and Xcel Energy Services Inc. (Xcel).⁷

7. On October 21, 2015, MISO and Xcel filed answers. Xcel and Transource filed answers to MISO's answer on November 3, 2015 and November 6, 2015, respectively.⁸

8. On October 23, 2015, Exelon Corporation filed a motion to intervene out-of-time.

IV. Discussion

A. Procedural Issues

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), we will grant Exelon Corporation's late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits answers to protests and answers to answers unless otherwise ordered by the decisional authority. We accept MISO's, Xcel's, and

Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; South Mississippi Electric Power Association; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

⁷ Xcel submitted its pleadings on behalf of itself, Northern States Power Company, a Minnesota Corporation, Northern States Power Company, a Wisconsin Corporation, and Xcel Energy Transmission Development Company, LLC.

⁸ In their answers to MISO's answer, Xcel and Transource reiterated arguments made in their comments.

Transource's answers because they provided information that assisted us in our decision-making process.

B. Substantive Issues

11. The Commission accepts MISO's filings, subject to condition, as discussed below.⁹

1. Proposed Tariff Changes

a. Competitive Developer Qualification Process

i. MISO Proposal

12. MISO proposes various changes to the provisions that describe the process to become a Qualified Transmission Developer.¹⁰ Among these changes, MISO proposes that, if MISO does not recertify an existing Qualified Transmission Developer, MISO will provide that entity with a written explanation detailing MISO's determination. In addition, MISO proposes that the Executive Oversight Committee¹¹ shall have final

⁹ The Commission can revise a proposal filed under section 205 of the FPA as long as the filing utility accepts the change. *See City of Winnfield v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). The filing utility is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing.

¹⁰ A Qualified Transmission Developer is a Transmission Owner, Independent Transmission Company (ITC), or Non-owner Member that submits a Transmission Developer Application and is subsequently found by MISO to meet the minimum requirements for a Qualified Transmission Developer as outlined in Attachment FF or the Tariff. MISO Tariff, Module A, § II.1.Q (Definitions - Q).

¹¹ The Executive Oversight Committee is a committee consisting of three or more executive staff of MISO, including at least one officer, that is charged with overseeing all MISO staff and consultants involved in evaluating Transmission Developer Applications and Proposals in response to a posted Request for Proposal. The Executive Oversight Committee will have exclusive and final decision making authority over: (i) the certification and termination of Qualified Transmission Developers and; (ii) the evaluation and selection of Proposals, resulting in designating Selected Developers. The Executive Oversight Committee shall possess the specific technical, financial, and regulatory expertise necessary for evaluation of Transmission Developer Applications and Proposals. *Id.* § II.1.E (Definitions - E).

authority to recertify or terminate a Qualified Transmission Developer's qualified status.¹²

13. MISO also proposes revisions to accommodate entities that have already signed the Transmission Owners Agreement or registered with NERC in accordance with NERC's registration guidelines.¹³ In addition, MISO proposes revisions to allow a Transmission Developer Applicant to be a Transmission Owner or a Non-owner Member in good standing at the time that MISO acts on its qualification application, instead of at the time that the developer submits its qualification application.¹⁴

14. MISO proposes to add to the project implementation qualification criterion and the operations, maintenance, repair and replacement qualification criterion a requirement that the Transmission Developer Applicant include a written certification signed by an authorized representative of the Transmission Developer Applicant stating that the information in the submission is true and accurate.¹⁵ MISO states that this revision matches the certification requirements already accepted by the Commission for the legal information and financial information qualification criteria.¹⁶ MISO also proposes that it will treat information received in annual qualification recertification submittals as confidential information in the same manner as initial Transmission Developer Applications, except for the name of the Qualified Transmission Developer.¹⁷

15. MISO also states that it is proposing non-substantive revisions to the Alternative Dispute Resolution provision in the Competitive Developer Qualification Process to make it consistent with defined terms and clarify its provisions to make naming

¹² MISO Tariff, Attachment FF, § VIII.B.3.2 (Review of Renewal Submissions). *See also* MISO Filing at 11.

¹³ MISO Tariff, Attachment FF, §§ VIII.B.4.b & VIII.B.4.d. *See also* MISO Filing at 11-12.

¹⁴ MISO Tariff, Attachment FF, § VIII.B.4.a. *See also* MISO Filing at 11.

¹⁵ The requirement to certify information is true and accurate is also addressed below in the Proposal Attestation Requirements section of this order.

¹⁶ MISO Tariff, Attachment FF, §§ VIII.B.4.1 & VIII.B.4.2. *See also* MISO Filing at 12.

¹⁷ MISO Tariff, Attachment FF, § VIII.B.6 (Confidential Treatment of Prequalification Information). *See also* MISO Filing at 13.

conventions and formatting consistent with changes in defined terms and clarify references to other sections in Attachment FF.¹⁸

ii. Protests

16. Xcel argues that that the Commission should clarify that the Executive Oversight Committee’s “exclusive and final authority” to approve or reject Transmission Developer Applications and to recertify Qualified Transmission Developers is subject to the alternative dispute resolution procedures in the Tariff. To that end, Xcel suggests that the Commission direct MISO to revise the references to the Executive Oversight Committee’s exclusive and final authority in sections VIII.B.2.2 and VIII.B.3.2 of Attachment FF to add “except as provided for in section VIII.B.7 [Alternative Dispute Resolution] of Attachment FF of the Tariff.”¹⁹

17. Xcel also states that it is concerned that the Alternative Dispute Resolution provision is silent about whether it applies when the Transmission Developer renewal submission is denied or the Transmission Developer’s Qualified Transmission status is terminated.²⁰ Xcel states that that a Transmission Developer should be afforded alternative dispute resolution in both of these additional instances. Thus, Xcel asserts that the Commission should require MISO to further revise the Alternative Dispute Resolution provision to add language stating:

Any entity who is not recertified as a Qualified Transmission Developer by the Transmission Provider may request alternative dispute resolution under Attachment HH of the Tariff within thirty (30) Calendar Days of receiving the Transmission Provider’s written explanation detailing its determination to terminate the entity’s Qualified Transmission [Developer] status.²¹

¹⁸ MISO Filing at 25 (citing MISO Tariff, Attachment FF, § VIII.B.7 (Alternative Dispute Resolution)).

¹⁹ Xcel Protest at 39 (citing MISO Tariff, Attachment FF, §§ VIII.B.2.2 (Transmission Developer Application Review) and VIII.B.3.2 (Review of Renewal Submissions)).

²⁰ *Id.* at 40 (citing MISO Tariff, Attachment FF, § VIII.B.7 (Alternative Dispute Resolution)).

²¹ *Id.* at 40.

iii. MISO Answer

18. MISO believes that Xcel's request to revise sections VIII.B.2.2 and VIII.B.3.2 of Attachment FF to include the language stating "except as provided for in Section VIII.B.7 of Attachment FF of the Tariff" is unnecessary. MISO states that dispute resolution is generally applicable to all matters under the section VIII of Attachment FF and that the exclusive and final authority of the Executive Oversight Committee is not inconsistent with dispute resolution under Attachment HH.²²

19. However, MISO agrees with Xcel's proposal to add language stating that any entity who is not recertified as a Qualified Transmission Developer by MISO may request alternative dispute resolution under Attachment HH of the Tariff within thirty calendar days of receiving MISO's written explanation detailing its determination to terminate the entity's Qualified Transmission Developer status. MISO states that this language would clarify the application of Attachment HH to Qualified Transmission Developer termination or non-recertification decisions and supports the addition of this language if so ordered by the Commission.²³

iv. Commission Determination

20. We accept, subject to condition, MISO's proposed changes to the Competitive Developer Qualification Process. We find that, in general, the proposed changes are appropriate and provide more clarity for transmission developers that wish to become qualified.

21. We will not require MISO to implement Xcel's proposal that the Executive Oversight Committee's exclusive and final authority be revised to reference the Alternative Dispute Resolution provision. With the change we direct below to clarify the applicability of the Alternative Dispute Resolution provision, the Alternative Dispute Resolution provision in section VIII.B.7 of Attachment FF will be generally applicable to all matters under section VIII, and, therefore, a reference to the Alternative Dispute Resolution provision elsewhere in section VIII is unnecessary.

22. We agree with Xcel that the Dispute Resolution provision should be revised to make clear that the provision applies if a qualification renewal submission is denied or a Transmission Developer's Qualified Transmission status is terminated. Currently, the Dispute Resolution provision states that it applies when an initial Transmission

²² MISO Answer at 15.

²³ *Id.*

Developer Applicant is denied. We note that MISO also agrees with Xcel's proposed revisions. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a further compliance filing to revise section VIII.B.7 (Alternative Dispute Resolution) of Attachment FF to add a sentence stating that any entity who is not recertified as a Qualified Transmission Developer by MISO or a Qualified Transmission Developer whose Qualified Transmission Developer status is terminated may request alternative dispute resolution under Attachment HH of the Tariff within thirty (30) Calendar Days of receiving the MISO's written explanation detailing its determination to not recertify or to terminate the entity's Qualified Transmission Developer status.²⁴

b. Request for Proposals

i. MISO Proposal

23. MISO proposes revisions that it states clarify that transmission projects approved by MISO's Board of Directors may contain transmission facilities that are considered Competitive Transmission Facilities and non-competitive transmission facilities such as upgrades. MISO also proposes revisions to allow it to create and post a redacted Request for Proposals if the Request for Proposals contains Critical Energy Infrastructure Information (CEII).²⁵

24. MISO proposes that the list of the current transmission facility interconnection standards and requirements that will be included in each Request for Proposals include those established by any transmission owner(s) that are not a MISO Transmission Owner who have chosen to provide interconnection standards and requirements to MISO and to which the Competitive Transmission Facilities will interconnect. MISO states that this change ensures that the non-Member's interconnection standards and requirements are considered on par with MISO's transmission owners' interconnection standards and requirements and that bidders understand up front of standards that the Competitive Transmission Project must meet.²⁶

²⁴ Xcel Protest at 40.

²⁵ MISO Tariff, Attachment FF, § VIII.C (Request for Proposals). *See also* MISO Filing at 13.

²⁶ MISO Tariff, Attachment FF, § III.C.1 (Minimum Contents of a Request For Proposals). *See also* MISO Filing at 13. A Competitive Transmission Project is defined as the Competitive Transmission Facilities contained within a Market Efficiency Project

25. In addition, MISO proposes to eliminate the requirement that a Request for Proposals contain “additional requirements or qualification criteria of a specific state(s) related to specific New Transmission Facilities to be located within that state’s(s’) boundaries” because any such state requirements would fall under the category of Applicable Laws and Regulations.²⁷

ii. Protests

26. NextEra argues that MISO’s proposed revisions do not address the responsibility of Transmission Owners to interconnect their facilities with those of a Competitive Transmission Project. NextEra states that MISO attempts to define such responsibilities in Article 4.4 of the *pro forma* Selected Developer Agreement by requiring that both the “Selected Developer *and* Interconnecting Transmission Owner(s) shall take commercially reasonable efforts to finalize and execute the required Transmission-to-Transmission Interconnection at least one hundred and twenty (120) Calendar Days before the scheduled In Service Date of the Project.”²⁸ Yet, according to NextEra, the Interconnecting Transmission Owner would not be a party to the Selected Developer Agreement and, therefore, would not be bound by any of its provisions. To address this concern, NextEra asserts, the Commission should direct MISO to submit a compliance filing revising Attachment FF to restate in the Tariff the requirement proposed in Article 4.4 of the *pro forma* Selected Developer Agreement.²⁹

iii. MISO Answer

27. MISO agrees with arguments that the *pro forma* Selected Development Agreement cannot impose obligations on interconnecting transmission owners. Thus, MISO acknowledges, the requirement for interconnecting transmission owners to work with Selected Developers in good faith should be in Attachment FF. MISO therefore believes

or Multi-Value Project approved by the MISO Board in MISO’s Transmission Expansion Plan (MTEP) Appendix A. MISO Tariff, Module A, § II.1.C (Definitions - C).

²⁷ MISO Filing at 14.

²⁸ NextEra Protest at 5 (citing Selected Developer Agreement, Article 4.4) (emphasis added by NextEra).

²⁹ *Id.* at 5-6.

it would be appropriate for the Commission to order MISO to move this requirement to the Tariff.³⁰

iv. Commission Determination

28. We accept, subject to condition, MISO's proposed changes to the Request for Proposal provisions in Attachment FF of the Tariff. We also agree with NextEra and MISO that the requirement for interconnecting transmission owners to work with Selected Developers in good faith that is currently in Article 4.4 (Transmission-to-Transmission Interconnection Agreements) of the proposed *pro forma* Selected Developer Agreement should also be in Attachment FF of the Tariff. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to include in Attachment FF of the Tariff the requirement for a Selected Developer and Interconnecting Transmission Owner(s) to take commercially reasonable efforts to finalize and execute the required Transmission-to-Transmission Interconnection at least one hundred and twenty calendar days before the scheduled in service date of the Competitive Transmission Project.

c. Single-Developer Proposal and Joint-Developer Proposal

i. MISO Proposal

29. MISO proposes changes to the Tariff to establish two types of Proposals:³¹ Single-Developer Proposals and Joint-Developer Proposals. A Single-Developer Proposal is a Proposal submitted by a single RFP Respondent³² that would become the

³⁰ MISO Answer at 31.

³¹ Proposal is defined as a proposal to construct, implement, own, operate, maintain, repair, and restore all Competitive Transmission Facilities associated with a Competitive Transmission Project, in response to a Request for Proposal. Proposals may be submitted in one of two different forms: (i) a Single-Developer Proposal; or (ii) a Joint-Developer Proposal. The term "Proposal" shall include "Single-Developer Proposal" and "Joint-Developer Proposal." MISO Tariff, Module A, § II.1.P (Definitions - P).

³² RFP Respondent(s) is defined as one or more Qualified Transmission Developer(s) involved in a Proposal. *Id.* § II.1.R (Definitions - R).

sole Selected Developer³³ for the Competitive Transmission Project, should its Single-Developer Proposal be designated as the Selected Proposal³⁴ by MISO.³⁵ A Joint-Developer Proposal is a Proposal submitted jointly by two or more RFP Respondents that would each be designated as Selected Developers for the Competitive Transmission Project, should the Joint-Developer Proposal be designated as the Selected Proposal by MISO.³⁶ MISO also proposes provisions that outline what information must be included in a Joint-Developer Proposal and clarify how MISO will treat a default by any RFP Respondent that is part of a Joint-Developer Proposal.³⁷ MISO also proposes an additional new term, Joint Proposal, which it defines as a Proposal submitted jointly by two or more Qualified Transmission Developers each proposing to be a Selected Developer responsible for constructing and implementing a Competitive Transmission Project.³⁸ Finally, MISO proposes to delete the provisions associated with qualifying Joint Ventures because MISO states this concept caused confusion amongst applicants and, with the proposed Joint-Developer Proposal revisions, the Joint Venture pre-qualification requirements are no longer needed.³⁹

ii. Protests

30. MISO Transmission Owners suggest that MISO revise the definitions in Module A of the Tariff to delete the definition of “Joint Proposal.” According to MISO Transmission Owners, the proposed definitions for a “Joint Proposal” and a “Joint-

³³ Selected Developer(s) is defined as the RFP Respondent(s) identified in the Selected Proposal. Selected Developers shall not include Proposal Participants. *Id.* § II.1.S (Definitions - S).

³⁴ Selected Proposal is defined as the Proposal selected for implementation by the Executive Oversight Committee, pursuant to Attachment FF of the Tariff. *Id.* § II.1.S (Definitions - S).

³⁵ MISO Tariff, Attachment FF, § VIII.D.4.1 (Single-Developer Proposal).

³⁶ MISO Tariff, Module A, § II.1.J (Definitions – J) and MISO Tariff, Attachment FF, § VIII.D.4.2 (Joint-Developer Proposal).

³⁷ MISO Tariff, Attachment FF, §§ VIII.D.4.2 (Joint-Developer Proposal) & VIII.D.5.1.1 (Identification of RFP Respondents).

³⁸ MISO Tariff, Module A, § II.1.J (Definitions - J).

³⁹ MISO Filing at 11.

Developer Proposal” appear to refer to the same thing. MISO Transmission Owners also state that while the term “Joint-Developer Proposal” appears in Attachment FF of the MISO Tariff, the term “Joint Proposal” does not.⁴⁰

iii. Commission Determination

31. We accept, subject to condition, MISO’s proposed provisions that establish Single- and Joint Developer Proposals. We find that these new provisions make clear the requirements for transmission developers that wish to submit a Joint Developer Proposal. However, we agree with MISO Transmission Owners that MISO should delete the definition of a “Joint Proposal.” The term “Joint Proposal” is not used in Attachment FF, and, although it is defined slightly differently, appears to be the same thing as a “Joint Developer Proposal,” which is the phrase MISO uses in its proposed provisions in Attachment FF. Accordingly, to avoid potential confusion, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to delete the proposed definition for “Joint Proposal.”

d. Proposal Attestation Requirements

i. MISO Proposal

32. MISO proposes a new section that requires each RFP Respondent to include an affidavit as part of the Proposal submission, signed by an officer of its organization, attesting that: (i) it understands that the Tariff and the Business Practices Manuals govern MISO’s evaluation of Proposals and designation of a Selected Proposal; (ii) it agrees to be bound by the Tariff and to follow the applicable Business Practices Manuals; (iii) it has submitted the Proposal in good faith; (iv) the information submitted by the organization in the Proposal is true; (v) it has complied with all applicable federal, state and local laws, and regulations, specifically including all anti-trust and anti-collusion laws, and Good Utility Practice in preparing the Proposal; and (vi) if selected, it agrees to be bound by its Proposal.⁴¹

33. Furthermore, MISO proposes that each Proposal Participant shall include an affidavit as part of the Proposal signed by an officer of its organization attesting that: (i) its Aggregate Annual Transmission Revenue Requirement and any required financial information about it that has been submitted by the organization is true; and (ii) either (a) that it agrees to execute the Transmission Owners Agreement and identify the

⁴⁰ MISO Transmission Owners Comments at 9.

⁴¹ MISO Tariff, Attachment FF, §VIII.D.5.14 (Proposal Attestation).

Competitive Transmission Facilities associated with the Competitive Transmission Project in Appendix H of the Transmission Owners Agreement prior to closing on its conveyed interest should MISO designate the Proposal as the Selected Proposal; or (b) prior to such closing it will demonstrate that it has already executed the Transmission Owners Agreement and it agrees to identify the Competitive Transmission Facilities associated with the Competitive Transmission Project in Appendix H of the Transmission Owners Agreement.⁴²

ii. Protests

34. Republic argues that MISO should delete references to the Business Practice Manuals from proposed attestation (i) and (ii) required of each RFP Respondent. Republic states that, consistent with Commission precedent, the Tariff controls, and an attestation that the RFP Respondent followed the Tariff is sufficient as it necessarily includes any Business Practice Manuals consistent with the Tariff.⁴³

35. In addition, Republic argues that, consistent with the “good faith” requirement in attestation (iii), attestation (iv) should be revised to state that the information contained in the Proposal is true “to the best of affiant’s information and belief.”⁴⁴ Otherwise, Republic asserts, attestation (iv) could be implied as applying a standard beyond “good faith” and requiring absolute accuracy.⁴⁵

36. Similarly, NextEra requests that the Commission require MISO to revise attestation (iv) so that it states that information in the Proposal is true to the best of the RFP Respondent’s knowledge. NextEra asserts that this change is necessary because an RFP Respondent may rely on information obtained from or representations made by third parties, such as affiliates or contractors, in preparing a Proposal for a Competitive Transmission Project.⁴⁶ NextEra states that MISO should also make the same change to

⁴² *Id.*

⁴³ Republic Protest at 19.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* at 7-8.

⁴⁶ NextEra Protest at 4 (citing MISO Tariff, Attachment FF, § VIII.D.5.14 (Proposal Attestation)).

the similar requirement for a transmission developer submitting an application to become qualified to certify that the information in the application is true and accurate.⁴⁷

37. Finally, Republic argues that the phrase “including Good Utility Practice” should be removed from the requirement that an RFP Respondent confirm that “it has complied with all Applicable Laws and Regulations, including Good Utility Practice.” Republic asserts that Good Utility Practice is neither a “law” nor a “regulation” and thus reference to either laws or regulations as “including Good Utility Practice” is inappropriate. Further, according to Republic, the reference to Good Utility Practice in the context of a Proposal is vague. Republic asserts that the information requirements for Design,⁴⁸ together with MISO’s ability to add additional Design information requirements,⁴⁹ provide MISO sufficient information without the attestation as to whether the proposal is meets applicable requirements.⁵⁰

iii. MISO Answer

38. MISO disagrees that it should delete references to the Business Practice Manuals from proposed attestation (i) and (ii) required of each RFP Respondent. MISO states Business Practice Manuals are the proper vehicle for many requirements that do not significantly affect terms and conditions of service but that nonetheless are important for an ordered administration of the Competitive Developer Selection Process. MISO states that Business Practice Manuals will include details such as the types and forms of documents to be submitted, addresses where submissions should be made, and processes for review, and it is reasonable that transmission developers acknowledge their understanding that MISO will follow Business Practice Manuals. MISO states that it is also essential to require transmission developers to follow Business Practice Manual protocols to ensure that they receive uniform information and treatment. In addition,

⁴⁷ *Id.* at 4. As described above in the Competitive Developer Qualification Process section of this order, MISO proposes a similar requirement to attest that information in an application to become a Qualified Transmission Developer is true, which NextEra also requests be modified. We address that protest here (in the Proposal Attestation Requirements section of the order).

⁴⁸ Republic Protest at 8 (citing MISO Tariff, Attachment FF, §§ VIII.D.5.8.1 (Design for Competitive Transmission Line Facilities) and VIII.D.5.8.2 (Design for Competitive Substation Facilities)).

⁴⁹ *Id.* at 8 (citing MISO Tariff, Attachment FF, § VIII.D.5.8.3).

⁵⁰ *Id.* at 8.

MISO states that a transmission developer has the right to file a complaint with the Commission if it believes that a Business Practice Manual requirement is improper or should be in the Tariff.⁵¹

39. MISO disagrees with Republic and NextEra it should revise attestation (iv), which requires the RFP Respondent to attest that the information submitted by the organization in the Proposal is true. MISO states that proper application of the Tariff factors and fairness to other bidders requires that transmission developers warrant that the information contained in their Proposals is accurate and that bidders are in the best position to determine this accuracy through proper diligence. According to MISO, NextEra's and Republic's proposed changes to the attestation requirements would relieve the transmission developer of responsibility to make this diligent inquiry, with the result that information submitted with a Proposal would become binding only in the limited circumstance where MISO can prove that a developer actually knew the information submitted was false. MISO states that this also would be unfair to transmission developers who were not selected based on verified information.⁵²

40. MISO also disagrees with NextEra that a transmission developer should be relieved of its obligation to certify that the information in its application to become a qualified developer or in a Proposal is correct because a developer is allowed to rely on third-party resources to qualify. MISO states that, while the transmission developer may cite third-party resources in support of its application to become qualified or in a Proposal, these both remain the developer's submissions, and it is reasonable to require the developer to certify the accuracy of its own statements. MISO states that, as a practical matter, this will require the transmission developer to perform due diligence and/or avoid making definitive statements that it has not fact checked. MISO notes that the attestation requirements do not require the transmission developer to make definite statements of which it is not sure or prevent the developer from representing that a given statement is based on unverified third-party information.⁵³

41. In response to Republic's protest of attestation requirement (v) required of each RFP Respondent, MISO states that, while Good Utility Practices are not themselves laws or regulations, they may be included or required by laws and regulations and, in any event, constitute the practices and industry standards in the electric industry to which prospective developers should be required to conform. Nonetheless, MISO states that it

⁵¹ MISO Answer at 9.

⁵² *Id.* at 10.

⁵³ *Id.* at 10-11.

would be willing, if ordered on compliance, to amend this sentence to read “Applicable Laws and Regulations and Good Utility Practice.”⁵⁴

iv. Commission Determination

42. We accept, subject to condition, MISO’s proposed Proposal Attestation Requirements. We find that the requirement that RFP Respondents and Proposal Participants include in any Proposal an affidavit signed by an officer of the transmission’s developer’s organization making certain attestations is appropriate because MISO will be relying on the information submitted in a Proposal in the evaluation process.

43. We disagree with Republic’s assertion that it is inappropriate to require RFP Respondents to attest that they understand that MISO’s evaluation of Proposals and designation of a Selected Proposal is governed by the Tariff and the Business Practices Manuals and that the RFP Respondent agrees to be bound by the Tariff and to follow the applicable Business Practices Manuals. In MISO’s Order No. 1000 compliance proceeding, the Commission required that MISO’s Tariff be sufficiently detailed as to provide interested parties with the framework necessary to understand the process, with remaining information relegated to the Transmission Planning Business Practice Manual.⁵⁵ The Commission then found MISO’s Tariff met this requirement by including sufficient detail in its Tariff and supplementing that detail with information in Business Practice Manuals.⁵⁶ Thus, we agree with MISO that it is appropriate to require transmission developers to follow Business Practice Manual protocols, which will also ensure that developers receive uniform information and treatment.

44. However, we agree with Republic and NextEra’s assertion that the requirement to attest that information is true should be revised to require that the information be true to the best of the RFP Respondent’s knowledge. We disagree with MISO that Republic and NextEra’s proposed change would relieve the transmission developer of responsibility to make a diligent inquiry about whether their information is accurate. Rather, the proposed change merely recognizes that absolute accuracy may not be tenable when a transmission developer relies on information provided by third parties. Therefore, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to change the attestation requirement so that a transmission developer submitting a qualification

⁵⁴ *Id.* at 11.

⁵⁵ MISO First Compliance Order, 142 FERC ¶ 61,215 at P 65.

⁵⁶ MISO Second Compliance Order, 147 FERC ¶ 61,127 at PP 37, 361, 391, 396.

application or a Proposal must attest that information is true to the best of the transmission developer's knowledge and belief.

45. We also agree with Republic that the requirement for an RFP Respondent to attest that it has complied with all applicable federal, state and local laws, and regulations, specifically including all anti-trust and anti-collusion laws, and Good Utility Practice should be clarified to make it clearer with respect to Good Utility Practice. Consistent with the change MISO suggests in its answer, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising attestation (v) to state "it has complied with Applicable Laws and Regulations and Good Utility Practice."⁵⁷

e. Proposal Clarifications

i. MISO Proposal

46. MISO proposes revisions that give it the right, but not the obligation, during the Competitive Developer Selection Process to request a RFP Respondent to provide clarifications to its submitted Proposal. MISO states that under this proposed language, the RFP Respondent may either provide the requested clarification or decline to provide such clarification and have its Proposal evaluated as submitted. MISO states that RFP Respondents will not be penalized for failing to provide a requested clarification but Proposals with unclear or ambiguous elements may be at a disadvantage vis-à-vis Proposals that are clear or have been clarified.⁵⁸

ii. Commission Determination

47. We accept MISO's provision providing it with the right, but not the obligation, to request clarifying information from an RFP Respondent and for the RFP Respondent to have the choice about whether to provide the clarifying information. However, we affirm

⁵⁷ MISO Tariff, Attachment FF, § VIII.D.5.14 (Proposal Attestation). "Applicable Laws and Regulations" is defined as all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide. MISO Tariff, Module A, § II.1.A (Definitions - A).

⁵⁸ MISO Tariff, Attachment FF, § VIII.D.7 (Proposal Clarifications). *See also* MISO Filing at 20.

that MISO must exercise the discretion it has to request clarifying information in its evaluation process on a not unduly discriminatory basis.⁵⁹

f. Withdrawing Submitted Proposals

i. MISO Proposal

48. MISO proposes to create a provision giving RFP Respondents new opportunities to withdraw a submitted Proposal during two separate and distinct time-periods.⁶⁰ MISO proposes that the first time-period for withdrawal is prior to the Proposal Submission Deadline, during which a RFP Respondent may withdraw a Proposal by informing MISO as soon as practical in writing. Any deposits submitted to MISO associated with the withdrawn Proposal will be returned in full and the withdrawn Proposal will not be considered or evaluated by MISO. MISO states that it is fair to refund the entire deposit because MISO does not intend to evaluate Proposals before the Proposal Submission Deadline and it therefore will not have incurred significant evaluation costs before this time.⁶¹

49. MISO states that the second time-period for withdrawal is after the Proposal Submission Deadline and prior to the announcement of a Selected Developer. MISO proposes that an RFP Respondent may withdraw its submitted Proposal during this time by informing MISO in writing, as soon as practical, but no later than such time that MISO publicly announces the Selected Proposal for the RFP. Upon receiving a withdrawal notification, MISO will stop its evaluation and consideration of the Proposal. However, MISO proposes that an RFP Respondent that withdraws its Proposal after the Proposal Submission Deadline will still be obligated to pay its pro rata costs associated with the full evaluation period.⁶²

⁵⁹ See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 328 (requiring that the evaluation process be transparent and not unduly discriminatory); Order No. 1000-A, 139 FERC ¶ 61,132 at P 454 (requiring the same process be used to evaluate proposals from incumbent and nonincumbent transmission developers).

⁶⁰ MISO Filing at 20-21.

⁶¹ MISO Tariff, Attachment FF, §VIII.D.8 (Withdrawing Submitted Proposals). See also MISO Filing at 21.

⁶² MISO Tariff, Attachment FF, §VIII.D.8 (Withdrawing Submitted Proposals).

50. MISO states that, after the Proposal Submission Deadline, MISO will have begun and/or completed its evaluation of the Proposal to be withdrawn and comparative analysis of that Proposal to the others that have been submitted. In addition, MISO states that any withdrawal of a Proposal at this point could require it to incur additional expenses in re-performing the comparative analysis without the withdrawn Proposal, thus increasing overall evaluation costs. MISO states that several stakeholders asked MISO to allow Proposals to be withdrawn after the Proposal Submission Deadline. MISO states that some stakeholders suggested that such withdrawal should be accompanied by a partial refund, some stakeholders suggested no refund, and some suggested that withdrawal should be allowed only until a certain time period had passed (e.g. 60 or 90 days).⁶³

51. MISO states that it ultimately determined that RFP Respondents should be allowed to withdraw their Proposals after the Proposal Submission Deadline at any time prior to selection of a Selected Developer but without a refund. MISO submits that this approach is reasonable because, while the withdrawal of any Proposal once evaluation has started will result in increased evaluation costs that other RFP Respondents must bear, the withdrawing RFP Respondent can be allowed to withdraw its Proposal while still being responsible for their pro rata share. In addition, MISO believes that it would be counterproductive to require an RFP Respondent to continue through evaluation and to execute the Selected Developer Agreement when it no longer desires to, or has become unable to adhere to the Proposal it submitted. Based on these considerations, MISO believes that allowing Proposal withdrawal before a selection decision is made but requiring the withdrawing RFP Proponent to remain responsible for its pro rata share of costs associated with the full evaluation period strikes the appropriate balance between certainty in evaluation and fairness to other RFP Respondents and the need to account for changed circumstances by Developers prior to selection. MISO states that the withdrawing RFP Proponent will still be able to participate in the refund of remaining deposit funds once the Competitive Developer Selection Process has been completed on the same basis as other RFP Proponents.⁶⁴

ii. Protests

52. NextEra asserts that MISO's proposal that the withdrawal of a Proposal after the Proposal Submission Deadline will not relieve the RFP Respondent from its obligations of the pro rata costs associated with the full evaluation period nor will the RFP Respondent be afforded any refund other than those funds remaining once the Competitive Developer Selection Process has been completed for the RFP is patently

⁶³ MISO Filing at 21.

⁶⁴ *Id.*

unfair. NextEra states that MISO's Tariff allows MISO to take up to 180 days to evaluate Proposals in each RFP and, for example, if an RFP Respondent withdraws its Proposal one month after the Proposal Submission Deadline, MISO's proposal would require the RFP Respondent to continue paying for MISO's evaluation of *other* RFP Proposals for up to five more months. According to NextEra, such charges would not be just and reasonable and should not be accepted by the Commission.⁶⁵

iii. MISO Answer

53. MISO states that it is proposing to allow bidders to withdraw their Proposals without changing the non-refundable nature of the deposit, which was non-refundable under MISO's previously-accepted Tariff language. MISO states that it is proposing the withdrawal provision because it would be counterproductive to require an RFP Respondent to continue through evaluation and to execute the Standard Development agreement when it no longer desires to, or has become unable to, adhere to the Proposal it submitted. MISO states that its proposal fairly balances the interests of withdrawing bidders with those who must still bear evaluation costs and avoids the impracticality of attempting to calculate the proportionate share of cost responsibility for a withdrawing bidder up to the day that it withdraws. MISO also notes that if the proposed withdrawal provision were rejected, Proposal evaluation fees would remain non-refundable and the only result would be that Proposals could not be withdrawn. MISO asserts that achieving NextEra's desired result would require the Commission to revisit past decisions on the nonrefundable nature of deposits and would ignore the compromise MISO reached with stakeholders.⁶⁶

iv. Commission Determination

54. We accept MISO's proposal to allow an RFP Respondent to withdraw a Proposal before the Proposal Submission Deadline and to provide a full refund of any Proposal deposit for such a withdrawn Proposal. We find that it is appropriate for MISO to refund the entire deposit if the Proposal is withdrawn before the Proposal Submission Deadline because MISO does not intend to perform any analysis of a Proposal until after the Proposal Submission Deadline.

55. We also accept MISO's proposal to allow an RFP Respondent to withdraw a Proposal after the Proposal Submission Deadline but to not provide a refund of any deposit and to require any Proposal withdrawn after the Proposal Submission Deadline to

⁶⁵ NextEra Protest at 4-5.

⁶⁶ MISO Answer at 16-17.

remain obligated to pay its pro rata costs associated with the full evaluation period. We find that MISO has justified its proposal by explaining that withdrawing a Proposal after the Proposal Submission Deadline may result in increased evaluation costs that the remaining RFP Respondents would have to bear. In addition, MISO applies all Proposal deposits submitted in response to a specific Request for Proposals equally to the cost of evaluating all Proposals, such that MISO essentially pools such funds to cover the costs of evaluating all proposed solutions for a specific Request for Proposals.⁶⁷ If MISO had to provide partial refunds to Proposals withdrawn after the Proposal Submission Deadline, it would likely need to track evaluation costs at a level of granularity not required by Order No. 1000. We find that NextEra has not justified its request for us to impose the potential additional time and expense associated with more granular cost tracking in the evaluation of all Requests for Proposals only so that an entity can receive a partial refund for a Proposal withdrawn after the Proposal Submission Deadline. In addition, all RFP Respondents, including those that have withdrawn a Proposal after the Submission Deadline, will receive a pro rata share of any refunds due after the evaluation process is complete.

56. We also note that, as MISO explains, the existing Tariff provisions do not allow for any Proposal deposit refunds because an RFP Respondent cannot withdraw a Proposal after the Proposal Submission Deadline. The only change MISO proposes here is to allow an RFP Respondent to withdraw its Proposal after the Proposal Submission Deadline. MISO states that potential RFP Respondents have expressed an interest in being able to withdraw a Proposal after the Proposal Submission Deadline for reasons other than receiving a refund of the Proposal deposit. Therefore, MISO's proposal merely provides RFP Respondents with that option, while leaving unchanged the non-refundable nature of the deposit.

g. RFP Respondent's Qualified Transmission Developer Status

i. MISO Proposal

57. MISO proposes revision to require that RFP Respondents maintain their status as a Qualified Transmission Developer throughout the duration of the Competitive Developer Selection Process and any Proposal involving a RFP Respondent that ceases to be a Qualified Transmission Developer will be deemed invalid and will not be evaluated or

⁶⁷ See MISO Second Compliance Order, 147 FERC ¶ 61,127 at PP 301, 319.

considered further by MISO. MISO also proposes that it will provide a written explanation to RFP Respondents identifying why the Proposal has been disqualified.⁶⁸

58. MISO states that these revisions build upon existing language in the Tariff which states that if the RFP Respondent is not a Qualified Transmission Developer on the date the RFP was posted, or ceases to be a Qualified Transmission Developer after the date the RFP was posted, the Proposal will not be evaluated or considered further.⁶⁹ MISO states that, in light of its proposed Joint-Developer Proposal provisions, it is applying this same logic to Proposals that have multiple RFP Respondents. MISO submits that this new provision is appropriate to clarify the obligations of a Qualified Transmission Developer to remain qualified and ensure that only a Qualified Transmission Developer is selected as a Selected Developer.⁷⁰

ii. Protests

59. Republic states that it has two concerns with the proposed tariff language that requires each RFP Respondent to remain qualified throughout the Competitive Developer Selection Process. First, Republic says that the new language in section VIII.D. is duplicative because it already appears in proposed section VIII.D.12.⁷¹ Second, Republic asserts that MISO should be required to revise the provision to provide notice before a previously Qualified Transmission Developer's status is changed, and provide the Qualified Transmission Developer with an opportunity to cure any alleged deficiency. Republic argues that a previously Qualified Transmission Developer should have no less than 30 days from the date of notification to cure any alleged deficiency, which is the same as the cure period MISO provides for initial Qualifications Applications.⁷²

⁶⁸ MISO Tariff, Attachment FF, § VIII.D (Proposals). MISO also proposes language to state that Proposals may be submitted only in response to a Request For Proposals issued by MISO and only by entities that are listed as Qualified Transmission Developers at the time the Proposal is submitted. *Id.*

⁶⁹ MISO Filing at 14, 23-24.

⁷⁰ *Id.* at 23-24.

⁷¹ Republic Protest at 10.

⁷² *Id.* at 11 (citing MISO Tariff, Attachment FF, § VIII.B.2.1 (Completed Transmission Developer Applications)).

iii. MISO Answer

60. MISO agrees with Republic that it would be unfair not to offer a cure period. Accordingly, MISO would support a compliance directive requiring it to amend proposed section VIII.D.12 to provide a thirty-day cure period on the same terms as offered to initial applicants.⁷³

iv. Commission Determination

61. We accept, subject to condition, MISO's proposal to require that RFP Respondents maintain their status as a Qualified Transmission Developer throughout the duration of the Competitive Developer Selection Process and any Proposal involving a RFP Respondent that ceases to be a Qualified Transmission Developer will be deemed invalid and will not be evaluated or considered further by MISO. However, MISO must make two changes. First, we agree with Republic that MISO proposes essentially the same provision twice – at the beginning of section VIII.D (PROPOSALS) and as a stand-alone provision in section VIII.D.12 (RFP Respondent's Qualified Transmission Developer status). Because the two duplicative provisions could cause confusion, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to remove from section VIII.D of Attachment FF the requirement that RFP Respondents maintain their status, which already appears and should remain in section VIII.D.12.

62. In addition, we agree with Republic and MISO that there should be a cure period before a previously Qualified Transmission Developer loses that status. Accordingly, consistent with MISO's answer, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to revise section VIII.D.12 of Attachment FF to provide a thirty-day cure period on the same terms as offered to developers that submit their initial application to become qualified.

h. Financial Information

63. MISO proposes a new "Financial Information" section that states, "Each Proposal shall contain information and details regarding the financials of the Proposal as further specified in the applicable Business Practice Manuals."⁷⁴ MISO states that this proposed section builds on the currently effective Tariff language requiring MISO to evaluate the

⁷³ MISO Answer at 14.

⁷⁴ MISO Tariff, Attachment FF, § VIII.D.5.7 (Financial Information).

capital resources available to fund project costs as they arise and providing that the project cost estimate submission requirements are minimum requirements.⁷⁵

i. Protests

64. Republic argues the Commission should require that MISO specifically identify in the Tariff the Financial Information Requirements for a Proposal. Republic argues that leaving such a critical factor to the Business Practice Manuals is inappropriate and counter to the Commission's policy on when matters must be included in a Tariff rather than a Business Practice.⁷⁶

ii. MISO Answer

65. MISO states that Republic's protest lacks merit for several reasons. First, MISO states that it is not proposing to remove any language identifying or requiring specific financial documents or information in a Proposal. MISO asserts that, to the extent that Republic claims it is unreasonable not to specify the precise financial documents to be required in the Tariff, this protest is improper and should have been raised in the docket where this language was approved. Second, MISO states that the standards by which MISO will evaluate Proposals are clearly detailed in the Tariff, and MISO does not propose to alter the showing of financial ability that a prospective transmission developer must make, the way in which MISO will evaluate that ability, or the weight to be given to that factor. MISO states that all that the new Financial Information provision does is allow MISO to specify the types of documents to be submitted to meet this showing in Business Practice Manuals, and it asserts that this flexibility is reasonable and necessary. MISO believes that the proper focus should be on the showing to be met, i.e., whether the transmission developer has the capital resources available to fund project costs as they arise and that details regarding the form and type of documents that should be submitted to meet this showing properly belong in Business Practice Manuals, where they may be changed if found inappropriate for a given Project.⁷⁷

⁷⁵ MISO Filing at 18.

⁷⁶ Republic Protest at 6-7 (citing *California Indep. Sys. Operator Corp.*, 122 FERC ¶ 61,271, at P 16 (2008) and *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at PP 453, 657 (2004)).

⁷⁷ MISO Answer at 7-8

iii. Commission Determination

66. We accept, subject to condition, MISO's proposed Financial Information provision. MISO states that the proposed provision does not change the existing requirement that the transmission developer have the capital resources available to fund project costs as they arise.⁷⁸ However, the proposed Financial Information provision is not limited to documentation to demonstrate capital resources available to fund a project and requires, more broadly, that each Proposal contain "information and details regarding the financials of the Proposal as further specified in the applicable Business Practice Manuals." Although it is appropriate to supplement information in the Tariff with information in Business Practice Manuals, MISO may not rely entirely on Business Practice Manuals to explain what is sufficient to meet the new Financial Information requirement.⁷⁹ Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, revisions to section VIII.D.5.7 of Attachment FF to clarify what types and the purpose of the financial information that must be included in each Proposal.

i. Confidential Treatment of Proposals

i. MISO Proposal

67. MISO proposes to revise the currently effective confidentiality provisions in the Tariff to specify what information will and will not be confidential. MISO states that currently, all information submitted with a Proposal is considered Confidential Information.⁸⁰ However, MISO states that it is required to publicly post a report after it concludes the evaluation of Proposals, identifying the Proposal designated as a Selected

⁷⁸ MISO Tariff, Attachment FF, §VIII.E.1.1.c (MISO is required to evaluate the "[d]escription of capital resources available to fund project costs as they arise.>").

⁷⁹ See, e.g., *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059, at P 288 (2013) (requiring details regarding what is sufficient to meet the firm capital commitment requirement are properly included in the OATT, not the business practice manuals).

⁸⁰ Confidential Information is any proprietary or commercially or competitively sensitive information, trade secret or information regarding a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Transmission Customer, Market Participant, or other user, which is designated as confidential by the entity supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise, that is received by MISO and is not disclosed except under the terms of a Confidential Information policy. MISO Tariff, Module A, § II.1.C (Definitions - C).

Proposal and MISO's basis for awarding the Selected Proposal from the comparative evaluation analysis.⁸¹ MISO states that, in order to produce a report that can effectively explain MISO's basis for selecting one proposal over another, it must be able to discuss various components of each submitted Proposal, at least at a high level. MISO states that it therefore proposes to revise the confidentiality provision to allow some of the information submitted in Proposals to be publicly disclosed.⁸²

68. Specifically, MISO proposes that it will not publicly post or share with any individual except employees of MISO and/or contractors of MISO that have executed an appropriate non-disclosure agreement, without the prior written consent of the RFP Respondent(s), the following categories of information submitted in a Proposal: (a) all detailed breakdowns of costs, including but not limited to, itemized costs for labor and materials; (b) all information pertaining to RFP Respondent's and Proposal Participant's financing arrangements; (c) any detailed design, routing, siting, or specialty construction techniques; and (d) any other items of data or portions of documents that are clearly labeled and specifically designated as confidential, except for the items specified in the section as being publically available or which MISO is otherwise required to make publicly available.⁸³

69. MISO proposes that the following categories of information shall not be considered or maintained as Confidential Information: (a) the names of RFP Respondents and Proposal Participants involved in a Proposal; (b) the high-level design for Competitive Transmission Facilities; (c) the total estimated cost of the Competitive Transmission Facilities; (d) the estimated 40 year annual transmission revenue requirement; (e) information relating to any cost-containment measures, cost caps, and rate incentives submitted by RFP Respondents and Proposal Participants; (f) information regarding in-service dates of the Competitive Transmission Facilities; (g) the final score assigned to each Proposal through MISO's comparative analysis evaluation, with the names of the RFP Respondents and Proposal Participants redacted; (h) all timetables and milestones agreed to between a Selected Developer(s) and MISO in the Selected Developer Agreement; (i) all publically available information; and (j) all information for which a RFP Respondent has provided consent to release.⁸⁴

⁸¹ MISO Filing at 22 (citing MISO Tariff, Attachment FF, § VIII.E.2).

⁸² *Id.* at 22.

⁸³ MISO Tariff, Attachment FF, § VIII.D.9 (Confidential Treatment of Proposals).

⁸⁴ *Id.*

ii. Protests

70. Republic argues that MISO's list of items that will not be kept confidential is vague in both the content of information released and in the timing of the release of information. Republic asserts that MISO should be required to revise the provision to clearly state what proposal information is not confidential at the time the proposal is made, and what selected developer information is no longer confidential once selection occurs.⁸⁵

71. Republic also asserts that MISO should be required to make clear that specific proposal information relating to total estimated cost, estimated 40 year annual transmission revenue requirement, and any cost-containment measures, cost caps, and rate-incentives submitted by RFP Respondents and Proposal Participants will remain confidential. Republic asserts that, while MISO states that the information that would be disclosed in an evaluation and selection report would be at a high level, the actual cost estimates, 40 year annual transmission revenue requirements, or specific cost containment language is not high level discussion or appropriately revealed. Republic states that California Independent System Operator (CAISO) has provided very detailed evaluation reports that provide high level information regarding its evaluation, without providing specific project proposal information.⁸⁶ Republic also argues that disclosure of specific proposal information provides no benefits to ratepayers, and can place transmission developers at a disadvantage in subsequent competitive solicitations.⁸⁷ Republic asserts that MISO should therefore be required to revise its proposal to make it very clear what information will be disclosed so that the Commission and potential RFP Respondents can evaluate the reasonableness of the proposed disclosure.⁸⁸

iii. MISO Answer

72. MISO states that its confidentiality proposal is reasonable and achieves a balance between transparency, MISO's obligation to provide a selection report, and the needs of

⁸⁵ Republic Protest at 8-9.

⁸⁶ *Id.* at 9 (citing <http://www.caiso.com/Documents/DelaneyColoradoRiverTransmissionLineProject-ProjectSponsorSelectionReport.pdf> and <http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf>).

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 10.

competing transmission developers to understand why their Proposal was not selected, against the interests of transmission developers in maintaining the confidentiality of their own information. MISO states that a clear distinction can be made between information submitted in a proposal that will be kept confidential (such as detailed breakdowns of costs, including but not limited to, itemized costs for labor and materials and information pertaining to financing arrangements), and the total estimated transmission project cost and the estimated 40 year annual transmission revenue requirement, which are not confidential. MISO does not believe that the bare 40 year estimated annual transmission revenue requirement for a transmission project, which a Selected Developer ultimately must file, is sensitive information that would prejudice a transmission developer in future solicitations. MISO also disagrees that that disclosure of such information provides no benefits to ratepayers. MISO states that disclosure of a transmission project's cost and what a developer expects to recover in rates is essential to providing the type of information needed for both regulators and ratepayers to evaluate whether the competitive selection process is working.⁸⁹

73. In addition, MISO states that because bidders are afforded significant latitude in crafting their own cost-containment proposals, MISO's public selection report must provide details about the cost caps received to explain why one Proposal was selected over another. MISO also states that it is essential that the details of any accepted cost containment or cost cap provisions be made public so that regulators and ratepayers with an interest in such proceedings can monitor and enforce these promises.⁹⁰

iv. Commission Determination

74. We accept, subject to condition, MISO's proposal to clarify what information in a Proposal will be treated as confidential information, and what information will not be treated as confidential information. We disagree with Republic that MISO should treat total estimated cost, estimated 40 year annual transmission revenue requirement, and any cost-containment measures, cost caps, and rate-incentives submitted by RFP Respondents and Proposal Participants as confidential. Such information is important to understand why one Proposal was selected over another, particularly with respect to any cost-containment proposals, which, as MISO notes, can vary among Proposals. In addition, Republic is wrong that disclosure of specific cost information in a Proposal provides no benefits to ratepayers. This information is clearly beneficial to ratepayers – the rates they pay may be based on the information supplied in the Proposal. In addition, we find unconvincing Republic's argument that disclosing cost information can place

⁸⁹ MISO Answer at 12.

⁹⁰ *Id.* at 12-13.

transmission developers at a disadvantage in subsequent competitive solicitations, at least with respect to the winning bidder. The winning bidder will ultimately have to disclose the annual transmission revenue requirement and cost-containment information if it expects to be able to recover such costs through a Commission-approved rate.

75. However, we agree with Republic that MISO's proposal is unclear about when MISO intends to disclose the non-confidential information submitted in a Proposal. MISO indicates that disclosure of much of the information will be in the post-evaluation selection report, but the Tariff language is unclear on this point. It is also unclear whether MISO intends to disclose in the post-evaluation selection report all non-confidential information submitted in all the Proposals or plans to disclose more detailed information only about the Proposal that is selected. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to revise section VIII.D.9 of Attachment FF to clarify: (1) when and in what manner MISO intends to disclose each category of non-confidential information and (2) what non-confidential information MISO intends to disclose for each Proposal (e.g., whether it intends to disclose more or different non-confidential information included in a Selected Developer's Proposal versus a Proposal that is not selected). Following receipt of this additional information, we will consider whether MISO's proposal strikes an appropriate balance between the need for transparency in the selection process and the protection of potentially sensitive commercial information for Proposals that are not selected.

j. Evaluation of Proposals

i. MISO Proposal

76. MISO states that among the non-substantive changes it is proposing are revisions at the beginning of section VIII.E (Evaluation of Proposals), which MISO states includes language moved from various provisions within the currently effective Tariff.⁹¹ The revised section includes language stating that, "Specific methods used to evaluate various aspects of a Proposal shall be described in the Business Practices Manuals."⁹² MISO also proposes language at the beginning of section VIII.E stating that MISO "may decline to accept any or all Proposals that do not meet the Tariff's requirements for the project classification in question or will not sufficiently address the Transmission Issue(s) the RFP was intended to address."⁹³

⁹¹ MISO Filing at 26.

⁹² MISO Tariff, Attachment FF, § VIII.E (Evaluation of Proposals).

⁹³ *Id.*

ii. Protests

77. Republic asserts that the Commission should require that the methods used to evaluate proposals be described in the Tariff rather than the Business Practice Manuals. Republic states that, although MISO asserts that section VIII.E constitutes language moved from existing provisions in the Tariff, MISO's overhaul of its as yet unused process warrants a renewed Commission review of the language. Republic states that the Commission's policy is that provisions which the "rule of reason" determines are "provisions significantly affecting rates, terms and conditions of service . . . must be filed for Commission approval" and included in the Tariff.⁹⁴ Republic also states that Order No. 1000 held that evaluation to determine the more efficient or cost-effective developer is necessary because of its direct impact on rates. According to Republic, the criteria by which MISO makes that determination, therefore, is the type of provision "significantly affecting rates, terms and conditions of service" and which should be set forth in the Tariff rather than the Business Practice Manuals. Republic argues that having the methods of evaluation located in the Business Practice Manuals, while the actual criteria to be evaluated are reflected in the Tariff, opens the opportunity for the Business Practice Manual evaluation methods to override the Tariff requirement. For these reasons, Republic argues that the criteria and methods of evaluation should be in the Tariff.⁹⁵

78. Republic also requests the Commission direct MISO to revise the language in section VIII.E of Attachment FF which states that MISO "may decline to accept any or all proposal that does not meet the Tariff's requirements for the project classification in question or will not sufficiently address the Transmission Issue(s) the RFP was intended to address." Republic states that, because MISO determines the project before competitive solicitation, there should be no instances in which proposals will not sufficiently address the Transmission Issue(s) the RFP was intended to address.⁹⁶ Republic also requests that the Commission require MISO to clarify that MISO will only decline to select a Proposal from a Qualified Transmission Developer if a Proposal does not meet the project classification in question, and, if a nonincumbent is assigned a transmission project under such circumstances, the nonincumbent will be required to sign the Selected Developer Agreement⁹⁷ and that MISO will prepare a Selection Report.⁹⁸

⁹⁴ Republic Protest at 12 (citing *California Indep. Sys. Operator Corp.*, 122 FERC ¶ 61,271 at P 16).

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 12-13.

⁹⁷ *Id.* at 13 (citing MISO Tariff, Attachment FF, § VIII.F (Selected Developer Agreement)).

Republic argues that review of the MISO analysis is equally critical and the Selection Report is necessary whether a project proposal was selected or MISO determined that no proposals meet the Tariff's requirements for the project classification in question.⁹⁹

iii. MISO Answer

79. MISO states that Republic does not dispute that the revisions it references in its protest are non-substantive. MISO states that, instead, Republic plainly seeks further, and untimely, rehearing of approved Tariff language based only on an assertion that "MISO's overhaul of its as yet unused process warrants a renewed Commission review of the language."¹⁰⁰ MISO states that this argument lacks merit and that the fact that a process is as yet unused is not relevant to the question of whether it already has been approved by the Commission and does not authorize collateral attacks.¹⁰¹

80. MISO states that Republic's protest of language stating that specific methods used to evaluate various aspects of a Proposal shall be described in the Business Practices Manuals is improper because this language already has been approved in the currently-effective Tariff. MISO states that, likewise, Republic's protest of language regarding MISO's ability to decline to accept Proposals that do not meet the Tariff's requirements also restate—and do not change—currently effective Tariff language.¹⁰²

81. MISO asserts, therefore, that Republic's arguments are beyond the scope of this proceeding and seek yet further consideration of matters that the Commission has considered, issued orders and rehearing orders on, and which now are being considered on appeal. MISO states that Republic's introduction of unrelated reforms that MISO's instant filing does not address does not bring these matters within the scope of the filing. Instead, according to MISO, the gravamen of Republic's complaint—that MISO's filing should have addressed certain matters not included in the September 16 Filing—

⁹⁸ *Id.* at 13 (citing MISO Tariff, Attachment FF, § VIII.E.2 (Proposal Selection and Posting Selection Report)).

⁹⁹ *Id.* at 13.

¹⁰⁰ MISO Answer at 5-6 (citing Republic Protest at 11-12).

¹⁰¹ *Id.* at 5-6.

¹⁰² *Id.* at 6.

demonstrates that they are beyond the scope of this docket and that this filing is not the appropriate forum to consider them.¹⁰³

iv. Commission Determination

82. We accept MISO's proposed non-substantive changes to the provisions describing how it will evaluate Proposals. We reject Republic's protest as beyond the scope of the changes MISO proposes in the instant filing. The Commission has previously accepted the language Republic protests, and MISO is not proposing to change the existing language. Specifically, the Commission previously accepted language in MISO's Tariff stating that "Specific methods used to evaluate various aspects of a New Transmission Proposal shall be described in the Business Practices Manual for Transmission Planning."¹⁰⁴ and "Transmission Provider may decline to accept any or all New Transmission Proposals that do not meet the Tariff's requirements for the project classification in question or will not sufficiently address the Transmission Issue(s) the Transmission Proposal Request was intended to address."¹⁰⁵ Republic's claim that MISO's overhaul of its as yet unused process warrants a renewed Commission review of the language is insufficient for us to revisit the acceptance of the previously-approved language. If Republic believes that language in MISO's Tariff that the Commission has previously approved, and that MISO is not proposing to change, is no longer just, reasonable or unduly discriminatory, it may file a complaint pursuant to section 206 of the FPA.

k. Additional Tariff Changes

83. MISO proposes various other unprotested changes to the competitive transmission developer and selection process. We accept MISO's remaining proposed changes to the competitive transmission developer qualification and selection process in Attachment FF of its Tariff. We find these changes provide additional clarity regarding this process and are otherwise consistent with Order No. 1000.

¹⁰³ *Id.* at 5.

¹⁰⁴ MISO Tariff, Attachment FF, § VIII.E.8 (Evaluation and Selection).

¹⁰⁵ *Id.* § VIII.9 (Recourse if No New Transmission Proposals are Received or Selected).

2. Selected Developer Agreement

a. Overview

84. MISO proposes to eliminate from the Tariff references to the Binding Proposal Agreement. MISO states that this proposal is in response to stakeholder opposition to executing a separate agreement before their Proposal is selected.¹⁰⁶ In its place, MISO proposes a new section in Attachment FF titled “Selected Developer Agreement,” which states that the RFP Respondents identified in a Selected Proposal shall execute the Selected Developer Agreement or request the submission of an unexecuted Selected Developer Agreement with the Commission no later than 60 days after MISO posts the name of the Selected Developers on its website.¹⁰⁷ MISO states that this approach allows obligations to be imposed at the point where they become relevant and is similar to PJM and CAISO, which use post-selection *pro forma* developer agreements rather than a separate binding proposal agreement.¹⁰⁸

85. Specifically, after a developer’s proposal is selected in MISO’s Order No. 1000 competitive bidding process, MISO proposes to require that the winning developer (Selected Developer)¹⁰⁹ execute its proposed *pro forma* Selected Developer Agreement.¹¹⁰ According to MISO, the objective of the Selected Developer Agreement is to provide and enforce the rights and obligations of the Selected Developer, MISO, and any assigned party, if applicable, during the development and construction of the Competitive Transmission Project (Project), consistent with the Selected Developer’s proposal.¹¹¹ Specifically, among other things, the Selected Developer Agreement defines each party’s roles regarding how the development and construction of the project will be monitored, modified, insured, and administered, and how the Selected Developer will recover certain costs. In addition, the Selected Developer Agreement provides

¹⁰⁶ MISO Filing at 24.

¹⁰⁷ MISO Tariff, Attachment FF, § VIII.F (Selected Developer Agreement).

¹⁰⁸ MISO Filing at 24.

¹⁰⁹ If an incumbent transmission developer’s proposal is selected, it will be treated as a Selected Developer for the purposes of constructing and implementing the associated transmission project.

¹¹⁰ MISO Filing at 27.

¹¹¹ *Id.* at 27-28.

requirements and procedures for identifying and resolving disputes, defaults, contract breaches, and it specifies which terms survive after the Selected Developer Agreement is terminated. Lastly, MISO states it will report agreements conforming to the *pro forma* Selected Developer Agreement through the Commission's Electronic Quarterly filing process, and that it will file nonconforming agreements with the Commission.

b. Proposed Provisions

i. Effective Date, Term, and Termination

(a) MISO's Proposal

86. Article 2 provides that the Selected Developer Agreement will become fully effective when the Selected Developer executes the Selected Developer Agreement and provides a financial deposit of three percent of the cost of the Project.¹¹² MISO states that the Commission approved PJM's request to require a deposit of three percent of the project costs.¹¹³ Article 2 also provides that the agreement will terminate if the project has been cancelled,¹¹⁴ the Selected Developer defaults,¹¹⁵ the project is reassigned to another entity,¹¹⁶ or the project is completed and the facilities are turned over to MISO's functional control.¹¹⁷ According to Article 2, no termination shall become effective until

¹¹² Under this provision, the Selected Developer has 30 days to obtain financial security, and during this time the agreement will be provisionally effective. If the Selected Developer fails to timely secure the requisite financial security, it will not be in default, but the agreement will be terminated and treated as if it was never effective. Selected Developer Agreement, Article 2.1 (Effective Date).

¹¹³ MISO Filing at 30 (citing PJM Operating Agreement, Schedule 6, § 1.5.8(j); PJM, Intra-PJM Tariffs, OATT Attachment KK (PJM Designated Entity Agreement), Article 3).

¹¹⁴ Selected Developer Agreement, Article 2.3.3 (Project Cancellation).

¹¹⁵ *Id.* Article 2.3.2 (Default).

¹¹⁶ *Id.* Article 2.3.4 (Reassignment).

¹¹⁷ *Id.* Article 2.3.1 (Project Completion).

the parties have complied with the laws and regulations applicable to such termination and MISO has filed a notice of termination with the Commission.¹¹⁸

87. Upon termination of the Selected Developer Agreement, Article 2 provides that all parties shall have certain responsibilities. Specifically, each party shall use commercially reasonable efforts to mitigate the associated costs and damages arising as a consequence of the termination.¹¹⁹ For the portion of the project that has not yet been constructed, under Article 2, the Selected Developer is required to stop work, provide MISO with a summary of all pending contracts and orders, and cancel any pending orders or contracts associated with the project, unless otherwise advised by MISO.¹²⁰ However, in the event that the project is reassigned, MISO may require that the Selected Developer assign pending contracts directly to the entity designated to complete the project.¹²¹ Article 2 further requires that if a project is cancelled or reassigned due to the Selected Developer's default, the Selected Developer will be responsible for all costs incurred by MISO to facilitate the cancellation or reassignment, otherwise MISO will bear its own costs.¹²²

88. Article 2.5 provides that certain terms will survive after the Selected Developer Agreement is terminated, expired, or cancelled. Specifically, obligations that arise from acts or events that occurred while the Selected Developer Agreement was in effect shall perpetually remain in effect for the purposes of determining and enforcing of those obligations. Article 2.5 provides that the rights and obligations of the parties shall survive the termination, expiration, or cancellation of the Agreement. However, according to Article 2.5, the liability and indemnity provision provided in Article 13 shall

¹¹⁸ *Id.* Article 2.3.5 (Compliance with Applicable Laws and Regulations and FERC Acceptance).

¹¹⁹ *Id.* Article 2.4 (Termination Responsibilities).

¹²⁰ *Id.* Article 2.4 (Termination Responsibilities).

¹²¹ MISO Filing at 31.

¹²² Selected Developer Agreement, Article 2.4 (Termination Responsibilities). With respect to any portion of the Project already installed or constructed, the Selected Developer will bear all costs associated with rendering the construction site safe, and storing and/or returning, preserving, and maintaining, all materials, equipment, or facilities associated with the project.

survive termination, expiration, or cancellation of the Agreement and remain in effect until the Selected Developer executes the MISO Transmission Owners Agreement.¹²³ MISO states that this approach and structure is similar to that employed by PJM in its Designated Entity Agreement.¹²⁴

(b) **Protests**

(1) **Termination Responsibilities**

89. Edison, NextEra, Republic, Transource, and Xcel argue that it is unreasonable to require Selected Developers to find counterparties that will agree to allow it to assign contracts to an unidentified third-party.¹²⁵ Edison argues that this requirement places developers at a disadvantage and could discourage developers from participating in the MISO process.¹²⁶ Republic states that a similar provision was proposed by a CAISO stakeholder and rejected by CAISO.¹²⁷ Transource argues that this provision creates significant uncertainty as to ownership of project assets, and it is unclear whether project financing, which typically has superior ownership rights to equity in the case of default, would allow or accommodate this type of control by a third party. Additionally, Transource asserts that MISO can neither own transmission nor take direct ownership of contracts related to the construction of transmission assets.¹²⁸

90. Republic and Transource argue that MISO should also eliminate the obligation in Article 2 requiring that a Selected Developer cancel existing contracts upon termination of the Selected Developer Agreement because such requirement may inappropriately impose costs on a Selected Developer. For example, instead of being able to recover costs by selling equipment under a contract, the Selected Developer will be subject to

¹²³ *Id.* Article 2.5 (Survival). The Transmission Owners Agreement must account for the project's facilities. *Id.*

¹²⁴ MISO Filing at 32.

¹²⁵ Edison Protest at 14; NextEra Comments at 6-7; Republic Protest at 14-15; Xcel Comments at 30.

¹²⁶ Edison Protest at 14-15.

¹²⁷ Republic Protest at 14 (citing September 10, 2014 filing letter of CAISO in Docket No. ER14-2824, at 9).

¹²⁸ Transource Comments at 7.

damages for cancelling a contract.¹²⁹ Xcel argues that this requirement could increase the overall cost of the project by eliminating a transmission developer's ability to use Master Services Agreements or other types of specifically tailored agreements which often times reduce the costs of goods and services. Xcel asserts that Article 2 should be amended to require only that MISO and the Selected Developer work in good faith to transfer contracts, to the extent applicable to any new entity.¹³⁰ Xcel states that this type of language is consistent with Commission-approved language in the CAISO Approved Project Sponsor Agreement.¹³¹ Xcel further asserts that the Selected Developer Agreement contains no provisions for how in-house work is to be addressed should the Project be assigned to a third party under the variance analysis provisions of the Tariff.¹³²

91. Edison argues that the deadlines in Article 2 could be difficult to meet and that a Selected Developer only should be required to make "reasonable commercial efforts" to meet deadlines for stopping work and reporting pending contracts.¹³³ Edison further argues that MISO should add a provision clearly stating that the Selected Developer Agreement is not intended to limit a Selected Developer's ability to recover costs from abandoned plant.¹³⁴

92. Midcontinent MCN states that if the Selected Developer Agreement is terminated, the Selected Developer is required to perform certain wind-down activities, such as render safe, store, preserve, and maintain the project.¹³⁵ According to Midcontinent MCN, if the Selected Developer is in default, it is responsible for bearing all of the costs for the wind-down activities, yet if the Selected Developer is not in default, MISO will cover only MISO's own share of the wind-down costs. Transource argues that this provision is an unjust and unreasonable inequity.¹³⁶ Midcontinent MCN argues that

¹²⁹ *Id.* at 3-4 (referring to Selected Developer Agreement, Article 2.4.B.2).

¹³⁰ Xcel Comments at 30 (referring to Selected Developer Agreement, Article 2.4.B.1).

¹³¹ *Id.* at 30 (citing CAISO Approved Project Sponsor Agreement at Article 5.8).

¹³² *Id.* at 30-31.

¹³³ Edison Protest at 14.

¹³⁴ *Id.* at 19.

¹³⁵ Midcontinent MCN Comments at 7.

¹³⁶ Transource Comments at 4.

MISO should revise Article 2 to clarify that the Selected Developers will only bear wind-down costs if it defaults and that MISO will pay for all wind-down costs if the project is cancelled or reassigned due to events outside a Selected Developer's control.¹³⁷

93. NextEra argues that MISO should clarify that although Article 2 does not specify how a Selected Developer will recover the cost to reassign a project, this omission does not restrict or impair a Selected Developer's right to seek cost recovery for such costs under the FPA.¹³⁸ Transource and Xcel argue that MISO should include in its Tariff language stating whether the Selected Developer can either recover these costs or charge them to a third party to whom the Project is reassigned.¹³⁹

(2) Survival Provision

94. MISO Transmission Owners assert that the survival provision is too vague and should be clarified.¹⁴⁰ Midcontinent MCN asserts that the survival provision in Article 2 is needlessly complex and should be as straight-forward as the corresponding Commission-approved provision in PJM's Designated Entity Agreement.¹⁴¹

95. Xcel argues the provision regarding liability and indemnity is superfluous. Xcel further posits that MISO should specify whether the three year statute of limitation period under Delaware Law governs the survival obligations specified in the first sentence of Article 2.5.¹⁴²

96. Transource argues that because the Selected Developers will use the Selected Developer Agreement to obtain project financing, the Selected Developer Agreement obligations should either terminate upon termination of the Selected Developer Agreement, or the Selected Developer Agreement should remain in full effect until all obligations are satisfied.¹⁴³ Edison argues that such provisions should not survive past

¹³⁷ Midcontinent MCN Comments at 7 (referring to Article 2.4.D).

¹³⁸ NextEra Comments at 8 (referring to Article 2.4.C).

¹³⁹ Xcel Comments at 31; Transource Comments at 4.

¹⁴⁰ MISO Transmission Owners Comments at 6-7.

¹⁴¹ Midcontinent MCN Comments at 8.

¹⁴² Xcel Comments at 32-33.

¹⁴³ Transource Comments at 7.

the project development stage, and that having it go longer will interfere with the Transmission Owners Agreement. Edison contends that after the project is under MISO's operational control, through the survival provision, the terms of the Selected Developer Agreement will inappropriately impose on nonincumbent transmission owners obligations that are properly governed by the Tariff or Transmission Owners Agreement. As such, Edison argues, Selected Developers are held to different standards than incumbent transmission owners that develop local transmission projects and, to the extent that a Selected Developer is also an incumbent transmission owner, incumbent transmission owners will be subject to two different sets of requirements. According to Edison, under MISO's proposal, the surviving provisions of the Selected Developer Agreement could remain in effect for the entire life of the project.

97. For example, Edison states that the insurance obligations that the Selected Developer Agreement imposes on a Selected Developer do not terminate after construction of the project is complete, and there is no similar provision in the Tariff or Transmission Owners Agreement that applies to local transmission projects. Similarly, Edison contends that the liability provisions should not survive after the Selected Developer Agreement is terminated, as a Selected Developer should be subject to the same liability provisions as all MISO transmission owners once its project is energized and it has signed the Transmission Owners Agreement.¹⁴⁴ Lastly, Edison further argues that the refund obligations that survive the Selected Developer Agreement should be in the Transmission Owners Agreement.¹⁴⁵

(c) **MISO Answer**

(1) **Termination Responsibilities**

98. MISO states that it agrees with protestors that Article 2.4.B's assignability and cancellation provisions could result in unforeseen commercial difficulty and interfere with contract formation and damages mitigation. MISO states that it agrees with Xcel that a simpler obligation requiring the Selected Developer to work in good faith to transfer needed contracts in the event of reassignment would help facilitate the transition process while alleviating the concerns of protestors. Therefore, MISO proposes several changes to address the concerns.¹⁴⁶ However, MISO disagrees with protestors that Article 2 needs to state how a developer can recover costs when the Selected Developer

¹⁴⁴ Edison Comments at 11-13.

¹⁴⁵ *Id.* at 13.

¹⁴⁶ MISO Answer at 19.

Agreement is terminated for a reason other than when the developer defaults. MISO states that, if the Selected Developer Agreement is terminated, the Selected Developer may submit a filing under FPA to recover such costs and that it is not appropriate for MISO to cover such costs for the Selected Developer because its costs are socialized to its members, so to the extent that the developer has such filing rights it should make the necessary filing.¹⁴⁷

(2) Survival Provisions

99. MISO disagrees with Edison's contention that the Selected Developer Agreement does not transition a Selected Developer's rights and responsibilities to the Tariff and Transmission Owners Agreement once that Selected Developer has turned over functional control of the project to MISO. MISO argues that the survival provision is reasonable in that it allows obligations to survive termination of the Selected Developer Agreement only to the extent necessary to provide for the determination and enforcement of these obligations arising from acts or events that occurred while the Selected Developer Agreement was in effect.¹⁴⁸ Thus, MISO concludes, in general, the survival obligations will be "determined long before the limitations period occurred."¹⁴⁹ MISO also disagrees with Xcel's argument that the survival language relating to liability and indemnity is superfluous. MISO states that its proposal is the result of stakeholder discussions in which stakeholders asked for certainty about when the insurance and indemnity provisions would terminate, but agreed that a Selected Developer should not be required to maintain insurance to cover losses that occur after energization of the project, when the Transmission Owners Agreement would apply, and that after a Selected Developer executes the Transmission Owners Agreement, the indemnity provisions of the Transmission Owners Agreement and Tariff should govern, except for "tail coverage." MISO argues that, in accordance with the stakeholder discussions, the proposed provision acts to accelerate the time at which the insurance and indemnity provisions terminate.¹⁵⁰

¹⁴⁷ *Id.* at 21.

¹⁴⁸ *Id.* at 22-23.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ *Id.* at 23-24.

(d) **Commission Determination**

100. We accept, subject to condition, MISO's proposed provisions in Article 2. Specifically, we agree with protestors that MISO should not include the proposed provisions reserving MISO's right to assign or direct termination of contracts with third parties upon termination of the Selected Developer Agreement and requiring Selected Developers to make any third-party contracts assignable to MISO. We agree with protestors that such provisions may not be commercially practical and could potentially increase the total cost of Projects. We agree with the changes MISO proposed in its answer to address these concerns.¹⁵¹ Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to: (1) remove Article 2.4A, which requires the Selected Developer to stop work on the transmission project within five business days after receipt of the termination notice or on the effective date of such termination notice, (2) remove Article 2.4B(2), which requires the Selected Developer to cancel any pending orders of, or return, any materials or equipment for, or contracts for construction of, Competitive Transmission Facilities, (3) remove the language in Article 2.4B(1) regarding MISO's right to require a Selected Developer to assign a pending contract, order, procurement, or other written assignment directly to another entity designated to complete the Project and a Selected Developer's obligation to secure and protect this right, and (4) insert language providing for an obligation for the Selected Developer to work in good faith with the entity to which the Project is to be assigned and third parties to facilitate the transfer, including the transfer of any contracts relating to the Project that the incoming developer desires to procure.

101. In regard to the survival provision, we agree with MISO that all contractual obligations should be satisfied even after the termination of the agreement, unless it is specified that those obligations will be governed by the Tariff or subsequent agreements.¹⁵² To that end, we find the termination of the liability and indemnity provisions to be reasonable, noting MISO's explanation that this provision was a result of stakeholder discussions regarding certainty about when these obligations terminate and stakeholder agreement that the Tariff and ISO Agreement will appropriately govern such obligations. However, we decline to direct MISO to revise Article 2.5 to specify a statute of limitations in the open-ended clause of the survival provision. We note that the clause

¹⁵¹ *Id.* at 19-20.

¹⁵² *See, e.g., Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,262, at P 98 (2008) (finding that the open-ended survival clause in CAISO's *pro forma* scheduling coordinator agreement appropriately prevents parties from eventually avoiding liability for obligations that occurred prior to the termination of the agreement).

applies to obligations arising from acts or events that occurred while the Selected Developer Agreement was in effect. If the survival clause was not open-ended, parties could eventually avoid liability for financial and other obligations that occurred prior to the termination of a Selected Developer Agreement. Therefore, we find that it is reasonable for a Selected Developer to remain responsible for performing such obligations because the Selected Developer should satisfy its obligations under the Selected Developer Agreement while such agreement was in effect.

102. We find that Edison's concerns about the extent to which the insurance and liability provisions of the Selected Developer Agreement survive after the Selected Developer Agreement is terminated and its assertion that the Transmission Owners Agreement does not impose similar provisions on incumbent transmission owners are misplaced. Article 2.5 provides that the liability and indemnity provisions under the Selected Developer Agreement terminate after the Selected Developer executes the Transmission Owners Agreement for the project; thus, similar to the incumbent transmission owners, the nonincumbent transmission developers will not be subject to similar provisions under both agreements at the same time. We also note that Article 13.3.1 regarding Selected Developer insurance obligations specifies that a Selected Developer is only required to maintain the default minimum insurance coverages for a project "*throughout the period of [the Selected Developer Agreement].*"¹⁵³ Similarly, we reject Transource's claim that the survival provision regarding liability and insurance obligations is superfluous. For the aforementioned reasons, it is appropriate for Article 2.5 to specify that the liability and insurance obligations will terminate after the Selected Developer executes the Transmission Owners Agreement. As MISO explained, through the stakeholder process, it determined that the liability and insurance provisions of the Selected Developer Agreement would inappropriately overlap similar provisions in the Tariff or Transmission Owner Agreement.

103. We reject Edison's assertion that the refund provision obligations should also be transferred to the Transmission Owners Agreement. As stated earlier, all contractual obligations should be satisfied even after the termination of the Selected Developer Agreement, unless it is specified that those obligations will be governed by a subsequent agreement. We find it reasonable that MISO has elected to have the Selected Developer Agreement govern the Selected Developer's obligations to provide refunds or adjustments to its recovered costs, as such costs were incurred pursuant to the Selected Developer's obligations under the Selected Developer Agreement.

104. In regard to NextEra's concern about whether Article 2 waives a Selected Developer's filing rights, we agree with MISO that the Selected Developer Agreement

¹⁵³ Selected Developer Agreement, Article 13.3.1 (emphasis added).

does not affect a Selected Developer's rights to seek cost recovery with the Commission under the appropriate section of the FPA.

ii. **Financial Security**

(a) **MISO Proposal**

105. Article 3 provides that the Selected Developer is required to submit financial security to MISO in an amount equal to three percent of the total estimated cost of the project in the form of either an irrevocable letter of credit or cash deposit.¹⁵⁴ If the Selected Developer provides a cash deposit, Article 3 provides that the Selected Developer must wire the funds to an account that MISO designates.¹⁵⁵

106. According to Article 3, MISO will use the financial security if it conducts a variance analysis that is prompted by a Selected Developer's default.¹⁵⁶ Specifically, Article 3 provides that MISO will use the financial security to offset the costs of reevaluating the project and Selected Developer, and transitioning the project to a new entity, or MISO will distribute the funds as directed by the Commission.¹⁵⁷

107. For a Selected Developer that provides, as support for its winning proposal, an "Acknowledgment of Support" from its parent or affiliate, Article 3.5 provides that such developer must maintain the acknowledgment during the term of the Selected Developer Agreement.¹⁵⁸

¹⁵⁴ *Id.* Article 3 (Financial Security). The letter of credit must be in effect (or cash deposit held) for the term of this agreement and for an additional 60 calendar days following the date of termination of the agreement. *Id.* Article 3.1 (Irrevocable Standby Letter of Credit); Article 3.2 (Cash Deposit).

¹⁵⁵ *Id.* Article 3.2 (Cash Deposit).

¹⁵⁶ *Id.* Article 3.3 (Right to Draw on Financial Security).

¹⁵⁷ *Id.* Article 3.4 (Distribution of Financial Security). Such costs may include consultant fees, attorneys' fees, cost of litigation/regulatory proceedings, and staffing costs directly attributable to taking action pursuant to the variance analysis. *Id.*

¹⁵⁸ MISO Filing at 33-34; Selected Developer Agreement, Article 3.5. If MISO finds that the entity that has provided the acknowledgement of support is no longer capable of providing such support, MISO may require the Selected Developer to

(b) Protests

108. Edison argues that there should be a cap on MISO's ability to use the financial security and that all disbursements should be subject to review by the Commission.¹⁵⁹

109. Republic argues that MISO's Tariff has no requirement that the Selected Developer post financial security and the Commission should reject MISO's effort to create such an obligation through the Selected Developer Agreement rather than the Tariff.¹⁶⁰

110. Transource states that the financial security will cover certain costs that MISO incurs when it performs a variance analysis. However, because MISO plans to revise the variance analysis, Transource argues, MISO has not stated how it will use the financial security; therefore, Transource asserts, MISO has not justified the need for the financial security requirement.¹⁶¹

111. Xcel argues that Article 3, regarding MISO's right to draw on the financial security to offset costs that it incurs for conducting a variance analysis does not address how the Selected Developer may recover similar costs. Further, Xcel asserts, the variance analysis provisions of the Tariff do not require the Selected Developer to pay for the costs of reevaluation. Thus, Xcel requests that the Commission direct MISO to address the aforementioned cost recovery issues in MISO's Tariff and stakeholder process.¹⁶²

112. MISO Transmission Owners assert that "Acknowledgement of Support" is not a defined term in the Tariff or Selected Developer Agreement and should be defined in the Selected Developer Agreement.¹⁶³

substitute the acknowledgement of support or provide an alternate solution. Selected Developer Agreement, Article 3.5.

¹⁵⁹ Edison Protest at 15 (citing PJM Designated Entity Agreement at Article 3.1).

¹⁶⁰ Republic Protest at 15-16.

¹⁶¹ Transource Comments at 4.

¹⁶² Xcel Comments at 33-34.

¹⁶³ MISO Transmission Owners Comments at 7.

(c) **MISO Answer**

113. In response to Republic's contention that the Project Financial Security requirement should be in the Tariff, MISO states that such action is unnecessary because the Selected Developer Agreement will, upon acceptance, become a part of the Tariff. Moreover, MISO states, the Selected Developer Agreement will be binding on the parties to the agreement.¹⁶⁴

114. MISO states that, contrary to Transource's contention, it has justified the Project Financial Security requirement by explaining that project abandonment, cancellation, or reassignment could result in MISO or the entity assigned to construction incurring significant costs in terms of labor, expertise, and increased construction costs. MISO further states that it would be unjust and unreasonable to socialize these costs among MISO ratepayers.¹⁶⁵ MISO contends that without the financial security requirement, MISO would be forced to obtain these funds from the Selected Developer after a default, which would involve costly and time-consuming litigation or bankruptcy proceedings with the possibility that not all needed funds would be recovered. Furthermore, MISO notes, MISO modeled its financial security requirement off of requirements that the Commission has already accepted for the same purpose.¹⁶⁶

115. MISO disagrees with claims that it has not explained the precise situations under which it will use the financial security and that the proposal is premature because MISO has not yet made changes to the variance analysis. MISO states that the Selected Developer Agreement explains how it will use the financial security and reserves to the Commission the right to direct that financial security be used in other ways. MISO further states that the instant filing does not include revisions to the variance analysis provisions of the Tariff, and that Transource's comments regarding reporting how MISO uses financial security are premature insofar as such language would be included in these revisions.¹⁶⁷

116. With respect to MISO Transmission Owners' assertion that the term "Acknowledgement of Support" is not defined in the Selected Developer Agreement,

¹⁶⁴ MISO Answer at 25.

¹⁶⁵ *Id.* at 26 (citing MISO Filing at 33).

¹⁶⁶ *Id.* at 26-27 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 271 (2013)).

¹⁶⁷ *Id.* at 27-28.

MISO agrees and, if so directed by the Commission, will include a definition for this term on compliance.¹⁶⁸

(d) **Commission Determination**

117. We accept, subject to condition, MISO's proposed financial security provisions under Article 3. Specifically, in submitting the financial security deposit, the Selected Developer is permitted, under Article 3, to wire a cash deposit to a designated account. In the event that deposit is not used, MISO will return the deposit to the Selected Developer.¹⁶⁹ However, MISO does not specify that it will include interest with any deposit refund. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 3 to state that MISO will include interest, calculated pursuant to section 35.19(a) of the Commission's regulations,¹⁷⁰ with any cash deposit that is returned to the Selected Developer.

118. In regard to Xcel's assertion that MISO should clarify how it uses the financial security, we find that the Selected Developer Agreement adequately states how MISO will use the financial security. Specifically, Article 3.4 (Distribution of Financial Security) provides that MISO may use the financial security to offset costs reasonably incurred to reevaluate the Project, and that such costs may cover staffing, consulting fees, and regulatory proceedings. However, we find that MISO should provide to the Selected Developer an accounting of the actual reevaluation cost that is offset by the financial security. In Order No. 2003,¹⁷¹ the Commission required certain conditions to ensure that the Interconnection Customer is adequately informed regarding the actual costs of

¹⁶⁸ *Id.* at 28.

¹⁶⁹ Selected Developer Agreement, Article 3.3 ("The Transmission Provider shall hold the Cash Deposit for the term of this Agreement...and for an additional period of sixty (60) Calendar Days following the termination date of this Agreement...").

¹⁷⁰ 18 C.F.R. § 35.19(a) (2015).

¹⁷¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

studies.¹⁷² Similarly, we find that the Selected Developer should be informed of the actual reevaluation costs. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to revise the Selected Developer Agreement to add a requirement that upon the termination of a Selected Developer Agreement, it will provide the Selected Developer with a detailed and itemized accounting of the financial security.

119. MISO agrees with MISO Transmission Owners' assertion that it should define the term "Acknowledgement of Support" in the Selected Developer Agreement. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to include such a definition in the Selected Developer Agreement.

120. We reject Transource's claim that the financial security provisions in Article 3 are not justified because MISO is planning to revise the variance analysis provisions located in the Tariff. We find that the financial security provision does not conflict with the existing variance analysis provisions in the Tariff. In particular, the Tariff provides the specific circumstances under which MISO may conduct a variance analysis, such as material schedule delays and cost increases; however, that list is not exhaustive.¹⁷³ Therefore, currently, MISO may perform a variance analysis pursuant to this provision of the Selected Developer Agreement. To the extent Transource believes any future changes to the variance analysis provisions have an impact on the Selected Developer Agreement, it can raise any concerns if and when such changes are submitted to the Commission.

121. In regard to Xcel's protest that Article 3 does not provide for how a Selected Developer may recover the cost associated with MISO performing a variance analysis for a Project, we note that cost recovery for Project costs is governed by Article 9, not

¹⁷² See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 220 (requiring Transmission Provider to provide "detailed and itemized accounting" of Interconnection Study costs); See *ISO New England Inc.*, 150 FERC ¶ 61,209, at PP 270-271 (2015) (finding that for the deposit that the developer provides to ISO-NE to cover certain study costs, ISO-NE must provide the qualified developer with a detailed and itemized accounting of how it used the deposit).

¹⁷³ MISO Tariff, Attachment FF, Article IX, Variance Analysis ("[C]ertain circumstances or events may significantly affect such an [sic] Competitive Transmission Project in a manner and to a degree that would require the Transmission Provider to perform a Variance Analysis. *Such circumstances or events may include, but are not limited to...*") (emphasis added).

Article 3. In addition, MISO confirms that nothing in the Selected Developer Agreement limits a Selected Developer's right to file with the Commission a request for cost recovery under the FPA.

iii. Regulatory Filings and Tariff Compliance

(a) MISO Proposal

122. Article 4 provides that MISO will file the Selected Developer Agreement with the Commission.¹⁷⁴ It also provides that the Selected Developer shall comply with MISO's Tariff,¹⁷⁵ but if the Selected Developer Agreement is inconsistent with the Tariff, the Tariff shall govern.¹⁷⁶

123. Article 4 requires that before the project's in-service date, the Selected Developer must certify that it will operate its project within the boundaries of a "Balancing Area."¹⁷⁷ Also, prior to placing the project in service, the Selected Developer shall certify that it has complied with certain NERC standards.¹⁷⁸ Upon placing the project in service, according to Article 4, the Selected Developer must agree that the project will be placed under MISO's functional control.¹⁷⁹

124. In regard to complying with interconnection requirements, Article 4 provides that the Selected Developer must execute a Transmission-to-Transmission Interconnection Agreement with each interconnecting transmission owner.¹⁸⁰ Also, the Selected Developer must comply with the interconnection requirements and standards, effective as

¹⁷⁴ Selected Developer Agreement, Article 4.1 (Filing).

¹⁷⁵ *Id.* Article 4.2 (Selected Developer Subject to Tariff).

¹⁷⁶ *Id.* Article 4.3 (Relationship Between this Agreement and the Tariff).

¹⁷⁷ *Id.* Article 4.6 (Commitment to Operate with a Balancing Authority).

¹⁷⁸ *Id.* Article 4.7 (NERC Registration & Reliability Standards).

¹⁷⁹ *Id.* Article 4.5 (ISO Agreement and Requirement to Become a Transmission Owner). In addition to the Selected Developer agreeing to turn over operational control of the project's facilities, construction of the projects must be complete. *Id.*

¹⁸⁰ *Id.* Article 4.4 (Transmission-to-Transmission Interconnection Agreements). A Selected Developer must also execute all other agreements required by non-MISO transmission providers. *Id.*

of the effective date of the Selected Developer Agreement, of each entity with whose facilities the project will interconnect.¹⁸¹ Article 4 also provides that the Selected Developer and the Interconnecting Transmission Owner “shall take commercially reasonable efforts to finalize and execute the required” interconnection agreement within a specified timeframe.¹⁸² If the agreement is not executed within the specified timeframe, Article 4 provides that such delay will not be “automatically construed against” the Selected Developer if MISO conducts a variance analysis.¹⁸³ Article 4 provides that the interconnection agreement must be executed or filed unexecuted with the Commission before the project is energized or prior to the start of construction of the project.¹⁸⁴

(b) **Protest**

(1) **Filing Requirements for the Selected Developer Agreement**

125. MISO Transmission Owners assert that Article 4.1 should be revised to clarify that only Selected Developer Agreements that do not conform to the *pro forma* Selected Developer Agreement must be filed with the Commission and that conforming Selected Developer Agreements will be reported through MISO’s Electronic Quarterly Reports process.¹⁸⁵

(2) **Resolving Conflicts Between the Selected Developer Agreement and the Tariff or Other Agreements**

126. Xcel argues that Article 4.3 should specify that any conflicts between the Selected Developer Agreement and the Selected Developer’s proposal, or between the Selected Developer Agreement and the Selected Developer Agreement appendices shall be

¹⁸¹ *Id.* Article 4.8 (Interconnection and Reliability Criteria, Requirements, or Standards).

¹⁸² *Id.* Article 4.4 (Transmission-to-Transmission Interconnection Agreements).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ MISO Transmission Owners Comments at 7.

resolved in favor of the Selected Developer Agreement, consistent with the conflicts provision in MISO's *pro forma* Generator Interconnection Agreement.¹⁸⁶

(3) **NERC Certification**

127. Edison argues that the provisions related to complying with NERC reliability standards seem premature because Article 4 appears to require that the Selected Developer comply with each reliability standard well before the in-service date of the project, even if some standards are not yet applicable, and it requires a certification, which could result in a liability that other incumbent transmission owners do not face when constructing non-competitive projects.¹⁸⁷ Similarly, Transource argues that Article 4 inappropriately requires the Selected Developer to perform the reliability function of a NERC transmission owner before the Selected Developer becomes a transmission owner.¹⁸⁸

(4) **Commitment to Operate within a Balancing Authority**

128. To be consistent with the Tariff, MISO Transmission Owners assert that MISO should revise Article 4 to state that a Selected Developer must commit to operate in a "Local Balancing Authority" rather than a "Balancing Authority."¹⁸⁹

(5) **Transmission-to-Transmission Interconnection Requirements**

129. MISO Transmission Owners, NextEra and Xcel assert that the Interconnecting Transmission Owner is not a party to the Selected Developer Agreement and, therefore, the Interconnecting Transmission Owner cannot have obligations under the agreement.¹⁹⁰

¹⁸⁶ Xcel Comments at 34-35 (citing MISO Tariff, Attachment X, Appendix 6 at Article 30.2 ("In the event of a conflict between the body of this GIA and any attachment, appendices or exhibits hereto, the terms and provisions of the body of the GIA shall prevail and be deemed the final intent of the Parties.")).

¹⁸⁷ Edison Protest at 14.

¹⁸⁸ Transource Comments at 11.

¹⁸⁹ MISO Transmission Owners Comments at 4.

¹⁹⁰ *Id.* at 8-9; NextEra Comments at 6; Xcel Comments at 26.

Thus, NextEra requests that the Commission direct MISO to insert any requirements of the Interconnecting Transmission Owner in Attachment FF of the Tariff.¹⁹¹ NextEra also requests that the Commission direct MISO to clarify whether transmission-to-transmission interconnection agreements must be executed or filed with the Commission either prior to the start of construction or prior to the energization of any competitive transmission facilities, because it may not require both.¹⁹²

130. NextEra also argues that the requirement for Interconnecting Transmission Owners and Selected Developers to take commercially reasonable efforts to finalize and execute the required Transmission-to-Transmission Interconnection at least 120 days before the scheduled in-service date of the Project is not adequate to protect a Selected Developer from being removed from the Project due to delays in executing the agreement that are outside its control.¹⁹³ Similarly, Transource asserts that MISO should revise Article 4 to state that delays or actions by interconnecting utilities will not be the responsibility of the developer. Specifically, Transource asserts, notwithstanding cost containment measures, the Selected Developer should be able to recover interconnection costs imposed by an Interconnecting Transmission Owner.¹⁹⁴

(c) **MISO Answer**

(1) **Filing Requirements for the Selected Developer Agreement**

131. MISO disagrees that it is necessary to revise the Selected Developer Agreement as requested by MISO Transmission Owners. MISO explains that filing conforming agreements through Electronic Quarterly Reports constitutes filing them with the Commission.¹⁹⁵

¹⁹¹ NextEra Comments at 6.

¹⁹² *Id.* at 10.

¹⁹³ *Id.* at 9.

¹⁹⁴ Transource Comments at 5.

¹⁹⁵ MISO Answer at 33.

(2) **Resolving Conflicts Between the Selected Developer Agreement and the Tariff or Other Agreements**

132. In response to Xcel, MISO agrees that it would be helpful to clarify that any conflicts between the Selected Developer Agreement and the Selected Developer's proposal, or between the Selected Developer Agreement and the Selected Developer Agreement appendices should be resolved in favor of the Selected Developer Agreement as long as additional language is included providing that amendments to the Selected Developer Agreement, including approved change orders, will control over conflicting provisions within the body of the Selected Developer Agreement. Otherwise, MISO argues, Xcel's proposal could be read to invalidate amendments to the Selected Developer Agreement. MISO states that it is willing to make these revisions if so directed by the Commission.¹⁹⁶

(3) **Commitment to Operate within a Balancing Authority**

133. MISO agrees with MISO Transmission Owners that Article 4.6 should reference "Local Balancing Authority" rather than "Balancing Authority" and would support a compliance directive requiring this change.¹⁹⁷

(4) **Transmission-to-Transmission Interconnection Requirements**

134. In response to Transource's and NextEra's concerns about delays caused by an interconnecting transmission owner, MISO states that the provision insulates a Selected Developer from being held in default when the conduct of a third party, rather than the Selected Developer's performance, causes delays in executing the Selected Developer Agreement.¹⁹⁸ According to MISO, it is reasonable to make an exception to the otherwise reasonable rule that a party is responsible for its own performance under a contract in such cases.¹⁹⁹ However, MISO contends, Transource's and NextEra's requests to extend this limited exception would essentially relieve a Selected Developer

¹⁹⁶ *Id.* at 33-34.

¹⁹⁷ *Id.* at 31.

¹⁹⁸ *Id.* at 29.

¹⁹⁹ *Id.*

from compliance with any of its obligations under the Selected Developer Agreement whenever it claims that some action by an interconnecting transmission owner should excuse their performance.

135. Furthermore, MISO notes, both the Selected Developer Agreement and the Tariff have ample safeguards to protect the Selected Developer, as Selected Developers have the opportunity to implement a plan to cure a breach before MISO may declare a default, the Selected Developer Agreement allows for both informal dispute resolution and dispute resolution pursuant to the dispute resolution procedures of the Tariff, MISO will consider in any variance analysis the fault of the Selected Developer, and MISO must file the termination of any Selected Developer Agreement with the Commission. Thus, MISO argues, Transource's and NextEra's proposed revisions are not necessary to protect Selected Developers from unreasonable termination.²⁰⁰

136. MISO agrees with MISO Transmission Owners, NextEra, and Xcel that the Selected Developer Agreement cannot impose obligations on interconnecting transmission owners, who are not parties to the agreement. MISO acknowledges that any obligation that interconnecting transmission owners work with a Selected Developer in good faith belongs in the Tariff and, thus, believes that it would be appropriate for the Commission to direct MISO to move this requirement to the Tariff.²⁰¹

(d) Commission Determination

137. We accept, subject to condition, MISO's proposed provisions in Article 4 regarding regulatory filings and Tariff compliance. Specifically, we agree with NextEra that it is unclear whether transmission-to-transmission interconnection agreements must be executed or filed unexecuted with the Commission prior to the start of construction or prior to the energization of any competitive transmission facilities. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising the last paragraph of Article 4.4 to clarify when transmission-to-transmission interconnection agreements must be executed or filed unexecuted with the Commission.

138. We also agree with Edison that it is unclear whether Article 4.7 requires full compliance with each reliability standard before the in-service date of the Project, even if some standards are not yet applicable. For instance, Article 4.7 provides that the Selected Developer will certify that it has registered with NERC, complied with NERC standards,

²⁰⁰ *Id.* at 28-31.

²⁰¹ *Id.* at 31.

and performed reliability functions of a NERC transmission owner, operator, and planner before the Project is placed in-service. We find that it is reasonable that applicable NERC requirements should be met before the Project is placed in-service, but it is unclear whether all of the requirements in Article 4.7 necessarily apply before the in-service date of a Project, particularly the requirement to perform the reliability functions of a NERC transmission owner, operator, and planner. Accordingly, we direct MISO to revise Article 4.7 to clarify that the Selected Developer is only required to certify it has complied with all the standards that are applicable to the Selected Developer prior to the in-service date of a Project.

139. In addition, we agree with MISO and MISO Transmission Owners that Article 4 should be revised to state that a Selected Developer must commit to operate in a Local Balancing Authority rather than a Balancing Authority, as Local Balancing Authority is the term used in the Tariff.²⁰² Accordingly, we direct MISO to submit, within 30 days of the date of issuance this order, a compliance filing with this change.

140. In response to MISO Transmission Owners' argument that Article 4.1 should be revised to clarify that only nonconforming Selected Developer Agreements must be filed with the Commission, we find that MISO adequately clarifies it will file all Selected Developer Agreements with the Commission. MISO clarifies that it will seek Commission approval for non-conforming agreements, and it will report conforming agreements in Electronic Quarterly Reports.

141. Also, we reject Xcel's protest that Article 4 should be revised to provide that if there is any conflict between the Selected Developer Agreement and the Selected Developer's Proposal or between the Selected Developer Agreement and the Selected Developer Agreement appendices, the conflict should be resolved in favor of the Selected Developer Agreement. Article 25 provides that the Selected Developer Agreement consists of all agreement documents, which include the appendices, attachments, exhibits, and schedules. In addition, Article 9 provides that certain aspects of the Selected Developer's proposal, such as project milestones and binding cost cap information, must be included as an attachment to the Selected Developer Agreement and are incorporated into the terms of the Selected Developer Agreement. Thus, as MISO states in its answer, the revisions requested by Xcel could inappropriately invalidate the other agreement documents, which are integrated with some of the provisions of the Selected Developer Agreement.

142. In addition, we disagree with arguments that proposed Article 4.4 does not adequately protect Selected Developers from delays in executing the Transmission-to-

²⁰² See MISO Tariff, Module A, § 1.L (Definitions) (34.0.0).

Transmission Interconnection Agreement that are outside its control. Article 4 obligates the Selected Developer to take “*commercially reasonable*” efforts to finalize the Transmission-to-Transmission Interconnection at least 120 days before the in-service date of the Project.²⁰³ To the extent that there is a delay, Article 4.4 further provides that such delays will not automatically be construed against the Selected Developer in consideration of the Variance Analysis pursuant to Article 10.²⁰⁴ Thus, notwithstanding the Interconnecting Transmission Owner’s actions, a Selected Developer will not be at fault if it can demonstrate that it took commercially reasonable efforts to implement a timely interconnection. Further, MISO proposes to impose a similar obligation on Interconnecting Transmission Owners.²⁰⁵ Also, as MISO points out, the Selected Developer Agreement and the Tariff have other safeguards to protect Selected Developers from losing a project due to factors beyond its control, such as the opportunity to implement a plan to cure a breach before MISO may declare Default, informal dispute resolution and dispute resolution pursuant to the Dispute Resolution procedures of the Tariff, consideration of the fault of the Selected Developer in any variance analysis, and the requirement for MISO to file the termination of any Selected Developer Agreement with the Commission.

143. With respect to concerns that the Selected Developer Agreement cannot impose obligations on interconnecting transmission owners, who are not parties to the agreement, we note that MISO agrees to add the obligations to the Tariff, and we direct MISO to do so above in the Request for Proposals section of this order.

144. Lastly, while we agree with Transource that Selected Developers should not be required to bear the costs of additional specifications beyond the initial functional requirements MISO issued at the time of competitive solicitation, we find that the Selected Developer Agreement supports this approach. Indeed, as MISO points out in its answer, the proposed Selected Developer Agreement allows for Selected Developers to recover the costs associated with interconnecting transmission owners’ interconnection requirements outside of any cost cap. Specifically, Article 9.2.1 of the Selected Developer Agreement provides an exception to any cost cap or cost containment measures where an unforeseen interconnecting transmission owner interconnection requirement increases costs. Moreover, a Selected Developer can include in its cost containment agreement a list of exclusions to its proposed cost cap or cost containment

²⁰³ Selected Developer Agreement, Article 4.4 (emphasis added).

²⁰⁴ *Id.* Article 4.1.

²⁰⁵ *See infra* P 143.

measures, which under Article 9, would then be an exception to any cost cap or cost containment measures.

iv. Scope of Service

(a) MISO Proposal

145. Article 5 outlines the Selected Developer's responsibilities. Specifically, Article 5 provides that the Selected Developer shall commence construction as soon as practicable after the effective date of the Selected Developer Agreement, and that it is solely responsible for all planning design, engineering, procurement, construction, installation, management, operation, and safety associated with the project, including obtaining all necessary permits, siting and other regulatory approvals.²⁰⁶ Also, all modifications to the specifications of the Project must be approved by MISO.²⁰⁷

146. In performing its obligations under the agreement, according to Article 5, the Selected Developer must adhere with all applicable laws, regulations, standards, and Good Utility Practice. In addition, "[to] the extent a [p]arty, through no fault of its own, is required to take, or is prevented from, or is limited in taking any action by such regulations and standards, such [p]arty shall not be deemed to be in [b]reach of this [a]greement for its lack of compliance therewith."²⁰⁸ MISO states that this provision is similar to Article 4.4 of CAISO's Approved Project Sponsor Agreement.²⁰⁹ Further, in the event that the Selected Developer violates an applicable law, regulation, or safety standard, it is required to promptly report such violation to MISO, and MISO has the right to require that the Selected Developer develop and implement a plan to cure an identified violation.

²⁰⁶ Selected Developer Agreement, Article 5.1 (Commencement of Project Construction and Associated Competitive Transmission Facilities); *Id.* Article 5.2 (Exclusive Responsibility of Selected Developer).

²⁰⁷ *Id.* Article 5.2 (Exclusive Responsibility of Selected Developer).

²⁰⁸ *Id.* Article 5.3 (Performance Standards).

²⁰⁹ MISO Filing at 36 (citing CAISO Approved Project Sponsor Agreement at Article 4.4).

(b) **Protests**

147. Transource argues that rather than all modifications, MISO should only be required to approve material modifications that affect the ability of the Project to meet ampacity, voltage, and other specific performance requirements. Also, Transource argues, the Selected Developer should not have to seek MISO approval to make modifications that do not affect the electrical performance of the Project.²¹⁰

148. Xcel argues that it is unreasonable to require that the Selected Developer report violations of law or safety standards to MISO immediately upon discovery, potentially before they are reported to the federal, state or local agency with jurisdiction over the issue, because this requirement goes significantly beyond MISO's appropriate role in overseeing the Selected Developer's work. Xcel further asserts that MISO could potentially require the Selected Developer to implement a curative plan that is suboptimal from a timing and cost perspective and the Selected Developer Agreement makes no provisions as to how such additional costs would be addressed.²¹¹

149. Edison asserts that it is unclear whether Article 5 provides a Selected Developer an exception from breaching its responsibility to obtain siting authority.²¹² If Article 5 does provide such exception, Edison requests that MISO clarify the standard necessary to receive the exception, such as whether a Selected Developer could be found to be at fault for a failed attempt at obtaining siting on the basis that "it did not try hard enough."²¹³

(c) **MISO Answer**

150. In response to Xcel's concerns about the Selected Developer Agreement's reporting and cure plan obligations, MISO agrees that these requirements could be more than what is required for MISO to fulfill its oversight role and potentially interfere with the Selected Developer's or regulatory authority's efforts to address a violation. Thus, MISO states, it is willing to revise Article 5.3 of the Selected Developer Agreement if directed by the Commission to (1) remove the language allowing MISO to require the Selected Developer to develop and implement a cure plan and instead allow MISO to require the Selected Developer to provide supporting information after making its report

²¹⁰ Transource Comments at 10.

²¹¹ Xcel Comments at 15-16.

²¹² Edison Protest at 16.

²¹³ *Id.*

to MISO and (2) change the timeframe for notifying MISO of violations of applicable laws, regulations, and safety standards from the time of discovery to the time that the Selected Developer reports a violation to, or receives notice of a violation from, a Governmental Authority.²¹⁴

151. MISO disagrees with Edison's claim that Article 2.3 is ambiguous. MISO replies that Article 2 provides a limited exception that excuses a Selected Developer from compliance with its obligations under the Selected Developer Agreement where a regulation or standard affirmatively prevents or delays the Selected Developer from meeting those obligations. MISO states that the provision does not invite MISO to judge whether a selected Developer tried hard enough to obtain a permit or license on time, which is the Selected Developer's responsibility. MISO states that to invoke this exception, a Selected Developer would need to identify the regulation or standard and explain how it prevents or delays compliance.²¹⁵

(d) Commission Determination

152. We accept, subject to condition, MISO's proposed provisions in Article 5 regarding scope of service. We agree with Xcel's concerns about the Selected Developer Agreement's reporting and cure plan obligations. We note that MISO agrees with Xcel's assertion that it is inappropriate for the Selected Developer Agreement to require a Selected Developer to promptly notify MISO when the Selected Developer violates a law or safety standard. MISO also agrees with Xcel's contention that requiring a Selected Developer to implement a cure plan could be inconsistent with its oversight roles and potentially interfere with the Selected Developer's or regulatory authority's efforts to address the violation. In addition, we note that MISO retains the right to conduct a variance analysis if the reported violation constitutes a default by the Selected Developer. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to make the changes it proposes in its answer.²¹⁶

153. We disagree with Transource that Article 5 should be revised to provide that MISO's approval may only be required for material modifications to certain performance requirements, such as voltage or ampacity. Consistent with previous orders, here, we find that it is appropriate for MISO to approve all proposed modifications to projects in

²¹⁴ MISO Answer at 34-35.

²¹⁵ *Id.* at 35-36.

²¹⁶ *Id.* at 35.

order to adequately facilitate transmission planning as well as to protect the reliable operation of MISO's transmission system.²¹⁷

154. Article 1 provides that any capitalized term not defined in the Selected Developer Agreement shall be as defined in the Tariff. The term "Modifications" is capitalized in Article 5.2, but it is not defined in Article 1 or Article 5.2. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising the third paragraph of Article 5.2 to make the term "modifications" lowercase.

155. Lastly, we agree with MISO that it sufficiently clear that the breach exception in Article 5.3 does not cover a Selected Developer that fails to obtain siting authority on time.²¹⁸

v. **Facilities Engineering, Procurement and Construction**

(a) **MISO Proposal**

156. Article 6 provides, among other things, how MISO will oversee the Project and how the Selected Developer may request modifications to the design, construction and operation of the project. Specifically, MISO will monitor the ongoing progress of the project, and if necessary, conduct a variance analysis, pursuant to its Tariff.²¹⁹ To change an aspect of a project, such as the scope, timing, and type of work to be performed on the project, a party must submit a change order. According to Article 6, a Selected Developer can change an aspect of a project if, after submitting a change order, it

²¹⁷ See, e.g., *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,187, at P 58 (2014); *Cal. Indep. Sys. Op. Corp.*, 149 FERC ¶ 61,107, at P 63 (2014) (CAISO Order).

²¹⁸ MISO Answer at 35-36.

²¹⁹ Selected Developer Agreement, Article 6.3 (Project Monitoring); MISO Tariff, Attachment FF (Transmission Expansion Planning Protocol) (41.0.0), § IX (Reevaluation) (describing the triggers and outcomes of a MISO reevaluation of a Project).

receives written consent from MISO.²²⁰ Similarly, MISO may change an aspect of the project, but its proposed change is effective upon the issuance of a change order.²²¹

157. Also, Article 6 provides requirements for how a Selected Developer shall address a generator's request to interconnect with the project. Specifically, in this instance, the Selected Developer will assume the function of a transmission owner, and it will use the generator interconnection procedures, as specified in MISO's Tariff, to study the generator's request.²²² According to Article 6, MISO will reimburse the developer for the actual costs incurred to analyze the generator's interconnection request.²²³

(b) Protests

158. Midcontinent MCN argues that Article 6.2 should not refer to variance analysis provisions in the Tariff and the related Business Practice Manual because MISO has stated that it is preparing Tariff revisions to its variance analysis and has yet to file them with the Commission. Thus, Midcontinent MCN asserts, the Commission does not have the requisite information to decide whether the Selected Developer Agreement is just and reasonable.²²⁴

159. Midcontinent MCN argues that the Selected Developer Agreement's sections on modifications and change order procedures are far more complex than those accepted in PJM and CAISO and should be modified to track CAISO's language.²²⁵

160. Republic, Transource, and Xcel argue that Article 6.4.1 inappropriately allows MISO to unilaterally impose a Change Order on the Selected Developer, effective immediately, and merely requires MISO to consult with the Selected Developer prior to issuing the Change Order. Republic argues that MISO's right to request a change in the project should be limited in the same manner as the Selected Developer; i.e., subject to an

²²⁰ Selected Developer Agreement, Article 6.4 (Modification). In reviewing the change request, MISO will determine if the modification is in accordance with the original project criteria and intent. *Id.* Article 6.4.1.

²²¹ *Id.* Article 6.4.1 (Change Order Procedures).

²²² *Id.* Article 6.5 (Generator Interconnection Study Process).

²²³ *Id.* Article 6.5 (Generator Interconnection Study Process).

²²⁴ Midcontinent MCN Comments at 10.

²²⁵ *Id.* at 8 (citing section 5.11.1 of CAISO Approved Project Sponsor Agreement).

acceptance by the Selected Developer, not to be unreasonably withheld, and only if “in accordance with the original Project criteria and intent.”²²⁶ Xcel asserts that providing MISO with the ability to unilaterally modify a project will introduce significant uncertainty into project development, and also the potential for disputes between MISO directives and the jurisdiction of federal, state and local entities. Xcel further argues that it is unclear if a Selected Developer must move forward with its development activities while a dispute resolution process is underway to address a failed negotiation on how a cost cap should be modified in light of a unilateral Change Order issued by MISO. Xcel posits that a Selected Developer should be allowed full recovery of its costs caused by MISO’s unilateral actions.²²⁷

(c) **MISO Answer**

161. MISO agrees that it would be reasonable to require agreement between the Selected Developer and MISO before MISO could issue a change order because it would ensure that the respective roles and responsibilities of each party remain clear. Thus, MISO suggests, the Commission should direct it on compliance to revise the proposed change order provision of Article 6.4.1 to require MISO to obtain the prior agreement of the Selected Developer to any contemplated change order prior to MISO issuance.²²⁸

162. In response to Xcel’s concern that Article 6.4.1 is unclear as to whether a Selected Developer must move forward with its development activities while a dispute resolution process is underway to address a failed negotiation on how a cost cap should be modified in light of a unilateral change order issued by MISO, MISO clarifies that its refusal to approve a modification requested by a Selected Developer would be subject to dispute resolution under the Selected Developer Agreement. MISO states that the Tariff is clear that the Selected Developer’s obligation to construct is waived during the pendency of dispute resolution.²²⁹

²²⁶ Republic Protest at 16.

²²⁷ Xcel Comments at 17-20.

²²⁸ MISO Answer at 36-37.

²²⁹ *Id.* at 37 (citing MISO Tariff, Attachment FF (Transmission Expansion Planning Protocol) (41.0.0), § VIII.E.8).

(d) **Commission Determination**

163. We accept, subject to condition, MISO's proposed provisions in Article 6 regarding facilities engineering, procurement, and construction. We agree with protestors that MISO should revise the change order procedures so that MISO is required to obtain the Selected Developer's agreement before issuing a change order. We note that MISO also agrees to this change. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 6.4.1 to require that MISO obtains agreement from a Selected Developer before MISO issues a change order. As we are directing MISO to revise this provision, we will not address concerns with the previously proposed language.

164. We disagree with Midcontinent MCN's assertion that because MISO plans to file tariff revisions to its variance analysis, the Commission does not have enough information to determine whether Article 6 is just and reasonable. We find that the provisions in Article 6 do not conflict with the currently effective variance analysis provisions in the Tariff.

vi. **Right to Inspect**

(a) **MISO Proposal**

165. Article 7 provides that MISO has the right to inspect the Project to assess the Project's status and the Selected Developer's compliance with the terms of the Selected Developer Agreement.²³⁰ Article 7 provides that the information obtained from such inspections will be designated and treated as confidential project information.²³¹

(b) **Protests**

166. Transource argues that the Selected Developer Agreement does not appear to include liability or indemnity provisions associated with MISO's inspections of a developer's project and that MISO should indemnify the developer from claims associated with MISO's work to complete its inspections.²³²

²³⁰ Selected Developer Agreement, Article 7 (Right to Inspect).

²³¹ *Id.*

²³² Transource Comments at 5-6.

(c) **Commission Determination**

167. We accept, subject to condition, MISO's proposed provisions in Article 7 regarding MISO's right to inspect. We agree with Transource that if MISO reserves the right to inspect a Selected Developer's facilities, then MISO should also indemnify the Selected Developer for claims arising from MISO's work to complete its inspections. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 7 to include indemnity provisions for claims arising from the work conducted to complete MISO's inspections.

vii. **Cost Recovery, Billing, and Payment**

(a) **MISO Proposal**

168. Article 9 provides that, in general, the Selected Developer shall use specific attachments to the Tariff to recover costs associated with the project, including the cost of interconnection and transmission service related studies.²³³ Also, Article 9 provides separate cost recovery requirements for a Selected Developer that submitted, as part of its proposal, a binding cost cap or cost containment measure, or committed to forego a rate incentive or rate recovery. Specifically, such a Selected Developer is required to agree that it shall not seek to recover costs higher than the maximum costs specified in the Agreement, except for costs that it incurred to comply with additional specifications or requirements of MISO and an interconnecting transmission owner, provided that the interconnection requirement was unforeseen at the time the Selected Developer selected its proposal.²³⁴ MISO states that it does not intend to assume an active role in enforcing cost caps and containment measures in Selected Developer rate proceedings and will not assume an active role in enforcing cost caps. Instead, MISO continues, accepted cost caps from a Selected Developer who has proposed them shall be public information, accessible by regulators in any rate case or other recovery proceeding.²³⁵

²³³ Selected Developer Agreement, Article 9.1 (Cost Recovery); MISO Tariff, Attachment O (Rate Formulae) (30.0.0), Attachment GG (Network Upgrade Charge) (2.6.0), Attachment MM (Multi-Value Project Charge) (32.0.0).

²³⁴ Selected Developer Agreement, Article 9.2. (Binding Cost Cap or Cost Containment Measures or Forgone Rate Incentives or Rate Recovery); Article 9.2.1(B).

²³⁵ MISO Filing at 38.

169. As for refunds, Article 9 provides that the Selected Developer shall make all refunds and adjustments to the costs it recovered pursuant to certain attachments of the Tariff.²³⁶

(b) **Protests**

(1) **General Cost Recovery**

170. MISO Transmission Owners state that cost recovery under the Tariff takes place under Schedules 7, 8, 9, 26, and 26-A and, thus, MISO should revise Article 9.1 of the Selected Developer Agreement to reference these schedules in the Tariff. In addition, MISO Transmission Owners contend that Attachments O, GG, and MM of the Tariff would not apply to a Selected Developer that is not already a Transmission Owner or ITC. Thus, MISO Transmission Owners argue, MISO should revise Article 9.1 to make clear that (1) if a Selected Developer is a Transmission Owner or ITC, Attachments O, GG, and MM will govern the Selected Developer's recovery of costs and (2) if the Selected Developer is not a Transmission Owner or ITC, the provisions of the Tariff specific to a Selected Developer's cost recovery shall govern.²³⁷

(2) **Cost Recovery for Selected Developers with Proposals that Contain Cost Restrictions**

171. Transource argues that a Selected Developer that is subject to cost containment measures should be permitted to recover costs associated with all change orders, rather than only material change orders.

172. Xcel asserts that the Selected Developer Agreement should be amended to reflect that, to the extent interconnection requirements of an Interconnecting Transmission Owner have been changed after the bid, the Selected Developer should be able to modify the Project to recover any increased costs, notwithstanding cost containment measures. Xcel states that the Commission has ordered CAISO to make such changes in its Approved Project Sponsor Agreement.²³⁸ In addition, Xcel asserts that the approved

²³⁶ Selected Developer Agreement, Article 9.4 (Refund Obligation) (referencing Attachment O (Rate Formula); Attachment GG (Network Upgrade Charge); and Attachment MM (MVP Charge)).

²³⁷ MISO Transmission Owners Comments at 4-5.

²³⁸ Xcel Comments at 27 (citing CAISO Order, 149 FERC ¶ 61,107 at P 91).

deviations listed in Article 9.2.1 are superfluous and that only an addition for other approved Change Orders and any exception in the Selected Developer's cost-cap proposal is needed.²³⁹

173. Similarly, NextEra requests that the Commission direct MISO to revise the exception to cost containment measures to allow the Selected Developer to seek recovery of excess costs caused by a requirement imposed by an Interconnecting Transmission Owner, which was not foreseen at the time that the Selected Developer's proposal was *submitted*, rather than at the time it was *selected*.²⁴⁰

(3) Refunds

174. Edison argues that cost containment provisions contained in Article 9, such as a particular return on equity, should be in the entity-specific rate appendices of the Tariff rather than in the Selected Developer Agreement.

175. MISO Transmission Owners argue that, similar to Article 9.1, Article 9.4 should be revised to reference all Tariff provisions that may require refunds.²⁴¹

176. Xcel argues that Article 9.4 should be clarified to indicate that the Selected Developer reserves its rights under section 206 to challenge and appeal any refund obligation due to adjustments from recovered costs from Attachment O, Attachment GG, and Attachment MM of the Tariff.²⁴²

(c) MISO Answer

(1) General Cost Recovery

177. MISO agrees with MISO Transmission Owners that Article 9.1 of the Selected Developer Agreement should include references to Schedules 7, 8, 9, 26, and 26-A of the Tariff and thus proposes to include them on compliance if directed to do so.²⁴³ However, MISO states, its proposed language regarding cost recovery as it applies to all Selected

²³⁹ *Id.* at 35-36.

²⁴⁰ NextEra Comments at 11; Transource Comments at 6.

²⁴¹ MISO Transmission Owners Comments at 6.

²⁴² Xcel Comments at 37.

²⁴³ MISO Answer at 38-39.

Developers is appropriate. According to MISO, Selected Developers who are not Transmission Owners or ITC are unable to use Attachments O, GG, and MM under the current Tariff. Thus, it included a statement that a Selected Developer may recover its costs under “any other provisions of the Tariff that become accepted by FERC.”²⁴⁴ MISO further states it has been working with the nonincumbent transmission developers to address this issue. MISO states that it does not want to prejudice these discussions or prejudice their outcome through the provisions of the Selected Developer Agreement.²⁴⁵

(2) **Cost Recovery for Selected Developers with Proposals that Contain Cost Restrictions**

178. MISO agrees with NextEra, Transource, and Xcel that Article 9.2.1(B) should refer to interconnection requirements that were not foreseen when a Proposal was “submitted” rather than “selected.” MISO would support making this revision if directed by the Commission.²⁴⁶

179. MISO disagrees with Xcel that the exceptions in Article 9.2.1 to a cost cap or cost containment measures are superfluous. MISO states that the language that Xcel proposes to omit explains what an additional specification of the Interconnecting Transmission Owner is and also subjects such additional specification to the change order process. MISO contends that this language neither contradicts nor duplicates the rest of the Article and should be accepted.²⁴⁷

(3) **Refunds**

180. In response to Edison, MISO disagrees that the cost cap and cost containment measures provisions should be moved to the Tariff entity-specific rate appendices. MISO states that such provisions would then be inapplicable to nonincumbent transmission developers who have not yet signed the Transmission Owners Agreement.²⁴⁸

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 39.

²⁴⁶ *Id.* at 32-33.

²⁴⁷ *Id.* at 37-38.

²⁴⁸ *Id.* at 40.

181. MISO agrees that Article 9.4 should include the language in Article 9.1 that references “any other provisions of the Tariff that become accepted by FERC that govern the Selected Developer’s recovery of costs associated with the Project and its associated Competitive Transmission Facilities” and will include it on compliance if directed to do so.²⁴⁹

182. With respect to Xcel’s argument that MISO should revise Article 9.4 of the Selected Developer Agreement to clarify that the Selected Developer’s obligation to make refunds under certain circumstances does not restrict its rights under FPA section 206, MISO states that such clarification is unnecessary. MISO contends that nothing in the Selected Developer Agreement purports to limit a Selected Developer’s section 206 rights and, in fact, Article 25.9 explicitly reserves such rights. However, MISO states, it would not oppose a Commission directive requiring such clarification.²⁵⁰

(d) Commission Determination

183. We accept, subject to condition, MISO’s proposed cost recovery provisions in Article 9. We agree with MISO’s proposed changes that it suggests in response to MISO Transmission Owners to revise Article 9.1 to include language stating that cost recovery will also be provided under Schedules 7, 8, 9, 26, and 26A of the Tariff. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing with this change. Also, MISO further agrees to modify Article 9.2.1(B) to allow a selected developer to recover certain interconnection costs that were unforeseen as of the date the developer’s proposal was submitted, not selected, as initially proposed. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing with this change.

184. We disagree with MISO Transmission Owners that Article 9 must be revised to make clear that entities that have not yet signed the Transmission Owners Agreement are not eligible to recover costs pursuant to Attachments O, GG, and MM in the Tariff. As MISO acknowledges, absent revisions to the Tariff, those Attachments do not apply to entities that have not signed the Transmission Owners Agreement. Thus, no clarification to Article 9 is needed. We note that the Commission previously explained that, although a Selected Developer is ineligible to recover costs until such time as it is eligible to sign the Transmission Owners Agreement, this does not prevent a nonincumbent transmission

²⁴⁹ *Id.* at 39-40.

²⁵⁰ *Id.* at 38.

developer from becoming a Selected Developer and using the MISO regional cost allocation method for Competitive Transmission Projects.²⁵¹

185. We also disagree with Xcel that the exceptions in Article 9.2.1 to the cost cap or cost containment measures are superfluous. Rather, these provisions describe the particular instances in which a Selected Developer may seek recovery of costs that deviate from the binding cost cap or cost containment commitments. In regard to Transource's assertion that cost recovery should not be limited to material changes, we direct MISO to clarify that "material" changes include any modifications subject to change order procedures, i.e. those seeking to change the scope, timing, or type of Work to be performed, under Article 6.4.1. As to Xcel's argument that Article 9.4 should be clarified to indicate that the Selected Developer reserves its rights under section 206 to challenge and appeal any refund obligation, we note that MISO clarifies that nothing in the Selected Developer Agreement purports to limit a Selected Developer's section 206 rights and, indeed, Article 25.9 explicitly reserves such rights.

186. We also agree with MISO that the provision governing cost containment measures should not be moved to the Tariff entity-specific rate appendices because, as MISO points out, such provisions would then be inapplicable to nonincumbent transmission developers who have not yet signed the Transmission Owners Agreement.

viii. Force Majeure Events

(a) MISO Proposal

187. Article 11 provides, among other things, that a party will not be considered to be in default with respect to any obligation in the agreement if such party experiences a

²⁵¹ MISO First Compliance Order, 142 FERC ¶ 61,215 at P 408.

force majeure event as defined in the agreement,²⁵² provided that such party follows reporting procedures in the agreement.²⁵³

(b) Protests

188. Republic argues that the exclusions to Force Majeure events proposed by MISO are too broad and should not exclude failures to or delays in procuring any permit, license or other approval from a Governmental Authority. Republic asserts that MISO has never penalized an incumbent transmission owner for failure to obtain a permit for a MISO-directed transmission addition and that MISO's Article 11.1 should be amended to be consistent with the provision in PJM's Designated Entity Agreement.²⁵⁴

189. Xcel argues that Article 11.1 should be amended to include failures or delays in obtaining transmission-to-transmission interconnection agreements from interconnecting transmission owners due to delays caused by the interconnecting transmission owner

²⁵² Article 11 defines a force majeure event as: "Force Majeure Events" shall refer to fire, flood, earthquake, other extreme elements of nature or acts of God, war, terrorism, riots, rebellions, revolutions, civil disturbances, court or agency ordered injunctions, industry-wide or national labor disputes and criminal acts to the extent these events: (a) prevent a party from discharging its obligations under the Tariff or this Agreement, or Agreement Documents or otherwise prevent all, or a portion of, the Project from being completed by the required in-service date; (b) are outside the control of the party whose performance is to be affected by the Force Majeure Event; and (c) could not reasonably be foreseen or prevented by the Party whose performance is to be affected by the Force Majeure event. Force Majeure Events do not include: (1) seasonal weather variations; (2) failures to or delays in procuring any permit, license or other approval from a Governmental Authority; (3) labor disputes that are specific to a Party, or a Party's independent contractors, and their workforce; (4) economic conditions that render a Party's performance under this Agreement and the Agreement Documents unprofitable or otherwise uneconomic; (5) any removable or remedial causes (other than settlement of a strike or labor dispute) which an affected Party fails to remove or remedy using Reasonable Efforts; or (6) the failure to obtain financing either in the amount or on the terms set forth in the Proposal.

²⁵³ Selected Developer Agreement, Article 11.2 (No Default).

²⁵⁴ Republic Protest at 17-18.

because transmission owners should not be able to influence whether a Selected Developer is in default of the Selected Developer Agreement.²⁵⁵

(c) **MISO Answer**

190. MISO disagrees with Republic's contention that Force Majeure events should include failures to procure, or delays in procuring, governmental approvals. MISO explains that such failures or delays are not always beyond the control of a Selected Developer and thus are not events of force majeure. Moreover, MISO states, the Selected Developer Agreement includes several safeguards for a Selected Developer that is not at fault for a failure to obtain, or delay in obtaining, governmental approvals, as such developers have a cure period and an opportunity to implement a cure plan. Additionally, MISO states, its variance analysis process considers fault, and any notice of termination of the Selected Developer Agreement will be filed with the Commission.²⁵⁶

191. In response to Xcel's argument that Force Majeure events should include failures to obtain, or delays in obtaining, transmission-to-transmission interconnection agreements from interconnecting transmission owners due to an interconnecting transmission owner's delay, MISO disagrees. MISO notes that Article 4.4 of the Selected Developer Agreement already provides that a Selected Developer need only take commercially reasonable efforts to execute any necessary transmission-to-transmission interconnection agreements and that the Selected Developer may file such agreements unexecuted.²⁵⁷

(d) **Commission Determination**

192. We accept, subject to condition, MISO's proposed provisions regarding *force majeure* events. We find that the list of *force majeure* events is too narrow and, on the other hand, the list of exceptions that do not constitute a force majeure event is broad and may unduly exclude events that are outside of a Selected Developer's control. Specifically, under Article 9, a *force majeure* event excludes labor disputes, yet it includes industry-wide or national labor disputes. In addition, MISO supports an exception for failures or delays in procuring any permit, license or other approval from a governmental authority, because such events may not be outside of the Selected Developer's control, yet this exception will exclude the instances where the Selected

²⁵⁵ Xcel Comments at 38.

²⁵⁶ MISO Answer at 41.

²⁵⁷ *Id.* at 40-41.

Developer is not at fault. Thus, we find that MISO should provide an additional category to recognize other events that are outside the Selected Developer's control, rather than provide a list of specific exceptions. As stated in Order No. 2003, a Force Majeure clause excuses performance under a contract due to an event beyond a Party's control.²⁵⁸ Further, we find that this revision is consistent with the common understanding of the term, the definition of the term under MISO's Tariff,²⁵⁹ as well as Commission acceptance of the definition of *force majeure* in similar agreements developed by PJM and CAISO.²⁶⁰ Therefore, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising the *pro forma* Selected Developer Agreement definition of *force majeure* to include "any other cause beyond a party's control," and removing the stated exclusions.

ix. Default

(a) MISO Proposal

193. If a party fails to discharge an obligation under the Selected Developer Agreement, Article 12 provides that such party will be in default of the agreement, unless its failure is the result of a force majeure event or act or omission of the other party to the Selected Developer Agreement.²⁶¹ When a party discovers that the other party has breached the agreement, according to Article 12, the party discovering the breach must

²⁵⁸ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 618, *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

²⁵⁹ Force Majeure is defined in the Tariff as: "An event of Force Majeure means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any Curtailment, order, regulation or restriction imposed by governmental military or lawfully established civilian authorities, *or any other cause beyond a Party's control.*" MISO Tariff, Module A, section 10.1 (Force Majeure) (30.0.0) (emphasis added).

²⁶⁰ See PJM Designated Entity Agreement at Article 10.0 (Force Majeure); CAISO Approved Project Sponsor Agreement, Article 1 (Definitions); *pro forma* LGIA at section 16.1.1.

²⁶¹ Selected Developer Agreement, Article 12 (Default).

inform the breaching party by providing a written notice.²⁶² If the breach is curable, then the breaching party will have 30 days from the receipt of notice to cure the breach, or if it provides the non-breaching party with a cure plan, the breaching party will have 90 days to cure the breach, or longer if the non-breaching party consents to a different deadline.²⁶³

While the non-breaching party is not required to accept the plan,²⁶⁴ Article 12 provides that the non-breaching party may not unreasonably withhold, delay, or condition its acceptance of a cure plan.

194. In the event the breach is not cured in a manner specified by Article 12, the Selected Developer Agreement will be terminated, and the non-breaching party will be able to recover from the breaching party all amounts due plus all other damages and remedies to which it is entitled at law or in equity.²⁶⁵ If the Selected Developer is the breaching party, MISO is permitted to draw upon the Selected Developer's financial security deposit.²⁶⁶

(b) Protests

195. Transource argues that Article 12 inappropriately provides that the non-breaching party is not required to accept a written cure plan that "increases the total cost of the Project" because, even in cases where the developer agrees to absorb any cost increase to cure a breach, the "total cost" of the project would technically increase. Transource further argues that if the developer's proposal did not contain a cost cap commitment, this section appears to conflict with Attachment FF, Section IX.A.1 of the Tariff, which provides a cost increase will cause a variance analysis if the cost increase reduces "the

²⁶² *Id.* Article 12.2 (Notice to Financing Parties). If a project finance entity is collateral assignee to the agreement, the non-breaching party will send notice to the project finance entity. *Id.*

²⁶³ *Id.* A project finance entity that is a collateral assignee to the agreement may have the right to cure the breach on behalf of the Selected Developer. *Id.*

²⁶⁴ *Id.* Article 12.1. The non-breaching party is not required to accept a cure plan that (1) materially alters the Project, (2) delays Project completion past the scheduled In Service Date, or (3) increases total Project costs. *Id.*

²⁶⁵ *Id.* Article 12.3 (Default and Right to Terminate).

²⁶⁶ *Id.*

benefit-cost ratio of an economically-driven Competitive Transmission Project to less than the required benefit-to-cost threshold....”²⁶⁷

196. Transource also argues that, in rejecting a cure plan due to a scheduling delay, MISO should have the burden of proof to demonstrate that the schedule delay has a material operational or reliability impact, and that the schedule to transition or assign the project would not be longer than the proposed new in-service date. Transource explains that a delay of one day is unreasonable. Transource also asserts that the developer should not be exposed to un-curable breach for schedule delays for actions caused by MISO, the interconnecting utility, “or any other excepted force outlined in its bid.”²⁶⁸

(c) **MISO Answer**

197. MISO agrees with Transource that where the Selected Developer is willing to absorb costs internally, MISO should not consider these as increased costs in evaluating a cure plan. MISO states that it is willing to clarify this point on compliance if the Commission directs it to do so.²⁶⁹ However, MISO disagrees with Transource’s contention that MISO should be required to adjust the in-service date of a Project through a cure plan if a schedule delay does not have a material, operational, or reliability impact. MISO argues that such delays should be evaluated through its variance analysis process, where third parties can be consulted regarding reliability impacts.²⁷⁰

198. In response to Transource’s contention that Article 12.1 is inconsistent with the existing variance analysis provisions of MISO’s Tariff, MISO states that the intent of the cure plan is to avoid a default and variance analysis.²⁷¹ MISO further notes that it will be filing revisions to those Tariff provisions.²⁷²

²⁶⁷ Transource Comments at 8.

²⁶⁸ *Id.* at 9.

²⁶⁹ MISO Answer at 42.

²⁷⁰ *Id.* at 42-43.

²⁷¹ *Id.* at 43.

²⁷² *Id.*

(d) **Commission Determination**

199. We accept, subject to condition, MISO's proposed provisions in Article 12. Specifically, we agree with MISO and Transource that Article 12 should be revised to provide that if a non-breaching party is willing to internally absorb costs to cure its breach, then the non-breaching party will not be permitted to consider such costs in its decision on whether it will accept the breaching party's cure plan. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing with this change.

200. We reject Transource's assertion that MISO should be required to accept a cure plan on the same basis in which it decides to conduct a variance analysis. We are persuaded by MISO's explanation that the objective of the cure plan is to help the Selected Developer avoid breaching the contract and, subsequently, triggering a variance analysis. While we agree with Transource's assertion that, in general, rejecting a cure plan solely on the basis that a Project will be delayed by one day would be unreasonable, we note that under Article 12, MISO is obligated to not unreasonably withhold, delay or condition its acceptance of a cure plan. Accordingly, it is appropriate for MISO to apply a different standard to determine whether a cure plan is reasonable.

201. In regard to Transource's assertion that a Selected Developer should not be exposed to an un-curable breach, if the breach is due to the act of others, we find that the Selected Developer Agreement already addresses this issue. Specifically, where MISO is at fault, with one exception,²⁷³ a Selected Developer will not be subject to an un-curable breach because Article 12 provides that a party will not be in default if the failure to discharge an obligation is the result of an act or omission of the other party.

202. Similarly, in regard to the acts of Interconnecting Transmission Owners, Article 4.4 already provides that Interconnecting Transmission Owners and Selected Developers take commercially reasonable efforts to finalize the Transmission-to-Transmission Interconnection at least 120 days before the in-service date of the Project. Article 4.4 further protects Selected Developers from losing a project due to delays or actions of the Interconnecting Transmission Owner by providing that any delays in executing the Transmission-to-Transmission Interconnection Agreements will not automatically be construed against the Selected Developer in consideration of the Variance Analysis pursuant to Article 10.²⁷⁴ As for the acts of "any other excepted force outlined in its

²⁷³ Article 9 provides an exception for the payment of money.

²⁷⁴ Selected Developer Agreement, Article 4.1.

bid,”²⁷⁵ we note that such events are already accounted for under Article 11 (Force Majeure), as revised.

x. **Limitation of Liability, Indemnity, and Insurance**

(a) **MISO Proposal**

203. Article 13 provides, among other things,²⁷⁶ that the Selected Developer shall indemnify, defend and hold harmless, MISO (including MISO’s employees and agents) from certain claims,²⁷⁷ and all losses and claims arising from a Selected Developer’s performance or failure to perform any obligation under the agreement.²⁷⁸ As to the extent of the indemnification, the Selected Developer is obligated to cover MISO’s actual losses, reasonable legal costs and fees, and the cost of complying with any equitable or non-monetary orders, directives, or judgement. In addition, in the event that the Commission or any other court or tribunal with jurisdiction over the dispute determines that the indemnities are unenforceable, MISO shall be entitled to seek recovery of its Actual Loss through its Tariff.²⁷⁹

204. Article 13 also outlines each party’s insurance requirements to cover the development and construction of the project. Specifically, according to Article 13, the Selected Developer is required to maintain employer’s liability and worker’s compensation insurance, comprehensive automobile liability insurance, excess public

²⁷⁵ Transource Comments at 9.

²⁷⁶ Selected Developer Agreement, Article 13 (providing the liability, indemnification, and insurance procedures, including the process for how parties will participate in legal and administrative proceedings).

²⁷⁷ Specifically, the Selected Developer shall indemnify, defend, and hold harmless, MISO for any claim alleging that the Transmission Provider improperly selected supervised or monitored the Selected Developer, its employees or independent contracts, but only to the extent such claim is based on a negligent act or omission by the Selected Developer, its employees or independent contracts for which the Transmission Provider is alleged to be liable. *Id.* Article 13.2 (Indemnity).

²⁷⁸ *Id.*

²⁷⁹ *Id.* Article 13.2.2 (Extent of Indemnification). The Selected Developer will cover the losses specified, net of any insurance or other recovery. *Id.*

liability insurance, and commercial general liability insurance.²⁸⁰ For the commercial general liability insurance, Article 13 provides that a Selected Developer is required to name as additional insured MISO and MISO's respective directors, officers, agents and employees.²⁸¹ Article 13 provides that the aforementioned insurance policies remain effective for two years after the termination of the agreement.²⁸²

205. Article 13 provides that the Selected Developer must report to MISO all accidents or occurrences resulting in the injury to any person, including certain reportable deaths, or in property damage in excess of \$5,000.²⁸³

(b) **Protests**

(1) **Indemnification**

206. Edison argues that the liability and indemnification provisions found in Article 13 are unusually unequal, and violate clear Commission policy on reciprocal liability provisions. Edison argues that the Selected Developer Agreement should not require a Selected Developer to indemnify MISO for consequential damages.²⁸⁴

207. NextEra and Republic argue that MISO's indemnity provision should be reciprocal and that MISO should revise Article 13.2 to provide for an indemnity from MISO to a Selected Developer with respect to losses and claims arising from MISO's performance or failure to perform under the Selected Developer Agreement, similar to CAISO's Approved Project Sponsor Agreement.²⁸⁵ NextEra argues that MISO's

²⁸⁰ *Id.* Article 13.3.1.1 (Employer's Liability and Worker's Compensation Insurance); Article 13.3.1.2 (Commercial General Liability Insurance); Article 13.1.3 (Comprehensive Automobile Liability Insurance); Article 13.3.1.4 (Excess Public Liability Insurance); and Article 13.3.1.6 (Primary Provisions).

²⁸¹ *Id.* Article 13.1.5 (Additional Insured). The Selected Developer is also required to add MISO to its Comprehensive Automobile Liability Insurance and Excess Public Liability Insurance policies. *Id.* Article 13.3.

²⁸² *Id.* Article 13.3.1.7 (Tail Coverage and Extended Reporting Period Coverage).

²⁸³ *Id.* Article 13.3.1.12 (Reporting of Accidents or Occurrence Resulting in Injuries).

²⁸⁴ Edison Protest at 16-17.

²⁸⁵ NextEra Comments at 12; Republic Protest at 18-19.

contention that its rights and responsibilities is limited to selecting a developer is narrow because under Article 6.4, MISO has the unilateral right to change the scope, type or manner of performance of the Project. Republic argues that regardless of the fact that Selected Developer's obligations under the Selected Developer Agreement may be greater than MISO's, resulting in a higher likelihood that it will need to indemnify MISO, when a party fails to perform its obligation under the Agreement, it should be required to indemnify the other party. In addition, Republic argues that Article 13.2.2 should be struck because MISO's ability to collect or not collect its "Actual Loss though its Tariff" must be addressed in the Tariff, not in the Selected Developer Agreement.²⁸⁶

208. Xcel argues that MISO should amend Article 13.2.1(G) so that the Selected Developer is only required to indemnify MISO for vicarious liability claims that are based on a *gross* or *willfully* negligent act or omission by the Selected Developer. Xcel asserts that both MISO and the Selected Developer are undertaking new obligations as part of implementing Order No. 1000 and most issues related to the selection of the Selected Developer to which an indemnity would apply would likely be due to the Selected Developer's fraud or other willful misconduct.²⁸⁷ Xcel also argues that Article 13.2.1(D)'s requirement to indemnify MISO for any failure of the Selected Developer to operate a safe construction environment is overreaching.²⁸⁸

(2) Insurance Requirements

209. Midcontinent MCN argues that the Selected Developer should not be required to name MISO as an additional insured because it will increase the cost of competitive projects, is unbalanced in MISO's favor, and there is no requirement for existing transmission owners to do the same.²⁸⁹

210. Xcel argues that Article 13.3.1(12)'s threshold for reporting property damage should be raised from \$5,000 to \$50,000, given the nature and type of work to be performed in the development of a Competitive Transmission Project.²⁹⁰

²⁸⁶ Republic Protest at 19.

²⁸⁷ Xcel Comments at 21-22.

²⁸⁸ *Id.* at 24.

²⁸⁹ Midcontinent MCN Comments at 9.

²⁹⁰ Xcel Comments at 23.

(c) **MISO Answer**

(1) **Indemnification**

211. MISO disagrees with Edison, NextEra, and Republic that MISO's indemnity provisions are overly broad and should be reciprocal. MISO states that it has no performance obligations under the Selected Developer Agreement that would justify a reciprocal indemnity and that its limited liability is set forth in the Tariff. In response to Edison's argument that the Selected Developer Agreement should not require a Selected Developer to indemnify MISO for consequential damages, MISO states that it removed the consequential damages provision based on stakeholder feedback.²⁹¹

212. MISO also disagrees with Xcel's statement that Article 13.2.1(G) should be revised so that a Selected Developer shall be required to indemnify MISO from any claim alleging that MISO improperly selected, supervised, or monitored the Selected Developer, its employees, or independent contractors only if that claim is based on a gross negligence or willful misconduct on the part of the Selected Developer, its employees, or independent contractors. MISO argues that limiting this indemnity to exclude simple negligence would go too far and that the provision as proposed is just and reasonable.²⁹²

(2) **Insurance Requirements**

213. With respect to Midcontinent MCN's contention that a Selected Developer should not be required to name MISO as an additional insured under Article 13.3, MISO disagrees. MISO argues that this requirement is reasonable because it will, along with the indemnity provisions, allow MISO to obtain recovery from the insurance company in the event of its loss. MISO notes that this requirement also appears in its *pro forma* Generator Interconnection Agreement and PJM's Designated Entity Agreement.²⁹³ MISO also states that this requirement applies to all transmission developers awarded Competitive Transmission Projects, whether they are incumbent transmission owners or nonincumbent transmission developers, and thus is not unduly discriminatory.²⁹⁴

²⁹¹ MISO Answer at 44-46.

²⁹² *Id.* at 46-47.

²⁹³ *Id.* at 48 (citing MISO *pro forma* Generator Interconnection Agreement at Article 18.4.5; PJM Designated Entity Agreement at Article 6.0).

²⁹⁴ *Id.* at 48.

214. MISO is not opposed to a directive requiring it to implement Xcel's proposal that the damage reporting threshold for OSHA-reportable damages under Article 13.3.1.12 of the Selected Developer Agreement should be raised from \$5,000 to \$50,000. However, MISO states, Selected Developers should remain responsible for reporting injury or death in addition to property damage.²⁹⁵

(d) Commission Determination

215. We accept, subject to condition, MISO's proposed liability, indemnity, and insurance provisions under Article 13. We agree with protestors that the indemnification provisions in the Selected Developer Agreement should be reciprocal to the extent allowed under the Tariff.²⁹⁶ In particular, we are persuaded by Republic's contention that, notwithstanding MISO's limited obligations, if either party fails to perform its obligation under the agreement, it should be subject to indemnifying the other party for losses and claims arising from such nonperformance. However, as MISO notes, its ability to assume liability is limited by the limited liability provision set forth in the Tariff. Specifically, under the Tariff, MISO's liability for damages arising or resulting from any act or omission in any way associated with service provided under the Tariff is limited to direct damages arising from MISO's gross negligence or intentional misconduct.²⁹⁷ Thus, we find that MISO should indemnify a Selected Developer for any claims arising from MISO's performance or nonperformance under the agreement due to MISO's gross negligence or intentional misconduct. We also note that a reciprocal provision is consistent with the indemnification provision in CAISO's Approved Project Sponsor Agreement approved by the Commission.²⁹⁸ Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising

²⁹⁵ *Id.*

²⁹⁶ See Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 658 (finding that because construction of Interconnection Facilities may expose both a Transmission Provider and an Interconnection Customer to liability for acts taken on the other Party's behalf, the Commission is retaining the bilateral nature of the indemnification provision).

²⁹⁷ MISO Tariff, Module A, §10.3 (Limitation of Liability Regarding Transmission Owner) (30.0.0).

²⁹⁸ CAISO Approved Project Sponsor Agreement at section 15.1 ("Each Party (the "Indemnifying Party") shall at all times indemnify, defend, and hold the other Party (the "Indemnified Party") harmless from any and all Losses arising out of or resulting from the Indemnifying Party's action or inactions of its obligations under this Agreement, except in cases of negligence or intentional wrongdoing by the Indemnified Party.").

Article 13.2 to provide that MISO will indemnify the Selected Developer, to the extent allowed under the Tariff, from any losses and claims arising from MISO's performance or failure to perform any of its obligations imposed by the Selected Developer Agreement.

216. Regarding Xcel's assertion that the threshold for reporting property damage should be raised from \$5,000 to \$50,000, we note that MISO agrees to revise article 13 to reflect this change. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing with this change.

217. We reject Xcel's argument that Article 13.2.1(G) should be limited to only require the Selected Developer to indemnify MISO for claims based on the Selected Developer's gross or willful negligence. We agree with MISO that a Selected Developer should be required to indemnify MISO for claims alleging that MISO improperly selected, supervised, or monitored the Selected Developer if those claims are based on a negligent act or omission by the Selected Developer. We find that this provision is consistent with MISO's limited oversight role. Thus, we find that MISO's proposed Article 13.2.1(G) is just and reasonable.

218. We reject Midcontinent MCN's protest of the requirement to name MISO as an insured under Article 13.3. While the cost of the insurance may increase the cost of a project, we find that such increase is reasonable because insuring MISO for a potential loss is likely to be less expensive than requiring MISO to pay for the actual costs of such losses, which may ultimately be passed along to its market participants, and subsequently, ratepayers. Further, we disagree with Midcontinent MCN that existing MISO Transmission Owners are treated differently, because the MISO Transmission Owners are also required to execute the Selected Developer Agreement when their proposal is selected.

xi. Assignments

(a) MISO Proposal

219. Article 14 provides that, subject to certain conditions,²⁹⁹ a party may assign all of its rights, duties, and obligations under the Selected Developer Agreement to another

²⁹⁹ Selected Developer Agreement, Article 14.3 (providing that the Transmission Provider's consent will not be "unreasonably withheld, conditioned, or delayed," but it shall be conditioned, with some exceptions, upon certain circumstances, including that the assignee must be a Qualified Transmission Developer and an Affiliate of the Selected Developer); Article 4.4 (providing that, as an exception, under certain circumstances, a project finance entity may be an assignee).

entity, provided that such party obtains written consent from the other party to the agreement, the assignment is not partial, and the assignment is disclosed in the Selected Developer's accepted proposal.³⁰⁰ Also, the assignee must assume, in writing, all rights, duties, and obligations of the assigning Selected Developer arising out of the Selected Developer Agreement.³⁰¹ However, if an assignment is successful, it will not relieve a party of its obligations under the agreement, nor will it enlarge a party's obligations.³⁰² On the other hand, an assignment that is in violation of this section is void and ineffective and, may, at MISO's election, be subject to a variance analysis.³⁰³ MISO states that Article 14 is based on the assignment provisions filed by SPP, CAISO, and PJM, which have been approved by the Commission.³⁰⁴

(b) Protests

220. Edison asserts that the Commission has found that assignment provisions should be reciprocal and that MISO's assignment provisions contain substantially more "hoops" than CAISO's Approved Project Sponsor Agreement and PJM's Designated Entity Agreement.³⁰⁵

221. Xcel requests that MISO clarify Article 14.3E providing that "no partial assignments or novations shall be allowed." Xcel asserts that it interprets this to mean

³⁰⁰ *Id.* Articles 14, 14.1, 14.2.

³⁰¹ *Id.* Article 14.3.H.

³⁰² *Id.* Article 14.6 (Effect of Assignment).

³⁰³ *Id.* Article 14.6.1 (Effect of Improper Assignment).

³⁰⁴ MISO Filing at 48.

³⁰⁵ Edison Protest at 18 (citing *South Carolina Elec. & Gas Co.*, 147 FERC ¶ 61,126, at PP 222, 223 (2014) (holding that the developer agreement should allow assignments to an affiliated company that satisfies the developer qualification criteria without the transmission providers' consent and directing SCE&G to revise this provision to permit a transmission developer to assign the Coordination Agreement or rights thereunder as security to assist with the financing of the construction or operation of the developer's transmission facilities without the prior consent of the transmission providers, subject to the developer informing the transmission providers of such an assignment as soon as practicable)).

full novations are allowed, but that it could also be interpreted to mean that no novations are allowed.³⁰⁶

(c) **MISO Answer**

222. MISO disagrees with Edison's contention that the assignment provisions impose too many requirements, stating that these requirements are based on those accepted for CAISO, PJM, and SPP, as well as stakeholder discussions. In addition, MISO disagrees with Edison's argument that the assignment provisions should be reciprocal, noting that it has not retained any right to assign its interests in the Project to another entity.³⁰⁷

223. In response to Xcel, MISO does not believe that novations should be allowed, as they are not appropriate where a transmission developer has been competitively selected. Moreover, MISO notes, novations are not permitted under SPP's tariff or MISO's Generator Interconnection Agreement.³⁰⁸

(d) **Commission Determination**

224. We accept, subject to condition, MISO's proposed provisions under Article 14 governing the assignment of a Selected Developer's rights, duties, and obligations under the Selected Developer Agreement to another entity. We agree with Xcel that it is unclear whether the language in Article 14.3(E) allows full novations. We note that MISO clarifies in its answer that a novation is not allowed because the Transmission Developer was competitively selected. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 14.3(E) to make this clear.

225. We reject Edison's request that MISO be required revise the proposed assignment provisions of the Selected Developer Agreement to make the assignment provisions reciprocal. Because a Selected Developer is selected based on a competitive qualification process, a Selected Developer's ability to assign its rights under the Selected Developer Agreement are appropriately limited. We find that the limitations on assignments by a Selected Developer in Article 14.3 appropriately provide the protections necessary to ensure that an assignee can perform as well as the Selected Developer and that reliability

³⁰⁶ Xcel Comments at 38.

³⁰⁷ MISO Answer at 49.

³⁰⁸ *Id.* (citing MISO *pro forma* Generator Interconnection Agreement at Article 19.1).

will not be compromised. We disagree with MISO that it is not retaining any right to assign its interests in a Project as Article 14 does not state that MISO is prevented from assigning its rights, duties, and obligations under the Selected Developer Agreement to another entity. However, we note that MISO's ability to assign its interests under the Selected Developer Agreement is not unlimited. For instance, Article 14.1 states that no party may assign the Selected Developer Agreement without prior written consent of the other party and Article 14.2 prohibits partial assignments.

xii. Project Confidential Information

(a) MISO Proposal

226. Article 16 provides that a Selected Developer may request confidential treatment of project information that is within the categories of information outlined in section VIII.D.14.1 of Attachment FF of the Tariff.³⁰⁹ To request confidential treatment, the Selected Developer must inform MISO through an inspection, oral communication or a written notice.³¹⁰ Also, a Selected Developer may use the procedures outlined in section VIII.D.14.2(d) of Attachment FF of the Tariff to inform MISO that project information should be treated as confidential.

227. Unless otherwise prohibited,³¹¹ MISO shall hold in confidence project confidential information for the term of the Selected Developer Agreement and for a period of three years after the expiration or termination of the Selected Developer Agreement.³¹² During this time, MISO shall not release or disclose project confidential information, except to its employees, consultants, and subcontractors,³¹³ and in certain circumstances, such as if required by law or a governmental authority.³¹⁴ In the event

³⁰⁹ Selected Developer Agreement, Article 16.1.

³¹⁰ *Id.* Article 16.1.1.

³¹¹ MISO must disclose information required to be disclosed by another provision of the Tariff, by FERC order, or by order of any court, tribunal or agency with authority to compel such disclosure. *Id.* Article 16.1.

³¹² *Id.* Article 16.2 (Term of Project Confidential Information).

³¹³ *Id.* Article 16.3 (Release of Project Confidential Information).

³¹⁴ *Id.* Article 16.5 (Required Disclosure) (providing that MISO must disclose confidential project information if a court or another Governmental Authority or entity

that MISO is required to disclose a party's project confidential information, it will notify such party.

228. As for remedies, if MISO breaches its obligations under Article 16, the Selected Developer may seek equitable relief, but not monetary damages, including direct, indirect, incidental, consequential or punitive damages resulting from or arising in connection with Article 16.

(b) Protests

229. Midcontinent MCN argues that the remedies provision should be revised to allow money damages for gross negligence or willful misconduct to protect against any knowing dissemination of privileged information that may cause financial harm to a developer.³¹⁵

(c) MISO Answer

230. MISO disagrees with Midcontinent MCN that a provision allowing for monetary damages in the event of a willful or grossly negligent disclosure of confidential information is necessary or appropriate. MISO states that such a provision would invite needless litigation and require the quantification of speculative damages, and that the limitation of remedies to injunctive relief is a standard commercial term.³¹⁶

(d) Commission Determination

231. We accept, subject to condition, MISO's proposed provisions in Article 16 regarding confidential information. We agree with MISO that a provision allowing for monetary damages, as Midcontinent MCN requests, would require the quantification of speculative damages and that limiting remedies to injunctive relief is appropriate. We note that this approach is consistent with a provision accepted by the Commission in CAISO's Approved Project Sponsor Agreement.³¹⁷

with the right, power and apparent authority to do so requests or requires disclosure); Article 16.6 (Disclosure to FERC, its Staff, or a State).

³¹⁵ Midcontinent MCN Comments at 9.

³¹⁶ MISO Answer at 51-52.

³¹⁷ See CAISO Approved Project Sponsor Agreement at Article 19.1.9.

232. However, regarding MISO's proposal to hold in confidence project confidential information for the term of the Selected Developer Agreement and for a period of three years after the expiration or termination of the Selected Developer Agreement,³¹⁸ the Selected Developer Agreement does not make clear what MISO will do with such confidential information after the three year period. Therefore, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing to revise the Selected Developer Agreement to state that it will return or destroy confidential information three years after the expiration or termination of the Selected Developer Agreement.

233. In addition, Article 16 of the Selected Development Agreement appears to include incorrect references to the Tariff. For example, Articles 16.1 and 16.1.1 of the Selected Developer Agreement reference various parts of section VIII.D.14 in Attachment FF of the Tariff, but section VIII.D.14 does not appear to exist in the Tariff. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing correcting the Tariff references in Article 16.

xiii. Project Safety

(a) Proposal

234. Article 17 requires the Selected Developer, while performing under the agreement, to take all necessary precautions to prevent property damage to the property of any third party and to protect all persons working on the project from personal injury, death, or occupational disease, injury, or death.³¹⁹ Also, it requires that the Selected Developer comply with Safety and Health Standards under the Occupational Safety and Health Act,³²⁰ and all other applicable laws, regulations, ordinances and standards.³²¹

(b) Protests

235. Transource asserts that MISO has not justified why the Article 17 safety requirements go beyond those required for non-competitive projects and the general

³¹⁸ Selected Developer Agreement, Article 16.2 (Term of Project Confidential Information).

³¹⁹ *Id.* Article 17 (Project Safety).

³²⁰ 29 U.S.C. § 651 (2012); Selected Developer Agreement, Article 17.

³²¹ Selected Developer Agreement, Article 17; MISO Filing at 50.

Tariff safety provisions in section VIII.B.4 of Attachment FF. Additionally, Transource states, the statement in Article 17 that a Selected Developer shall take all precautions necessary to prevent harm and/or damage to the property of any third party in its performance of the contract does not include the term “reasonable” or a similar qualifier.³²²

236. Xcel argues that it is unreasonable for MISO to have any contractual claim against the Selected Developer if the Selected Developer does not adequately ensure compliance with all applicable laws, regulations, ordinances, and standards, and that Article 17 is redundant because the Selected Developer must already undertake adequate safety practices under Good Utility Practice and laws, regulations, ordinances, and standards.³²³

(c) MISO Answer

237. MISO disagrees that Article 17 is unreasonable or unjustified. MISO states that the overriding importance of protecting persons from injury or death warrants specific attention on the part of the Selected Developer and should be an express contract provision, even though maintaining a safe Project environment may be a requirement of Good Utility Practice or Applicable Laws or Regulations. However, MISO agrees with Transource that a Selected Developer should take all reasonable precautions necessary to prevent harm and/or damage to the property of any third party in its performance of the contract and will clarify Article 17 accordingly if directed to do so by the Commission.³²⁴

(d) Commission Determination

238. We accept, subject to condition, MISO’s proposed provisions in Article 17 regarding project safety. We reject Xcel’s claim that the Selected Developer Agreement should not impose a contractual requirement requiring a Selected Developer to follow applicable safety laws, regulations, ordinances and standards. We are persuaded by MISO’s assertion that the importance of protecting persons from injury or death warrants specific attention on the part of the Selected Developer and should be an express contract provision.³²⁵

³²² Transource Comments at 10.

³²³ Xcel Comments at 23-24.

³²⁴ MISO Answer at 50-51.

³²⁵ *Cf. Pro forma LGIA* at § 18.3.11 (Insurance) (stating that “[t]he Parties agree to report to each other in writing as soon as practical all accidents or occurrences resulting

239. However, we agree with Transource that MISO should clarify Article 17 to state that a Selected Developer should take all “reasonable” precautions necessary to prevent harm and/or damage to the property of any third party in its performance of the contract. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing with this change.

xiv. Information Access and Audit Rights

(a) MISO Proposal

240. Article 18 provides that each party must make available to the other the costs that such party incurs in connection with its obligations under the Selected Developer Agreement and any information necessary for the other party to carry out its obligations under the agreement.³²⁶ In addition, the party receiving the disclosed information may only use such information for the purposes outlined in article 18.1.

241. Article 18 provides that each party shall notify the other party when it is aware that it is unable to comply with the provisions in the agreement for a reason other than a *force majeure* event, such as if a governmental authority advises it that it violated an applicable law, regulation or safety standard.³²⁷

242. Article 18 provides that MISO has the right to audit the Selected Developer’s cost pertaining to the performance or satisfaction of obligations under the Agreement, and that the Selected Developer has the right, as provided by the Tariff, to audit MISO accounts and records.³²⁸ For a period of twenty-four months after the Selected Developer issues the final cost summary, MISO may audit certain accounts and records related to the design, engineering, procurement, and construction of the project.³²⁹

in injuries to any person, including death, and any property damage arising out of this LGIA.”).

³²⁶ Selected Developer Agreement, Article 18.1.

³²⁷ *Id.* Article 18.2 (Reporting of Legal Violations and Non-Force Majeure Events).

³²⁸ *Id.* Article 18.3 (Audit Rights).

³²⁹ *Id.* Article 18.4 (Audit Rights Period for Construction-Related Accounts and Records).

(b) **Protests**

243. Xcel argues that it is unreasonable for the Selected Developer to report *potential* violations to MISO upon discovery of a violation because making such reports could escalate potential violations before the Selected Developer can address and rectify them, delay the project schedule, and unduly prejudice a Selected Developer's legal rights and opportunities to cost-effectively mitigate any potential violation.³³⁰

(c) **MISO Answer**

244. MISO states that it is willing to revise Article 18.2 of the Selected Developer Agreement if directed by the Commission to (1) change the timeframe for notifying MISO of violations of Applicable Laws and Regulations and safety standards from the time of discovery to the time that the Selected Developer reports a violation to, or receives notice of a violation from, a Governmental Authority and (2) remove the requirement that a Selected Developer agree to inform MISO if it discovers any facts that would lead a reasonable person to believe that the Selected Developer, including employees, agents, and subcontractors, has violated any Applicable Laws or Regulations or any applicable safety standards in the course of performing its Work or otherwise in regard to the Project.³³¹

(d) **Commission Determination**

245. We accept, subject to condition, MISO's proposed provisions in Article 18 regarding information access and audit rights. We find that Article 18 provides important information clarifying each party's rights and responsibilities with respect to making information available to the other party and auditing the other party's accounts and records. However, we agree with Xcel that it is unreasonable for the Selected Developer to report potential violations to MISO upon discovery of a violation as this could interfere with a Selected Developer's ability to properly address and rectify the violation. Therefore, we accept MISO's proposal in its answer to revise Article 18.2 of the Selected Developer Agreement to address Xcel's concerns. Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 18.2 of the Selected Developer Agreement to (1) change the timeframe for notifying MISO of violations of Applicable Laws and Regulations and safety standards from the time of discovery to the time that the Selected Developer reports a violation to, or receives notice of a violation from, a Governmental Authority and (2) remove the

³³⁰ Xcel Comments at 24-25.

³³¹ MISO Answer at 34-35.

requirement that a Selected Developer agree to inform MISO if it discovers any facts that would lead a reasonable person to believe that the Selected Developer, including employees, agents, and subcontractors, has violated any Applicable Laws or Regulations or any applicable safety standards in the course of performing its Work or otherwise in regard to the Project.

xv. Disputes

(a) MISO Proposal

246. Article 21 provides that initially, disputes arising out of or in connection with the Agreement shall be resolved informally between the designated representatives of each party. If the dispute is not resolved within 30 calendar days after the non-disputing party's notice of the claim, then the dispute will be submitted for resolution pursuant to the dispute resolution procedures specified in Attachment HH of the Tariff.³³²

247. In regard to disputes concerning indemnification, Article 21 provides that the Selected Developer must continue to indemnify MISO until a final determination as to whether the indemnification or defense was required. If no indemnity was required, MISO shall repay the Selected Developer for all funds and liability reasonably incurred as a result of the indemnification and defense.³³³

(b) Protests

248. Xcel argues that if MISO claims an indemnity by the Selected Developer and ultimately loses a dispute, MISO should cover the Selected Developer's indemnification costs with interest, at the Commission's then-authorized rate of interest. Xcel asserts that this will help incentivize MISO to only make indemnity claims when it believes that such claims are meritorious.³³⁴

(c) MISO Answer

249. MISO agrees that a Selected Developer should be made whole for its indemnification costs if indemnity is found not to apply. Thus, MISO states, it would be amenable to a directive requiring it to revise Article 21.1 to provide that, upon a finding that indemnity was not required, MISO shall be required to repay the Selected Developer

³³² Selected Developer Agreement, Article 21 (Disputes).

³³³ *Id.* Article 21.1 (Disputes Regarding Indemnification).

³³⁴ Xcel Comments at 25.

for all funds reasonably expended and liability reasonably incurred with interest at the CFR rate as a result of the indemnification and defense.³³⁵

(d) Commission Determination

250. We accept, subject to condition, MISO's proposed provisions in Article 21 governing disputes. We agree with both Xcel and MISO that a Selected Developer should be made whole for its indemnification costs if indemnity is found not to apply. Accordingly, we direct MISO, consistent with the change it proposes in its answer, to submit, within 30 days of the date of issuance of this order, a compliance filing revising Article 21.1 to provide that, upon a finding that indemnity was not required, MISO shall be required to repay the Selected Developer for all funds reasonably expended and liability reasonably incurred, with interest calculated pursuant to section 35.19(a) of the Commission's regulations, as a result of the indemnification and defense.

xvi. Protection of Work and Property

(a) Proposal

251. MISO states that Article 22 requires the Selected Developer to assume the risk of loss or damage to property, and to perform the work required by the Selected Developer Agreement in such a way as to assure the protection of MISO's Transmission System from loss, damage, and interruption.³³⁶ As such, Article 22 provides that the Selected Developer is responsible for the costs to correct damages to property, defective workmanship, and excessive cost of work, when such issues arise from the Selected Developer's acts or omissions.³³⁷

(b) Protests

252. Edison argues that Article 22 seems duplicative of the indemnification provisions and is thus unnecessary. Edison states that it is also unclear whether MISO is trying to prohibit these costs from being included in rates.³³⁸

³³⁵ MISO Answer at 47.

³³⁶ MISO Filing at 52.

³³⁷ Selected Developer Agreement, Article 22 (Protection of Work and Property).

³³⁸ Edison Protest at 19.

253. Transource argues that MISO has not justified why the Article 22 project performance standards go beyond those required by the Tariff for transmission owners of non-competitive projects.³³⁹

254. Xcel argues that Article 22 should not dictate how the Selected Developer assumes the risk of loss or damage or how the Selected Developer performs its work to assure the protection of the transmission provider's transmission system. Xcel argues that Article 5.2 already requires the Selected Developer to perform its obligations in accordance with Good Utility Practice and that the Selected Developer should determine how to bear that risk.³⁴⁰

(c) **MISO Answer**

255. In response to Edison, Transource, and Xcel, MISO proposes that on compliance, if directed by the Commission, it will strike Article 22 as proposed and replace it with the following statement: "Selected Developer at all times shall perform its Work in accordance with the Tariff and Good Utility Practice and shall assume the risk of loss or damage to real or personal property and to all Work."³⁴¹

(d) **Commission Determination**

256. We accept, subject to condition, MISO's proposed provisions in Article 22 regarding the protection of work and property. We agree with Xcel that Article 22 should not dictate how the Selected Developer performs its work to limit its own risk of loss or damage under the agreement. In accordance with the revision that MISO suggests in its answer, we direct MISO to submit, within 30 days of the date of issuance of this order, a compliance filing striking Article 22 of the Selected Developer Agreement as proposed and replacing it with following statement: "Selected Developer at all times shall perform its Work in accordance with the Tariff and Good Utility Practice and shall assume the risk of loss or damage to real or personal property and to all Work." As such, we will not address the protests, which relate to the initially proposed language, at this time.

³³⁹ Transource Comments at 11.

³⁴⁰ Xcel Comments at 39.

³⁴¹ MISO Answer at 51.

xvii. Regulatory Requirements and Governing Laws**(a) MISO Proposal**

257. Article 23 provides that each Selected Developer is required to obtain the required authorizations from governmental authorities by the dates set forth in the Selected Developer Agreement. In addition, it provides that nothing in the Selected Developer Agreement requires the developer to take an action that could subject it to lose its exemption under the certain laws, such as the Federal Power Act.³⁴²

258. In regards to venue, Article 23 provides that any dispute regarding the terms of the Selected Developer Agreement and obligations of any party arising under this agreement or pertaining to the project, must be brought before the Commission, unless the Commission directs the disputing party to pursue its claim before a state or federal court.³⁴³ If a party fails to abide by this provision, such act shall be grounds for dismissal of the suit without prejudice, and the party breaching this provision will bear the other party's cost in obtaining dismissal or transfer.³⁴⁴

(b) Protests

259. Transource argues that MISO should revise Article 23.1 to clarify that a Selected Developer missing an interim regulatory milestone is not a breach of the Selected Developer Agreement. Transource contends that this clarification is necessary because the Tariff does not require that a Selected Developer failing to meet an interim milestone is a breach.³⁴⁵

³⁴² Selected Developer Agreement, Article 23.1 (Regulatory Requirements).

³⁴³ *Id.* Article 23.2.2 (Venue); *id.* Article 23.2.3 (Non-FERC Jurisdictional Dispute Venue) (“Any claim that FERC finally determines must be made before a state or federal court shall be brought only in the Circuit or Superior Court for the County of Hamilton, Indiana or in the United States District Court for the Southern District of Indiana, applying Delaware Law.”).

³⁴⁴ *Id.* Article 23.2.3 (Non-FERC Jurisdictional Dispute Venue).

³⁴⁵ Transource Comments at 9.

(c) **MISO Answer**

260. MISO states that Transource's proposal is untenable because interim regulatory deadlines would not be binding if failing to adhere to them were not a breach under the Selected Developer Agreement. Furthermore, MISO argues, tracking regulatory deadlines is the best metric for ensuring that construction stays on schedule. Finally, MISO notes, the Selected Developer Agreement allows for a Selected Developer to cure interim delays, and MISO cannot unreasonably refuse to accept a plan for curing the delay as long as it does not delay the Project past its required in-service date.³⁴⁶

(d) **Commission Determination**

261. We accept MISO's proposed Article 23 of the Selected Developer Agreement as just and reasonable and not unduly discriminatory. We disagree with Transource that MISO should revise this article to clarify that a Selected Developer missing an interim regulatory milestone is not a breach of the Selected Developer Agreement. We agree with MISO that allowing a Selected Developer to miss an interim regulatory milestone without breaching the Selected Developer Agreement would render those milestones nonbinding, depriving MISO of a key opportunity for it to monitor the progress of a Project. In addition, as MISO explains, a Selected Developer can cure any breach of the Selected Developer Agreement due to a missed interim milestone as long as that cure does not delay the Project past its required in-service date.³⁴⁷ Thus, we find that Transource's proposed revision to Article 23 is neither necessary nor appropriate.

³⁴⁶ MISO Answer at 43-44.

³⁴⁷ Selected Developer Agreement, Article 12 (Default).

xviii. Representations, Warranties, and Covenants**(a) MISO Proposal**

262. Article 24 provides that each party must make certain representations, warranties and covenants.³⁴⁸ In addition, the Selected Developer must warrant that all data, including drawings and technical specifications, that it provides to MISO are accurate and complete.³⁴⁹

(b) Protests

263. NextEra argues that the required representation that all data provided to MISO are accurate and complete should include the phrase “as and when provided” and Republic asserts that the provision should include the phrase “to the best of Selected Developer’s knowledge and belief” to avoid breach for omissions or inaccuracies.³⁵⁰

(c) MISO Answer

264. MISO agrees with NextEra that drawings and specifications that are provided in draft form and clearly marked as such can reasonably be subject to revision. Accordingly, MISO would be amenable to a Commission directive requiring MISO to revise Article 24.5 to state that “[a]ll data, including drawings and technical specifications, provided by the Selected Developer to the Transmission Provider for the Project are accurate and complete as and when provided.”³⁵¹

³⁴⁸ *Id.* Article 24.1 (regarding good standing with applicable state laws); Article 24.2 (regarding authority to enter into the agreement); Article 24.3 (providing that the execution of the agreement will not conflict with any other obligation); Article 24.4 (providing that a party will obtain consent and approval by governmental authority, when applicable); Article 24.6 (Selected Developer Representations) (providing that, in executing the agreement, the Selected Developer is relying on what is specified in the RFP, the Agreement, the Tariff, and relevant portions of MISO’s Business Practice Manuals); MISO Filing at 54.

³⁴⁹ Selected Developer Agreement, Article 24.5 (Technical Specifications Accurate).

³⁵⁰ NextEra Comments at 12-13; Republic Protest at 19.

³⁵¹ MISO Answer at 52-53.

265. However, MISO disagrees with Republic's assertion that the Selected Developer should only be required to represent that these materials are accurate and complete to the best of its knowledge and belief. MISO contends that a Selected Developer should be responsible for providing accurate drawings and specifications, especially in the context of a competitively awarded project. MISO further argues that such a responsibility is necessary to ensure the proper and conforming development of the Project according to agreed specifications.³⁵²

(d) Commission Determination

266. With one exception, we accept MISO's proposed Article 24 of the Selected Developer Agreement, which governs the representations, warranties, and covenants that each party to the Selected Developer Agreement must make. We find that, in general, the representations, warranties, and covenants that proposed Article 24 requires each party to the Selected Developer Agreement to make are reasonable and are not unduly discriminatory.

267. We will not require MISO to revise proposed Article 24.5 of the Selected Developer Agreement to state that the Selected Developer represent that all data, including drawings and technical specifications, that it has provided to MISO are accurate and complete to the best of its knowledge and belief, as Republic requests. We agree with MISO that it is reasonable to require the Selected Developer to provide accurate drawings and specifications so that MISO can ensure that the Selected Developer is developing the Project in accordance with the agreed-upon specifications. Furthermore, the change that we direct below to accommodate draft drawings or technical specifications addresses Republic's concerns in part by allowing a Selected Developer to avoid breaching the Selected Developer Agreement simply because it has revised drawings or technical specifications that it provided to MISO in draft form. We disagree with Republic that we should require MISO to revise Article 24.5 to protect a Selected Developer from breaching the Selected Developer Agreement where it has omitted or provided inaccurate data.

268. We agree with NextEra that the required representation that all data the Selected Developer provides to MISO for the Project are accurate and complete should be revised to include the phrase "as and when provided." We agree that this revision is necessary to account for drawings and specifications that a Selected Developer provides to MISO in draft form and clearly marks as such, which can reasonably be subject to revision and thus are not necessarily accurate or complete at the time provided. We note that MISO also agrees with NextEra's proposed revisions. Accordingly, we direct MISO to submit,

³⁵² *Id.* at 52.

within 30 days of the date of issuance of this order, a further compliance filing to revise Article 24.5 of the Selected Developer Agreement (Technical Specifications Accurate) to state: “[a]ll data, including drawings and technical specifications, provided by the Selected Developer to the Transmission Provider for the Project are accurate and complete as and when provided.”

3. Stakeholder Process

a. Stakeholder Input

269. MISO states that it engaged in extensive stakeholder discussions, workshops, exchanges of written comments and answers, and dry runs to identify and draft the revisions to its Order No. 1000 compliant processes proposed in this filing. MISO states that it also engaged in outreach and collaboration with other RTOs in variance stages of developing and implementing Tariff language, *pro forma* agreements, and business practices to determine what has and has not worked well for other RTOs. As a result, MISO states that the proposals contained in this filing are informed by: (1) Substantial stakeholder input regarding the form and content of how new processes should run and how existing processes should be optimized; (2) Lessons learned from the developer qualification and selection processes of other RTOs; (3) Commission statements both in Order No. 1000 and in orders on other RTOs’ Order No. 1000 compliance and tariff optimization filings; and (4) Pre-existing MISO processes, forms, and agreements, such as the *pro forma* Generator Interconnection Agreement, adapted to fits the needs of the Transmission Developer Qualification and Selection process.³⁵³

b. Protests

270. Edison asserts that the MISO stakeholder process did not include meaningful, bilateral discussions between MISO and transmission developers, regarding the terms and conditions of the Selected Developer Agreement after it was posted.³⁵⁴ Midcontinent MCN and Transource assert that stakeholder discussion regarding the Selected Developer Agreement was rushed and gave stakeholders only a few weeks to provide input on the proposed Selected Developer Agreement, the associated tariff revisions, and

³⁵³ MISO Filing at 5-7.

³⁵⁴ Edison Protest at 3-8.

Transmission Owners Agreement language.³⁵⁵ Edison and Midcontinent request that the Commission order settlement judge and hearing proceedings.³⁵⁶

271. Republic argues that, despite MISO's assertion that its filing was based on "Lessons from Other RTOs," MISO left unchanged its evaluation formula with its minimal focus on cost without referencing that CAISO's and PJM's developer solicitation processes have resulted in selection of the developer based primarily on cost cap and cost containment commitments. Republic also asserts that MISO has yet to act on nonincumbent transmission developer suggestions, such as lowering from 345 kV to 200 kV the threshold for a transmission project to be considered a Market Efficiency Project, or effectively following its Tariff to prevent out of cycle transmission projects from circumventing the competitive process.³⁵⁷

c. Answers

272. Xcel responds to Edison's and Midcontinent MCN's requests for settlement judge procedures by stating that the majority, if not all of the protests can be resolved on the paper record in this proceeding. If the Commission chooses to refer the proceeding for further procedures to address issues not resolved by the Commission on the paper record, Xcel requests that the Commission convene a technical conference, rather than settlement judge procedures, to address remaining issues.³⁵⁸

273. MISO responds that its stakeholder process was extensive and provided ample opportunity over a sixteen-month period for stakeholders to participate in both conceptual and detailed discussions of the Tariff and Selected Developer Agreement provisions. MISO states that it worked with stakeholders to develop and discuss key concepts before posting its first complete draft of the Selected Developer Agreement in June 2015, and revised the Selected Developer Agreement afterwards to implement stakeholder-proposed revisions. MISO also notes that its stakeholder workshops were well attended.³⁵⁹

³⁵⁵ Midcontinent MCN Comments at 4-5; Transource Comments at 2.

³⁵⁶ Edison Protest at 19-20; Midcontinent MCN Comments at 4.

³⁵⁷ Republic Protest at 3-4.

³⁵⁸ Xcel Answer at 2-5.

³⁵⁹ MISO Answer at 54-55.

274. MISO also contends that further conferences or settlement proceedings are not necessary or appropriate. MISO states that most of the areas of comment involve discrete objections to specific provisions of the Selected Developer Agreement. In addition, MISO argues, the types of bilateral discussions that Edison and Midcontinent request are not appropriate for a *pro forma* agreement like the Selected Developer Agreement, which will apply broadly to diverse stakeholders. Finally, MISO states, such proceedings would serve only to readdress issues discussed during the stakeholder process and would allow a few stakeholders to dictate the content of the Selected Developer Agreement for all other transmission developers.³⁶⁰

d. Commission Determination

275. We find that MISO conducted an open and transparent stakeholder process. We note that MISO received stakeholder input through multiple discussions and workshops, and solicited comments regarding the instant proposal over a sixteen-month period. We also note that Midcontinent MCN does not allege that MISO violated any provisions in its Tariff regarding MISO's stakeholder process. To the extent that protestors disagree with certain provisions in MISO's proposal, we find that these protests do not raise disputed issues of material fact that cannot be resolved based on the record before us. Therefore, we decline to establish hearing and settlement judge procedures.

4. Typographical Errors and Corrections

276. In its comments, MISO Transmission Owners identify several miscellaneous typographical errors in the Selected Developer Agreement that it asks MISO to correct.³⁶¹ In its answer, MISO states that it reviewed MISO Transmission Owners' proposed corrections and commits to make them if so directed by the Commission. MISO also identifies several other non-substantive errors in Attachment FF of the Tariff and requests that the Commission direct MISO to correct the errors MISO has identified.³⁶² Accordingly, we direct MISO to submit, within 30 days of the date of issuance of this order, the non-substantive corrections to the Selected Developer Agreement that MISO Transmission Owners identify in their comments and the non-substantive corrections to Attachment FF of the Tariff that MISO identifies in its answer.

³⁶⁰ *Id.* at 55-56.

³⁶¹ MISO Transmission Owners Comments at 10.

³⁶² MISO Answer at 54.

The Commission orders:

(A) We accept MISO's revisions to its Tariff and the Transmission Owners Agreement, effective November 16, 2015, subject to condition, as discussed in the body of this order.

(B) We direct MISO to submit a compliance filing within 30 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.