

154 FERC ¶ 61,229  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Independent System Operator, Inc.                      Docket Nos. ER15-2657-001  
ER15-2657-002  
ER15-2658-001

ORDER ON REHEARING AND COMPLIANCE

(Issued March 22, 2016)

1. On November 13, 2015, the Commission issued an order accepting, subject to condition, Midcontinent Independent System Operator, Inc.'s (MISO) 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) modifying MISO's competitive transmission developer qualification and selection process and including a new *pro forma* Selected Developer Agreement.<sup>1</sup>
2. On December 14, 2015, Republic Transmission, LLC (Republic) filed a request for rehearing of the November 13, 2015 Order.<sup>2</sup> On December 14, 2015, MISO submitted revisions to Module A and Attachment FF of its Tariff to comply with the November 13, 2015 Order. In this order, we deny Republic's request for rehearing and accept MISO's filing, effective November 16, 2015.

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<sup>1</sup> *Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,168 (2015) (November 13, 2015 Order).

<sup>2</sup> The rehearing request was filed in Docket Nos. ER15-2657-002 and ER15-2658-001.

## **I. Background**

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 submitted changes to the Transmission Owners Agreement. MISO stated that the purposes of the proposed revisions were 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.<sup>3</sup> In the November 13, 2015 Order, the Commission accepted MISO's proposed Tariff revisions, subject to condition.

4. On December 14, 2015, in Docket No. ER15-2657-001, MISO submitted revisions to Module A and Attachment FF of its Tariff<sup>4</sup> to comply with the November 13, 2015 Order.

## **II. Notice of Filing and Responsive Pleadings**

5. Notice of MISO's compliance filing in Docket No. ER15-2657-001 was published in the *Federal Register*, 80 Fed. Reg. 79,324 (2015), with interventions and protests due on or before January 4, 2016. On January 4, 2016, Illinois Commerce Commission filed a notice of intervention.

## **III. Discussion**

### **A. Procedural Matters**

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), Illinois Commerce Commission's notice of intervention serves to make it a party to this proceeding.

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<sup>3</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 3.

<sup>4</sup> MISO, FERC Electric Tariff, Module A (Common Tariff Provisions) (30.0.0); Attachment FF (Transmission Expansion Planning Protocol) (43.0.0).

**B. Substantive Matters**

7. As discussed below, we deny Republic's request for rehearing and accept MISO's compliance filing.

**1. Financial Security Obligation****a. November 13, 2015 Order**

8. In the November 13, 2015 Order, the Commission accepted, subject to condition, MISO's proposed financial security provisions in Article 3 of the Selected Developer Agreement.<sup>5</sup> Article 3 requires a Selected Developer to submit financial security to MISO in an amount equal to three percent of the total estimated cost of the transmission project in the form of either an irrevocable letter of credit or cash deposit.<sup>6</sup> Article 3 also requires that the funds will be drawn upon in the event that MISO conducts a variance analysis due to a Selected Developer's default,<sup>7</sup> and 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.<sup>8</sup>

**b. Request for Rehearing**

9. Republic seeks rehearing of the Commission's decision to accept MISO's proposed financial security provisions in the Selected Developer Agreement because, according to Republic, there is no obligation in MISO's existing Tariff for the Selected Developer to post financial security, and the Tariff does not establish the circumstances under which the financial security will be accessed or how it will be distributed.<sup>9</sup> Republic asserts that the *pro forma* Selected Developer Agreement is not the place to

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<sup>5</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 117. We discuss the specific conditions the Commission imposed later in this order.

<sup>6</sup> Selected Developer Agreement, Article 3 (Financial Security).

<sup>7</sup> *Id.* Article 3.3 (Right to Draw on Financial Security).

<sup>8</sup> *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.*

<sup>9</sup> Republic Rehearing Request at 1-2.

introduce substantive commercial obligations, such as a requirement to post financial security.<sup>10</sup> Republic states that MISO justified the requirement by noting that PJM Interconnection LLC's (PJM) *pro forma* Designated Entity Agreement contains a similar requirement, but Republic argues that the PJM Tariff itself imposes the requirement to post financial security, including specifying the amount, and PJM's Designated Entity Agreement merely implements the Tariff requirement.<sup>11</sup>

10. Republic contends that, while the *pro forma* Selected Developer Agreement will be in the Tariff as a *pro forma* two-party agreement between signing Selected Developers and MISO, rules of general applicability should be in the universally applicable Tariff, not two-party agreements. Republic asserts that the Commission recognized this distinction in Order No. 2003 by ordering revisions to Open Access Transmission Tariffs to include both Generator Interconnection Procedures and a *pro forma* Generator Interconnection Agreement.<sup>12</sup> Republic requests that the Commission require MISO to move section 3 of the *pro forma* Developer Agreement to the Tariff.<sup>13</sup>

**c. Commission Determination**

11. We deny Republic's request for rehearing. We disagree with Republic that a Selected Developer's obligation to provide financial security must be in a different part of the Tariff than the *pro forma* Selected Developer Agreement and that the Selected Developer Agreement should not contain substantive commercial obligations. The Selected Developer Agreement is a part of the Tariff and is binding on the parties to the Selected Developer Agreement. In addition, the Selected Developer Agreement imposes numerous obligations that apply to the parties that execute the agreement, and Republic does not explain why the obligation to provide financial security should be treated differently than other obligations that are similarly included in the Selected Developer

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<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Republic Rehearing Request at 4-5 (citing *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)).

<sup>13</sup> *Id.* at 5.

Agreement rather than elsewhere in the Tariff. As with other Tariff provisions, the Commission reviewed and accepted the *pro forma* Selected Developer Agreement provisions and any changes to the *pro forma* Selected Developer Agreement must be filed with the Commission. Indeed, we find that the Selected Developer Agreement is an appropriate place for the obligation to provide financial security because the financial security funds are drawn upon only if a Selected Developer defaults under the Selected Developer Agreement.<sup>14</sup>

12. We also note that, on February 2, 2016, the Commission accepted, in a separate proceeding, MISO's proposed Tariff revisions that, among other things, provided more detail about the financial security required in the *pro forma* Selected Developer Agreement.<sup>15</sup> These revised Tariff provisions reference the financial security obligation in the Selected Developer Agreement, outline the circumstances in which the project financial security will be drawn upon, and explain how it will be used and distributed.<sup>16</sup> Thus, MISO has addressed through the changes to the Tariff in another proceeding Republic's concern that the Tariff does not establish the circumstances under which the financial security will be accessed or how it will be distributed.<sup>17</sup>

## 2. Confidential and Non-Confidential Information Provisions

### a. November 13, 2015 Order

13. In the November 13, 2015 Order, the Commission found that MISO's proposal was unclear about when MISO intends to disclose the non-confidential information submitted in a Proposal.<sup>18</sup> The Commission also found that it was unclear whether MISO

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<sup>14</sup> See Selected Developer Agreement, Article 3.3 (Right to Draw on Financial Security).

<sup>15</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,074 (2016).

<sup>16</sup> See MISO Tariff, Attachment FF, § IX.H (Project Financial Security).

<sup>17</sup> As to Republic's assertion that the requirement for a Selected Developer to post financial security in PJM is contained in a separate part of the Tariff instead of the Designated Entity Agreement, we note that Regional Transmission Organizations (RTO) are not required to have identical planning processes. See, e.g., *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320, at P 40 (2009) (finding that there can be more than one just and reasonable planning process and RTOs are not required to have identical planning processes).

<sup>18</sup> A Proposal is defined as a proposal to construct, implement, own, operate,

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intended to disclose in the post-evaluation selection report all non-confidential information submitted in all the Proposals, or if MISO planned to disclose more detailed information only about the Proposal that is selected. Thus, the Commission directed MISO 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). The Commission stated that, following receipt of this additional information, it would 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.<sup>19</sup>

**b. Summary of Compliance Filing**

14. On compliance, MISO proposes revisions to outline the categories of confidential and non-confidential information and to explain when and in what manner each category of information will be disclosed.<sup>20</sup> MISO proposes that it will not, without the prior

written consent of the respective RFP Respondent<sup>21</sup> and/or Proposal Participant,<sup>22</sup> publically disclose or share the following information with any individual except for

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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) (39.0.0).

<sup>19</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 75.

<sup>20</sup> MISO Tariff, Attachment FF, § VIII.D.9 (Confidential Treatment of Proposals).

<sup>21</sup> RFP Respondent(s) is defined as one or more Qualified Transmission Developer(s) involved in a Proposal submitted to the Transmission Provider in response to a Request for Proposals. *Id.* Module A, § II.1.R (Definitions - R).

<sup>22</sup> Proposal Participant(s) is defined as any entity or entities involved in a Proposal, excluding the RFP Respondent(s), that will co-own the Competitive Transmission Project and rely on the RFP Respondent(s) to be the Selected Developer(s) responsible for

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MISO employees or an independent contractor of MISO who requires access to such information to perform its duties and has executed MISO's non-disclosure and/or CEII agreement: (i) all detailed breakdowns of costs, including but not limited to, the itemized costs for labor and materials; (ii) all details of an RFP Respondent and/or Proposal Participant's financing arrangements; (iii) all detailed design, routing, siting, or specialty construction techniques; and (iv) any other information or portions of documents that are clearly labeled and specifically designated as "CONFIDENTIAL," except for: (1) the items specified as non-confidential information in Section VIII.D.9.b of Attachment FF; and (2) information and or items which MISO is otherwise required to make publically available.<sup>23</sup>

15. MISO proposes that the following categories of information shall not be considered confidential or maintained as Confidential Information: (i) the identity of RFP Respondents and Proposal Participants; (ii) the high-level design for Competitive Transmission Facilities; (iii) the total estimated cost of the Competitive Transmission Project; (iv) the estimated 40 year Annual Transmission Revenue Requirement; (v) information relating to any cost-containment measures, cost caps, and rate incentives; (vi) information regarding the proposed in-service dates of the Competitive Transmission Facilities; (vii) the final evaluation score assigned to each Proposal, with the names of the RFP Respondents and Proposal Participants redacted or masked; (viii) all timetables and milestones agreed to between a Selected Developer(s) and MISO in the Selected Developer Agreement; (ix) all publically available information; (x) any information for which a RFP Respondent or Proposal Participant has provided consent to release; and (xi) any information MISO is required to make publically available pursuant to section VIII.D.9.d of Attachment FF.<sup>24</sup>

16. MISO proposes that it may use the non-confidential information of Selected Developers, or RFP Respondents and Proposal Participants whose Proposals are not the Selected Proposal, only to the extent reasonably necessary to explain why the selection of the Selected Proposal is proper based on the comparative analysis required by the Tariff, including discussions of features of the Selected Proposal that MISO determined to be

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constructing and implementing the Competitive Transmission Facilities associated with the Competitive Transmission Project. Proposal Participants may be identified in a Proposal as responsible for one or more aspects of operations, maintenance, repair, or restoration, on terms comparable to those that would apply if the RFP Respondent(s) intended to rely on a third-party contractor. *Id.* § II.1.P (Definitions – P).

<sup>23</sup> *Id.* Attachment FF, § VIII.D.9(a).

<sup>24</sup> *Id.* § VIII.D.9(b).

important in selecting the Selected Proposal. MISO further proposes that it will only make public the identity of RFP Respondents and non-selected Proposal Participants submitting the non-confidential information when disclosing: information that is publically available; any information for which a RFP Respondent or Proposal Participant has consented to release; or, any information MISO is required to make publically available pursuant to section VIII.D.9(d) of Attachment FF. In addition, MISO proposes that, in all cases, non-confidential information that is not disclosed in the post-evaluation selection report shall not be otherwise disclosed by MISO except as required by section VIII.D.9(d) of Attachment FF.<sup>25</sup>

17. Finally, MISO proposes in section VIII.D.9(d) (Other Disclosures of Proposal Information) that it will disclose any information submitted in Proposals or in response to a request for clarification and or additional information, whether confidential or non-confidential, that it is otherwise required by or subject to another Tariff provision, Commission rule or order, or court order, or as ordered by state or federal agencies to disclose.<sup>26</sup>

**c. Commission Determination**

18. We accept MISO's proposed revisions regarding the categories of confidential and non-confidential information in Proposals, and the circumstances and manner in which each category of information will be disclosed. We find that MISO's proposal to not disclose any confidential information in the post-evaluation selection report, to only use non-confidential information to the extent reasonably necessary to explain why the selection of the Selected Proposal is proper, and to not disclose the identity of non-selected Proposal Participants, except in certain circumstances, adequately protects potentially sensitive commercial information. In addition, while no confidential information will be disclosed, we find that the proposed categories of non-confidential information, such as the cost of a project, cost containment information, and the 40 year revenue requirement, include sufficient information to achieve transparency in the selection process. Thus, we find that 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.

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<sup>25</sup> *Id.* § VIII.D.9(c).

<sup>26</sup> *Id.* § VIII.D.9(d).

### **3. Interest on Cash Deposit**

#### **a. November 13, 2015 Order**

19. In the November 13, 2015 Order, the Commission found that MISO's proposed provisions regarding a Selected Developer's obligation to provide financial security did not specify that MISO will include interest with any financial security deposit refund. Thus, the Commission directed MISO to revise Article 3 of the *pro forma* Selected Developer Agreement to state that MISO will include interest, calculated pursuant to section 35.19(a) of the Commission's regulations,<sup>27</sup> with any cash deposit that is returned to the Selected Developer.<sup>28</sup>

#### **b. Summary of Compliance Filing**

20. MISO notes that the Cash Deposit Agreement, which is Appendix E to the Selected Developer Agreement, provides that "Selected Developer shall earn interest on the Total Project Deposit at the Transmission Provider's overnight bank rate from and including the date of deposit to, but excluding, the date such Total Project Deposit is returned (or applied as described below)."<sup>29</sup> MISO states that, consistent with this approved language, it proposes to comply with the Commission's directive by adding the following sentence to Article 3.2 of the Selected Developer Agreement:

Upon return of a Cash Deposit, the Transmission Provider shall pay to the Selected Developer the total Cash Deposit minus any funds drawn pursuant to Article 3.3 ("Right to Draw on Financial Security") plus interest at the Transmission Provider's overnight bank rate from and including the date of deposit to, but excluding, the date such funds are returned to the Selected Developer.<sup>30</sup>

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<sup>27</sup> 18 C.F.R. § 35.19(a) (2015).

<sup>28</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 117.

<sup>29</sup> MISO Transmittal at 12 (citing Selected Developer Agreement, Appendix E—Cash Deposit Agreement at 1).

<sup>30</sup> Selected Developer Agreement, Article 3.2.

MISO submits that inclusion of this language complies with the Commission's directive in the November 13, 2015 Order and is consistent with the Cash Deposit Agreement in the Selected Developer Agreement that the Commission accepted in the November 13, 2015 Order.

**c. Commission Determination**

21. We accept MISO's proposed revision to Article 3.2 regarding interest earned on any returned cash deposit as complying with the directive to include interest with any cash deposit that is returned to the Selected Developer. We find that it is reasonable that MISO provide interest on refunds of unexpended deposits based on the actual interest MISO earned using MISO's overnight bank rate<sup>31</sup> and that it is consistent with the Cash Deposit Agreement in Appendix E of the Selected Developer Agreement.

**4. Other Compliance Directives**

**a. Attachment FF Revisions**

22. In the November 13, 2015 Order, the Commission directed MISO to revise section VIII.B.7 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 MISO's written explanation detailing its determination to not recertify or to terminate the entity's Qualified Transmission Developer status.<sup>32</sup> In response, MISO proposes to revise section VIII.B.7 of the Tariff to include the specific addition that the Commission directed.

23. The Commission also directed MISO 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 120 calendar days before the scheduled in service date of the Competitive Transmission Project.<sup>33</sup> In response, MISO proposes to revise

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<sup>31</sup> *See, e.g., Tampa Elec. Co.*, 148 FERC ¶ 61,172, at P 224 (2014) (finding that it is reasonable to make refunds on the basis of actual interest earned on unexpended qualification and information deposits).

<sup>32</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 22.

<sup>33</sup> *Id.* P 28.

Attachment FF of its Tariff to include this requirement in a new section VIII.I (Obligation to Negotiate Interconnection Agreements).

24. The Commission also directed MISO to delete the proposed definition for “Joint Proposal” from Module A of the Tariff.<sup>34</sup> In response, MISO proposes to do so.

25. In addition, the Commission directed MISO to change the attestation requirement in section VIII.D.5.14 so that a transmission developer submitting a qualification application or a Proposal must attest that information is true to the best of the transmission developer’s knowledge and belief.<sup>35</sup> Further, the Commission directed MISO to revise attestation (v) of section VIII.D.5.14 to state that “it has complied with Applicable Laws and Regulations and Good Utility Practice.”<sup>36</sup> In response, MISO proposes to revise VIII.D.5.14 as directed.

26. The Commission also directed MISO to remove from section VIII.D of Attachment FF the requirement that RFP Respondents maintain their status, finding that this requirement already appears, and should remain, in section VIII.D.12.<sup>37</sup> In response, MISO proposes to remove the requirement from section VIII.D.12.

27. The Commission further directed MISO to revise section VIII.D.12 of Attachment FF to provide a 30-day cure period on the same terms as offered to developers that submit their initial application to become qualified.<sup>38</sup> In response, MISO proposes to add language to section VIII.D.12 to state that MISO will send written notice to an RFP Respondent that MISO has determined is no longer a Qualified Transmission Developer stating the reason(s) for the loss of such status. MISO’s revised Tariff provides an RFP Respondent with 30 Calendar Days from MISO’s notification of the loss of Qualified Transmission Developer status to cure the reason(s) for such loss. Revised section VIII.D.12 further states that a Proposal shall not be deemed invalid if the

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<sup>34</sup> *Id.* P 31.

<sup>35</sup> *Id.* P 44.

<sup>36</sup> *Id.* P 45.

<sup>37</sup> *Id.* P 61.

<sup>38</sup> *Id.* P 62.

RFP Respondent cures the loss of Qualified Transmission Developer status within the 30 Calendar Day cure period.

28. Finally, the Commission directed MISO to revise 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.<sup>39</sup> In response, MISO proposes to revise section VIII.D.5.7 to state that RFP Respondents must provide the following: (1) a description of capital resources available to fund Competitive Transmission Project implementation costs, including how much capital is available, when the funds will be obtained, what conditions must be met to secure the funds, and the cost of funds; (2) an exhibit or high-level narrative description of the expected cash flows between the RFP Respondent and the funding source; (3) an overview schedule of significant expenditures for project implementation; (4) a description of immediately available funds to address unforeseen contingencies that arise during project implementation; (5) information describing the RFP Respondent's plan to obtain Project Financial Security within the timeframe required by the Selected Developer Agreement; (6) to the extent that an RFP Respondent intends to rely on personnel, material, technical, financial, and/or other resources from a parent or affiliate, an Acknowledgement of Support executed by such parent or affiliate; (7) the credit ratings, if applicable, and general financial information, including audited financial statements and notes, for the RFP Respondent and any parent or affiliate providing an Acknowledgement of Support, as well as *pro forma* financial statements for each calendar year until the RFP Respondent expects to place all project facilities into service; and (8) the RFP Respondent's financial strategy to facilitate timely replacements and rebuilds for the life of the project. MISO explains that these subsections are drawn from MISO's current draft Business Practice Manual 027, drafts of which, according to MISO, have been available for stakeholder review and comment since at least March of 2015.<sup>40</sup>

**b. Selected Developer Agreement**

29. In the November 13, 2015 Order, concerning proposed provisions addressing rights and obligations after a Selected Developer receives a notice of termination, the Commission directed MISO 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 a 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

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<sup>39</sup> *Id.* P 66.

<sup>40</sup> MISO Transmittal at 5.

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.<sup>41</sup> In response, MISO proposes to delete Article 2.4A and Article 2.4B(2). MISO further proposes to revise Article 2.4B(1), removing MISO's right to require assignment of contracts and instead requiring the Selected Developer to cooperate in good faith with the entity to which the Project is to be assigned and with any applicable third parties to facilitate the transfer of the Project, including the transfer of any contracts relating to the Project that the incoming developer desires to procure.<sup>42</sup>

30. The Commission also directed MISO to revise Article 3.4 of 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, as well as to include a definition for the term "Acknowledgement of Support."<sup>43</sup> In response, MISO proposes to add language to the end of Article 3.4 stating that MISO will provide an accounting of the financial security within 30 days of submitting a filing to terminate the Selected Developer Agreement, or in the case of default, within 30 days after implementation of the mitigation plan or MISO's determination to take no action. MISO also proposes to revise Article 1 to define the term "Acknowledgement of Support" as a document that MISO provides to RFP Respondents for submission with their proposals that (1) is executed by the parent or affiliate of an RFP Respondent, (2) lists specific personnel, material, technical, financial, and/or other support that the parent or affiliate commits to provide to the RFP Respondent if its Proposal is selected, and (3) authorizes the RFP Respondent to represent to MISO that such RFP Respondent will have access to the specified support if selected.

31. Moreover, the Commission directed MISO to revise the last paragraph of Article 4.4 to clarify when transmission-to-transmission interconnection agreements must be executed or filed unexecuted with the Commission. In response, MISO proposes to

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<sup>41</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 100.

<sup>42</sup> All tariff references in this section of the order are to MISO Tariff, Attachment FF, Appendix 1 to Attachment FF (Selected Developer Agreement).

<sup>43</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at PP 118-119.

revise Article 4.4 to clarify that transmission-to-transmission interconnection agreements must be executed or filed unexecuted prior to energization of the Competitive Transmission Project.<sup>44</sup> Additionally, the Commission directed 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, as well as to revise Article 4 to state that a Selected Developer must commit to operate in a Local Balancing Authority rather than a Balancing Authority.<sup>45</sup> In response, MISO proposes to do so.<sup>46</sup>

32. The Commission directed MISO to revise Article 5 to: (1) remove the language allowing MISO to require the Selected Developer to develop and implement a plan to cure violations of applicable laws, regulations, and safety standards and instead allow MISO to require the Selected Developer to provide supporting information after reporting any violations to MISO; (2) change the timeframe for notifying MISO of violations 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 (3) revise the third paragraph of Article 5.2 to make the term “modifications” lowercase.<sup>47</sup> MISO proposes the specific changes as directed.<sup>48</sup>

33. In addition, the Commission directed MISO to revise Article 6.4.1 to require that MISO obtain agreement from a Selected Developer before MISO issues a change order.<sup>49</sup> In response, MISO proposes to revise Article 6.4.1 to replace the requirement that MISO consult with a Selected Developer before issuing a change order with a requirement that MISO obtain the Selected Developer’s agreement to such change order, to state that the

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<sup>44</sup> MISO Transmittal at 14 (citing Selected Developer Agreement, Article 4.4 (Transmission-to-Transmission Interconnection Agreements)).

<sup>45</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at PP 137-139.

<sup>46</sup> MISO Transmittal at 14 (citing Selected Developer Agreement, Articles 4.6 (Commitment to Operate within a Local Balancing Authority) and 4.7 (NERC Registration and Reliability Standards)).

<sup>47</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at PP 152-154.

<sup>48</sup> MISO Transmittal at 14-15 (citing Selected Developer Agreement, Article 5.2 (Exclusive Responsibility of Selected Developer)).

<sup>49</sup> November 13, 2015 Order, 153 FERC ¶ 61,168 at P 163.

change order will become effective on an agreed date, and to include language stating that modifications to Project schedule, project cost, and cost caps shall be made by agreement between the parties.

34. The Commission further directed MISO to revise Article 7 to include indemnity provisions for claims arising from the work conducted to complete MISO's inspections.<sup>50</sup> MISO proposes to revise Article 7 to state that MISO "...agrees to indemnify the Selected Developer in accordance with Article 13.2 to the extent allowed by the Tariff for any claims arising from actions of the Transmission Provider, including its employees and agents, in completing such inspections."

35. The Commission directed MISO 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 Selected Developer's proposal was submitted. The Commission also directed MISO 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 its Tariff.<sup>51</sup> MISO proposes to revise Articles 9.1 and 9.2.1 as directed.

36. The Commission found that MISO's definition of "Force Majeure Events" in Article 11.1 was too narrow and that the exceptions were too broad. Therefore, the Commission directed MISO to include "any other cause beyond a party's control," and remove all stated exclusions from the definition.<sup>52</sup> MISO proposes to revise the definition of Force Majeure Events in Article 11.1 as the Commission directed.

37. The Commission directed MISO to revise Article 12 to provide that, if a 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.<sup>53</sup> In response, MISO revised subsection (iv) of Article 12.1 to state that that the non-breaching party shall not be permitted to consider cost increases as a factor in evaluating a cure plan to the extent that the breaching party has agreed to internally absorb such increases.

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<sup>50</sup> *Id.* P 167.

<sup>51</sup> *Id.* P 183.

<sup>52</sup> *Id.* P 192.

<sup>53</sup> *Id.* P 199.

38. In addition, the Commission found that that the indemnification provisions in the Selected Developer Agreement should be reciprocal to the extent allowed under the Tariff. Therefore, the Commission directed MISO to revise 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.<sup>54</sup> In response, MISO included a new subsection, 13.2.1.1, providing for a reciprocal indemnification clause. MISO also revised the indemnity and defense process in Article 13.2 to be equally applicable to MISO and the Selected Developer's indemnity obligations.

39. The Commission further directed MISO to revise the damage reporting threshold from \$5,000.00 to \$50,000.00.<sup>55</sup> In response, MISO revised the damage reporting threshold in Article 13.3.1.12 from \$5,000.00 to \$50,000.00.

40. The Commission directed MISO to revise Article 14.3(E) to clarify, consistent with MISO's Answer, that neither partial nor full novations are allowed.<sup>56</sup> In response, MISO revised Article 14.3(E) to state that no partial assignments shall be allowed, nor shall any novations be allowed, whether partial or full.

41. The Commission also directed MISO to revise Article 16 to state that MISO will return or destroy confidential information three years after the expiration or termination of the Selected Developer Agreement.<sup>57</sup> In response, MISO revised Article 16.2 to state that it shall return to the Selected Developer or destroy all Project Confidential Information at the expiration of three calendar years from the date that the Selected Developer Agreement expires or is terminated.

42. Moreover, the Commission directed MISO to 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.<sup>58</sup> In response, MISO inserted the word "reasonable" before "precautions" in the first sentence of Article 17.

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<sup>54</sup> *Id.* P 215.

<sup>55</sup> *Id.* P 216.

<sup>56</sup> *Id.* P 224.

<sup>57</sup> *Id.* P 232.

<sup>58</sup> *Id.* P 239.

43. The Commission found that it is unreasonable for the Selected Developer to be required to report potential violations to MISO upon discovery of a potential violation as this could interfere with a Selected Developer's ability to properly address and rectify the violation. Therefore, the Commission directed MISO to revise Article 18.2 of the Selected Developer Agreement to 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. The Commission also directed MISO to 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.<sup>59</sup> In response, MISO revised Article 18.2 to state that the Selected Developer must immediately inform MISO if it receives any notice from a Governmental Authority regarding a violation of Applicable Laws and Regulations or safety standards or reports such a violation to a Governmental Authority. MISO also proposes to remove from Article 18.2 the requirement that a Selected Developer agrees to inform MISO of potential violations.

44. The Commission further directed MISO, to revise Article 21.1 to include interest calculated pursuant to section 35.19(a) of the Commission's regulations on any repayment to the Selected Developer for all funds reasonably expended and liability reasonably incurred as a result of the indemnification and defense, upon a finding that indemnity was not required.<sup>60</sup> In response, MISO revised the last sentence in Article 21.1 to include interest calculated pursuant to section 35.19(a) of the Commission regulations with any funds repaid.

45. The Commission also directed MISO to revise Article 22 to state that the "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."<sup>61</sup> In response, MISO revised Article 22 with the specific language directed by the Commission.

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<sup>59</sup> *Id.* P 245.

<sup>60</sup> *Id.* P 250.

<sup>61</sup> *Id.* P 256.

46. The Commission found that the required representation that all data that the Selected Developer provides to MISO for the Project are accurate and complete should be revised to include the phrase “as and when provided.”<sup>62</sup> In response, MISO inserted the words “as and when provided” at the end of Article 24.5.

47. Finally, the Commission directed MISO to correct various typographical errors.<sup>63</sup> In response, MISO corrected the identified errors.

48. We find that MISO’s proposed revisions, as described above, comply with the directives in the November 13, 2015 Order.

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<sup>62</sup> *Id.* P 268.

<sup>63</sup> *Id.* PP 233, 276.

The Commission orders:

(A) Republic's request for rehearing is hereby denied, as discussed in the body of this order.

(B) MISO's compliance filing is hereby accepted, effective November 16, 2015, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.