

140 FERC ¶ 61,057  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Pioneer Transmission, LLC

Docket No. EL12-24-000

v.

Northern Indiana Public Service Company and Midwest  
Independent Transmission System Operator, Inc.

ORDER ON COMPLAINT

(Issued July 19, 2012)

1. On February 8, 2012, pursuant to sections 206 and 306 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>2</sup> Pioneer Transmission, LLC (Pioneer) filed a complaint against Northern Indiana Public Service Company (NIPSCO) and Midwest Independent Transmission System Operator, Inc. (MISO) (Complaint) alleging that: (1) NIPSCO does not have ownership and investment rights to any of the investment associated with the segment of the Pioneer Project<sup>3</sup> that MISO included in its 2011 Midwest Transmission Expansion Plan (MTEP) as a Multi-Value Project (MVP);<sup>4</sup> and (2) Pioneer should be allowed to become a party to the

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<sup>1</sup> 16 U.S.C. §§ 824e and 825e (2006).

<sup>2</sup> 18 C.F.R. § 385.206 (2011).

<sup>3</sup> The Pioneer Project is a 765kV transmission project that Pioneer intends to build in the State of Indiana and that would connect with both PJM Interconnection, L.L.C. (PJM) and MISO substations.

<sup>4</sup> MVPs are a category of transmission projects that enable the reliable and economic delivery of energy in support of documented energy policy mandates or laws and/or address multiple economic issues affecting multiple transmission zones, and/or address at least one economic issue affecting multiple transmission zones and one

(continued...)

Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (Transmission Owners Agreement) immediately and begin recovering Construction Work in Progress (CWIP) in accordance with the Commission's order approving transmission rate incentives for Pioneer.<sup>5</sup> For the reasons discussed below, the Commission denies the complaint against NIPSCO and dismisses as moot the complaint against MISO.

## **I. Background**

2. Pioneer is jointly owned by American Electric Power Company, Inc. (AEP) and Duke Energy Corporation (Duke). Pioneer was formed to conduct studies in support of the Pioneer Project.

3. On October 15, 2008, Pioneer submitted a section 205 filing with the Commission, requesting approval of formula rates in both PJM and MISO together with rate incentives in accordance with Order No. 679 for the project.<sup>6</sup> The Commission accepted the formula rates for filing, subject to the Pioneer Project being approved for construction in the PJM and MISO regional transmission plans as applicable and subject to settlement and hearing procedures.<sup>7</sup> The Commission also granted transmission rate incentives, which included the right to collect 100 percent of a return on CWIP, which "will not go into effect unless and until the project is approved by the regional transmission planning processes of PJM and MISO and there is a Commission-approved cost allocation methodology in place."<sup>8</sup>

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reliability issue. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010), *order on reh'g*, 137 FERC ¶ 61,074 (2011).

<sup>5</sup> *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009) (Incentives Order), *order on reh'g*, 130 FERC ¶ 61,044 (2010) (Incentives Rehearing Order).

<sup>6</sup> *See Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *reh'g denied* 119 FERC ¶ 61,062 (2007), *appeal dismissed sub nom.*, *Am. Pub. Power Ass'n. v. FERC*, No. 07-1050 (D.C. Cir. May 14, 2007).

<sup>7</sup> Incentives Order, 126 FERC ¶ 61,281 at P 110. The Commission approved Pioneer's rate formula on October 26, 2009 in a settlement order. *See Pioneer Transmission, LLC*, 129 FERC ¶ 61,065 (2009).

<sup>8</sup> Incentives Order, 126 FERC ¶ 61,281 at P 65.

4. On December 8, 2011, the MISO Board of Directors (MISO Board) approved a segment of the Pioneer Project, the Reynolds-Greentown Line, as an MVP.<sup>9</sup>

## **II. Complaint**

5. Pioneer states that it originally worked with PJM and MISO to consider the entire Pioneer Project under the cross-border cost allocation mechanism; however, it began pursuing the project in two segments after experiencing difficulty in getting joint PJM and MISO approval.<sup>10</sup> Pioneer asserts that originally, one segment was to run from an existing AEP Rockport substation to the Greentown substation, which is owned by Duke. However, according to Pioneer, during the MVP portfolio planning process, MISO planners determined that the AEP substation, which was deemed to be in PJM, was a less appropriate interconnection point for a MISO MVP. Thus, Pioneer contends that MISO planners modified the route slightly to run from a new substation in the vicinity of the existing Reynolds substation, which is owned by NIPSCO, to Greentown.<sup>11</sup>

### **A. Right to Construct and Own**

6. In regard to its dispute with NIPSCO, Pioneer claims that subsequent to MISO's approval of the Reynolds-Greentown Line, NIPSCO informed Pioneer that, pursuant to the Transmission Owners Agreement, NIPSCO is entitled to 100 percent of the investment and ownership in new facilities and equipment at the Reynolds substation and 50 percent of the investment and ownership of the Reynolds-Greentown Line. According to Pioneer, NIPSCO relies on Appendix B of the Transmission Owners Agreement for its investment and ownership rights of the Reynolds-Greentown Line. In relevant part, Appendix B states:

Ownership and the responsibilities to construct facilities which are connected between two (2) or more Owners' facilities belong equally to each Owner, unless such Owners otherwise agree, and the responsibility for

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<sup>9</sup> In its Complaint, Pioneer refers to the MVP at issue as New Reynolds-Greentown. For the purposes of this order, we will refer to it as Reynolds-Greentown, as it was designated by MISO in the approved MTEP. *See* 2011 MTEP, Appendix A.

<sup>10</sup> Pioneer Complaint at 13.

<sup>11</sup> According to Pioneer, it is still in discussion with MISO over MISO's modification to the termination of the line and it is not asking the Commission to reconsider in this complaint MISO's decision to relocate the terminal. Pioneer Complaint at 16, n.19.

maintaining such facilities belongs to the Owners of the facilities unless otherwise agreed by such Owners.<sup>[12]</sup>

7. According to Pioneer, NIPSCO argues that this language provides NIPSCO an exclusive “right-to-build” this portion of the Pioneer Project because it is an existing MISO transmission owner with transmission facilities near one end of the Pioneer Project.

8. Pioneer disagrees that this language gives NIPSCO any investment or ownership rights to the Reynolds-Greentown Line. First, Pioneer argues that NIPSCO is not a “connected” Owner because the Reynolds-Greentown Line will not connect to any existing NIPSCO facilities.<sup>13</sup> As evidence, Pioneer claims that MISO planning documents identified the terminus of the project segment as “New Reynolds,” indicating that a new 765/345 kV substation would need to be constructed near the Reynolds substation.<sup>14</sup> According to Pioneer, only in documents circulated subsequent to the MISO Board approval of the MVP Portfolio, was the name of the line segment changed from “New Reynolds” to Reynolds.<sup>15</sup> Furthermore, Pioneer states that because the Reynolds substation will require upgrades to support a 765 kV line, the project will not connect with any existing NIPSCO facilities, and therefore, even if the language is construed as a right of first refusal, it does not apply and NIPSCO is not a “connected” Owner.<sup>16</sup>

9. Pioneer argues that, regardless of NIPSCO’s owner status, as the project developer and sponsor, Pioneer should have the exclusive right to build and own the 765 kV line and the step down transformers. According to Pioneer, Appendix B, section VI of Transmission Owners Agreement establishes a *responsibility* to build and own, not an *exclusive right* to build and own.<sup>17</sup> In support of its argument, Pioneer points to the third-party provision in the Transmission Owners Agreement, which states that “[t]hird-parties shall be permitted and are encouraged to participate in the financing, construction and

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<sup>12</sup> Transmission Owners Agreement at App. B § VI.

<sup>13</sup> Pioneer Complaint at 29.

<sup>14</sup> *Id.* at 20.

<sup>15</sup> *Id.* at 23.

<sup>16</sup> *Id.* at 29.

<sup>17</sup> *Id.* at 25.

ownership of new transmission facilities as specified in the Midwest ISO Plan.”<sup>18</sup> Pioneer argues that this third-party language would be rendered meaningless if Appendix B was intended to establish any exclusive or preferential right to own and build facilities. Pioneer contends that in addressing a similar dispute in PJM, in *Primary Power*,<sup>19</sup> the Commission found that PJM’s regional planning procedures and related agreements, which also establish an obligation to build, did not preclude PJM from designating a non-incumbent transmission owner to own an RTO-approved project.<sup>20</sup>

10. Furthermore, Pioneer claims an October 11, 2011 letter from MISO’s Vice President and General Counsel (Kozey Letter) confirms that Pioneer is eligible and will be designated to build the segment of the Pioneer Project. According to Pioneer, the letter concludes that “Pioneer will be designated as the party responsible for construction of the Pioneer Project, if and when it is included in the MTEP [2011], and may begin construction activities, with the understanding that Pioneer will have to sign the Transmission Owners Agreement prior to commercial operation...”<sup>21</sup> Pioneer asserts that MISO’s interpretation of the Transmission Owners Agreement should be favored over the reading by an incumbent transmission owner seeking to benefit at Pioneer’s expense.<sup>22</sup>

11. Pioneer states that if the Commission accepts NIPSCO’s interpretation of the Transmission Owners Agreement, the language amounts to a right of first refusal, which the Commission found unjust and unreasonable in Order No. 1000.<sup>23</sup> Pioneer contends that the Commission cannot uphold right of first refusal provisions, even while the Order No. 1000 compliance process is ongoing. In support of its argument, Pioneer cites to the

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<sup>18</sup> *Id.* at 25 (citing Transmission Owners Agreement at App. B § VI).

<sup>19</sup> *Primary Power*, 131 FERC ¶ 61,015 (2010).

<sup>20</sup> Pioneer Complaint at 28.

<sup>21</sup> *Id.* at 27; Attachment A at 3.

<sup>22</sup> Pioneer Complaint at 28 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 58 (2006) (“as a general matter, an RTO should be considered a credible source when it comes to an accurate interpretation of its own tariff”)).

<sup>23</sup> *Id.* at 33-34 (citing *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 (2012)).

MVP Rehearing Order,<sup>24</sup> where the Commission found that unjust and unreasonable contract provisions violate section 205 of the FPA and cannot be enforced.

### **B. Owner Status and CWIP Recovery**

12. In regard to its dispute with MISO, Pioneer argues that MISO is interpreting the definition of “Owner” in the Transmission Owners Agreement in a way that prevents Pioneer from executing the Transmission Owners Agreement. The Transmission Owners Agreement defines “Owner,” in Article One, section I.P, as follows:

A utility or other entity which owns, operates, or controls facilities for the transmission of electricity in interstate commerce (as determined by the Midwest ISO by applying the seven-factor (7-factor) test of the FERC set forth in FERC Order No. 888, 61 Fed. Reg. 21,540, 21,620 (1996), or any successor test adopted by the FERC) and which is a signatory to this Agreement.[<sup>25</sup>]

According to Pioneer, MISO’s position is that Pioneer does not own, operate, or control any physical facilities, and therefore Pioneer can not be considered an “Owner” at this time.<sup>26</sup> Pioneer argues that this interpretation prohibits it from implementing the CWIP incentive previously granted to the project.

13. Pioneer argues that the Commission’s acceptance of its rate filing in the Incentives Order made Pioneer a public utility because its tariff is a jurisdictional facility under the FPA. According to Pioneer, because FPA section 201(c) defines a “public utility” as an entity that “owns or operates facilities subject to the jurisdiction of the Commission,” and the Transmission Owners Agreement and the FPA definitions are closely paralleled, Pioneer should be eligible to execute the Transmission Owners Agreement and become an Owner.<sup>27</sup>

14. Pioneer asserts that the seven-factor test is not relevant because it is used to distinguish between state-jurisdictional distribution and Commission-jurisdictional facilities. According to Pioneer, it is obvious that it is a public utility under the FPA, and the facilities associated with the Pioneer Project, including its conditionally approved rate

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<sup>24</sup> *Id.* at 34 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,074 (MVP Rehearing Order)).

<sup>25</sup> *Id.* at 35, n.38 (citing Transmission Owners Agreement at Article One § I.P).

<sup>26</sup> *Id.* at 35.

<sup>27</sup> *Id.* at 35-36.

schedule, are subject to the Commission's jurisdiction and that no part of the Pioneer Project represents facilities used in local distribution.<sup>28</sup> This, Pioneer claims, makes it eligible to file a rate schedule under the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) to recover its CWIP incentive during the construction of the project. Accordingly, Pioneer asserts that the Commission should rule that Pioneer be permitted to execute the Transmission Owners Agreement.

15. Alternatively, Pioneer requests that the Commission recommend that the MISO Board grant waiver of the Transmission Owners Agreement's operating facility requirement. Pioneer asserts that the Transmission Owners Agreement provides that "on a case-by-case basis, the Board may waive the requirement that such facilities be physically interconnected if allowing the member also to become an Owner will result in significant net benefits to the Midwest ISO and its Members."<sup>29</sup> Pioneer contends that as an approved MVP, it has already been shown that the Reynolds-Greentown Line will provide significant net benefits to the MISO system and members.<sup>30</sup>

16. Pioneer requests that if the Commission does not make either of these two findings, the Commission should find that the existing definition of "Owner" in the Transmission Owners Agreement is unjust, unreasonable, and unduly discriminatory and direct MISO to change it. Pioneer contends that the definition prevents new transmission developers from being treated on a non-discriminatory basis with existing transmission owners; only incumbent transmission owners will be permitted to recover CWIP even where the Commission has granted a new transmission developer like Pioneer incentives.<sup>31</sup>

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<sup>28</sup> *Id.* at 37.

<sup>29</sup> *Id.* at 40 (citing Transmission Owners Agreement at Article Two § V.A.2, which provides that "In general, an Owner must own, operate, or control interstate transmission facilities as detailed above; however, on a case-by-case basis, the Board may waive the requirement that such facilities be physically interconnected if allowing the Member also to become an Owner will result in significant net benefits to the Midwest ISO and its Members").

<sup>30</sup> *Id.* at 40-41.

<sup>31</sup> *Id.* at 42.

### **III. Notice and Responsive Pleadings**

17. Notice of the Complaint was published in the *Federal Register*, 77 Fed. Reg. 9225 (2012), with protests and interventions due on or before February 28, 2012.

18. Timely motions to intervene were filed by: the Coalition of Midwest Transmission Customers; Exelon Corporation; the PSEG Companies;<sup>32</sup> NextEra Energy Resources, LLC; Wisconsin Electric Power Company; Indiana Municipal Power Agency; and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy. Motions to intervene and comments were filed by: American Transmission Company LLC (American Transmission); Duke-American Transmission Company LLC (Duke-American Transmission); Indiana Office of Utility Consumer Counselor (Indiana OUCC); the Testimonial Staff of Indiana Utility Regulatory Commission (IURC Testimonial Staff); LS Power Transmission, LLC (LS Power); Midwest TDUs;<sup>33</sup> MISO Transmission Owners;<sup>34</sup> Southern Indiana Gas and Electric Company (Southern Indiana); and Xcel Energy Services Inc., on behalf of its utility operating company affiliates, Northern States Power Company, a Minnesota corporation and Northern States Power Company, a Wisconsin corporation (Xcel). The Organization of MISO States filed a

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<sup>32</sup> The PSEG Companies are comprised of: Public Service Electric and Gas Company; PSEG Power LLC; and PSEG Energy Resources & Trade LLC.

<sup>33</sup> The Midwest TDUs are comprised of: Great Lakes Utilities; Madison Gas and Electric Company; Midwest Municipal Transmission Group, on behalf of itself and its member, the Central Minnesota Municipal Power Agency; Missouri Joint Municipal Electric Utility Commission; and Missouri River Energy Services.

<sup>34</sup> The MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; Big Rivers Electric Corporation; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC Transmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

notice of intervention.<sup>35</sup> The Illinois Commerce Commission (Illinois Commission) filed a notice of intervention and comments.

19. On February 28, 2012, NIPSCO filed an answer to the Complaint (February 28 Answer). Also on February 28, 2012, MISO filed an answer to the Complaint.

20. On February 29, 2012, the Organization of PJM States, Inc. (PJM States) filed a motion to intervene out-of-time. On March 2, 2012, American Municipal Power, Inc. (American Municipal) filed a motion to intervene out-of-time. On March 6, 2012, Alliant Energy Corporate Services, Inc. (Alliant) filed a motion to intervene out-of-time.

21. On March 9, 2012, Illinois Commission filed an answer. On March 13, 2012, Xcel filed an answer. On March 14, 2012, Pioneer filed an answer. On March 27, 2012, NIPSCO filed an answer (March 27 Answer).

**A. NIPSCO February 28 Answer**

22. NIPSCO states that Pioneer's Complaint fails because the project at issue is not the Pioneer Project.<sup>36</sup> Contrary to Pioneer's assertions, NIPSCO states that the Pioneer Project is listed as Project No. 2795 in Appendix C<sup>37</sup> in MTEP 2009,<sup>38</sup> MTEP 2010,<sup>39</sup> and

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<sup>35</sup> The Organization of MISO States notes that the Indiana Utility Regulatory Commission recused itself from the vote on this intervention.

<sup>36</sup> NIPSCO February 28 Answer at 20 (citing Dehring Aff. at 27). NIPSCO adds that the Pioneer Project, as proposed in its 2008 incentive rate filing and in the 2009 studies by MISO and PJM, was to be a 240-mile, primarily south-north project crossing from PJM into MISO between AEP's Rockport substation, the site of approximately 2,600 MW of AEP coal-fired generation, through AEP's Sullivan substation in PJM and then terminate at Duke's Greentown substation in MISO. NIPSCO February 28 Answer at 20.

<sup>37</sup> Section 2.3 of the Transmission Planning Business Practice Manual (Transmission Planning Manual) defines Appendix C projects as:

Appendix C projects are projects which are proposed by Transmission Owners, [s]takeholders, or MISO planning staff for which specific needs have not yet been established, but that are thought by sponsor to be a potentially beneficial expansion, and for which the sponsor has provided to MISO a description of the potential need or benefit. All newly proposed projects start as Appendix C projects in the MTEP planning process. These could also include transmission projects which are conceptual in nature and

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MTEP 2011.<sup>40</sup> NIPSCO states that in MTEP 2011, Project No. 2795 describes the Rockport (AEP) to Greentown (Duke) project as a new 765 kV line from Rockport (AEP) to Greentown (Duke).<sup>41</sup> NIPSCO argues that this description is entirely consistent with Pioneer's original incentive rate application, which under the heading "Description of the Project," states, "[t]he line will run between two existing 765 kV substations, the Rockport Station in the south (in PJM) and the Greentown Station in the north (in the [MISO])."<sup>42</sup>

23. NIPSCO asserts that in contrast to the Pioneer Project, which remains in Appendix C to MTEP 2011, the MISO Board approved as a MVP the Reynolds (NIPSCO)-to-Greentown (Duke) project as an approved project in Appendix A<sup>43</sup> to

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in the early stages of planning. Appendix C projects are not included in MTEP initial power-flow models used to perform baseline reliability studies since the needs or the effectiveness of these projects are yet to be verified. In order to advance to Appendix B, Appendix C projects must be matched as a potential solution to an identified reliability, policy or other need, or to an identified cost savings or other benefit.

<sup>38</sup> NIPSCO February 28 Answer at 20 (citing Dehring Aff. at App. A).

<sup>39</sup> *Id.* (citing Dehring Aff. at App. B).

<sup>40</sup> *Id.* (citing Dehring Aff. at App. C).

<sup>41</sup> *Id.* NIPSCO adds that the Appendix C "Project Name" tab for Project No. 2795 states "Pioneer 765." *See id.* (citing Dehring Aff. at App. C).

<sup>42</sup> *Id.* (citing Pioneer Transmittal, Docket No. ER09-75-000, at 10 (filed Oct. 15, 2008)).

<sup>43</sup> Section 2.3 of the Transmission Planning Manual defines Appendix A projects as:

Appendix A projects are projects that have been justified to be the preferred solution to an identified reliability, policy or other need, or to achieve an identified cost savings or other benefit and that have been approved by the [MISO Board of Directors]. The project justification process includes consideration of a variety of factors including urgency of need and comparison from amongst alternatives of operating performance, initial investment costs, robustness of the solution, longevity of the solution provided, and performance against other economic metrics. Pending

(continued...)

MTEP 2011. Specifically, NIPSCO states Appendix A to MTEP 2011 includes: (1) Project No. 2202, Facility ID 4074, a new 765 kV line from the Reynolds substation to the Greentown substation, which is designated as a joint project between NIPSCO and Duke; and (2) Project No. 2202, Facility ID 4073, the 765 kV/345 kV transformer at the Reynolds substation which is designated as the sole responsibility of NIPSCO.<sup>44</sup> NIPSCO states that Project No. 2202 will run between two points within the MISO balancing authority area and will be placed under MISO's operational control. NIPSCO states that Project No. 2202 is designed to alleviate the queue of MISO wind resources near the Reynolds substation.<sup>45</sup> NIPSCO states that the Reynolds-Greentown Line will operate in conjunction with another MVP project, the Reynolds-to-Hiple 345 kV line.<sup>46</sup> NIPSCO argues that there can be no doubt that the Pioneer Project is not an approved project under the Commission-approved MTEP.<sup>47</sup> Thus, NIPSCO states that the Complaint should be dismissed because the facts on which Pioneer relies are wrong.

24. NIPSCO contends that Pioneer's assertion that the Transmission Owners Agreement and the Tariff do not give NIPSCO a joint development right for the Reynolds-Greentown Line incorrectly ignores the plain language of section VI, Appendix B of the Transmission Owners Agreement.<sup>48</sup> NIPSCO claims that additional Commission precedent also supports its interpretation of the plain language of the Transmission Owners Agreement. NIPSCO asserts that the Commission found reasonable the requirement for Southwest Power Pool, Inc. (SPP) to initially issue

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Appendix A projects are recommended for approval by the [MISO Board]. Once a project is approved by the [MISO Board] as an Appendix A project, the project is implemented in accordance with the [Transmission Owners Agreement] and the Tariff. Projects in Appendix A may be generated from the baseline planning process, or from the generator interconnection or Transmission Service request study processes. Projects in Appendix A may be eligible for regional cost sharing per provisions in Attachment FF of the Tariff, and are categorized according to their cost sharing eligibility.

<sup>44</sup> NIPSCO February 28 Answer at 21 (citing Dehring Aff. at App. C). *See also id.* at 41, 44-45.

<sup>45</sup> *Id.* at 21.

<sup>46</sup> *Id.* at 22.

<sup>47</sup> *Id.* at 25.

<sup>48</sup> *Id.* at 26-27.

notifications to construct to transmission owners to whose facilities a new project will interconnect.<sup>49</sup> According to NIPSCO, the SPP tariff provision at issue and the Transmission Owners Agreement have substantially the same development rights.<sup>50</sup>

25. NIPSCO claims that Pioneer attempts to derive a property right from the statement in the Transmission Owners Agreement that, “[t]hird parties shall be permitted and are encouraged to participate in the financing, construction, and ownership of the new transmission facilities as specified in the Midwest ISO Plan.”<sup>51</sup> While NIPSCO does not argue with the fact that this provision appears to give non-transmission owners the ability to participate in developing new transmission facilities, it contends that the plain meaning of the provision does not permit a third party to lay claim to another project that other transmission owners have the responsibility to build under the MTEP.

26. NIPSCO states that Pioneer argues that NIPSCO’s interpretation of the Owners Agreement would categorically exclude third-party participation in the MTEP because “only hypothetical facilities that third parties could build would be ones that don’t connect to any existing facilities in MISO; in other words, none.”<sup>52</sup> NIPSCO contends that the MISO planning process is open to third parties. NIPSCO points out that Pioneer submitted its project for consideration, but it was not approved.

27. NIPSCO argues that the Kozey Letter does not support Pioneer’s complaint. According to NIPSCO, just as the Commission rejected consideration of an email by one of the Transmission Owner parties in the *Duquesne* case, the Commission cannot rely on the Kozey Letter in its decision-making. NIPSCO asserts that the Commission must rely on the four corners of the agreement, and not “outside sources.”<sup>53</sup> NIPSCO argues that even if the Kozey Letter was enough to bind MISO, the letter simply states that “Pioneer will be designated as the party responsible for construction of the Pioneer Project, if and when it is included in the MTEP 11.”<sup>54</sup>

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<sup>49</sup> *Id.* at 28 (citing *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,171, at P 43 (2009)).

<sup>50</sup> *Id.* at 28-29 (citing SPP Open Access Transmission Tariff at Att. O § VI.4).

<sup>51</sup> *Id.* at 30 (citing Transmission Owners Agreement at App. B § VI).

<sup>52</sup> *Id.* at 34 (citing Pioneer Complaint at 26).

<sup>53</sup> *Id.* at 35 (citing *Duquesne Light Co.*, 138 FERC ¶ 61,111 (2012) (*Duquesne*)).

<sup>54</sup> *Id.* (citing Kozey Letter).

28. NIPSCO states that, even assuming *arguendo*: (1) that independent third-parties do have a right under the Transmission Owners Agreement to build projects approved in the MISO planning process; and (2) that the approved project is the Pioneer Project, Pioneer's complaint still fails because Pioneer is not an independent third party.<sup>55</sup> NIPSCO states that Pioneer is an affiliate of Duke Energy Indiana, an existing MISO Transmission Owner and a signatory to the Transmission Owners Agreement. NIPSCO argues that Duke cannot simply divest itself of its responsibilities under the Transmission Owners Agreement by forming a subsidiary and then claim what it perceives to be preferential rights to build as an "independent" third party.<sup>56</sup>

29. NIPSCO states that MISO is the planning authority, not Pioneer, and granting the relief requested would undermine the benefits of Regional Transmission Organization (RTO)-administered regional transmission planning that the Commission established in Order No. 2000, confirmed in Order No. 890, and is adjusting prospectively in Order No. 1000.<sup>57</sup> Importantly, NIPSCO states that the Transmission Owners Agreement states that the MTEP is the document certified by the MISO Board as "meeting the transmission needs of all stakeholders subject to any required approvals by federal or state regulatory authorities."<sup>58</sup> In addition, NIPSCO points out that Attachment FF, section V of the Tariff specifies that:

For each project included in the recommended MTEP, the plan shall designate, based on the planning analysis performed by [MISO] and based on other input from participants, including, but not limited to, any indications of a willingness to bear cost responsibility for the project; and applicable provisions of the [MISO Transmission Owners Agreement], one

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<sup>55</sup> *Id.* at 41.

<sup>56</sup> *Id.* at 41-42.

<sup>57</sup> *Id.* at 42 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); Order No. 1000, FERC Stats. & Regs. ¶ 31,323).

<sup>58</sup> *Id.* at 44 (citing Transmission Owners Agreement at App. B, Art. VI).

or more Transmission Owners or other entities to construct, own and/or finance the recommended project.[<sup>59</sup>]

30. NIPSCO argues that MISO conducted an independent, open and transparent transmission planning process that resulted in the approval of the Reynolds-Greentown Line, to be developed jointly by NIPSCO and Duke, that will connect through NIPSCO's Reynolds substation with another MVP project, the Reynolds-to-Burr Oak-to-Hiple 345 kV line. NIPSCO argues that this result in MTEP 2011 was the optimal solution.<sup>60</sup> NIPSCO argues that the decision to connect the two MVP projects at the Reynolds substation (i.e., change the configuration) was presented to stakeholders months before the MISO Board approved MTEP 2011.<sup>61</sup> NIPSCO states that the Reynolds-Greentown Line links interrelated MVP projects and will enable integration of wind generation in the vicinity of the Reynolds substation.<sup>62</sup>

31. Furthermore, NIPSCO states that Pioneer's attempt to create the "New Reynolds" substation is a poor attempt to undermine the judgment of the MISO planners and is an attempt to side-step the Transmission Owners Agreement.<sup>63</sup> Moreover, NIPSCO argues that Pioneer's attempt to assert that "the Pioneer Project will not connect with any existing NIPSCO facilities" is untrue.<sup>64</sup> NIPSCO also disputes Pioneer's suggestion that MISO's decision to terminate the project at Reynolds was the result of NIPSCO's last minute maneuvering.<sup>65</sup>

32. NIPSCO states that Pioneer's reliance on Order No. 1000 is flawed because the compliance requirements of Order No. 1000 will only apply "to the evaluation or reevaluation of any transmission facility that occurs after the effective date" of MISO's Order No. 1000 compliance filing.<sup>66</sup> Thus, NIPSCO argues that the MVPs approved in

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<sup>59</sup> MISO Tariff at Attachment FF § V.

<sup>60</sup> *Id.* at 42-43.

<sup>61</sup> *Id.* at 43 (citing Dehring Aff. at 26-27). *See also id.* at 36.

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

<sup>63</sup> *Id.* at 37, 39-40.

<sup>64</sup> *Id.* at 37 (citing Pioneer Complaint at 29).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 48 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 65).

MTEP 2011 will not be subject to any future right of first refusal-related modifications to the Transmission Owners Agreement unless those MVPs are subject to reevaluation.<sup>67</sup> In addition, NIPSCO argues that Order No. 1000, in fact, does not bar NIPSCO's interpretation of the Transmission Owners Agreement because in Order No. 1000, the Commission expressed concern about granting an ongoing right to build transmission projects sponsored by third-party developers.<sup>68</sup>

33. NIPSCO argues that Pioneer fails to meet the section 206 requirement for complaints that MISO's current methodology is unjust and unreasonable, but also that Pioneer's alternative approach is just and reasonable.<sup>69</sup> NIPSCO argues that because removing any right of first refusal provisions from the Tariff will not occur until after MISO's Order No. 1000 compliance filing is accepted, Pioneer's complaint is a collateral attack on Order No. 1000.<sup>70</sup> Similarly, NIPSCO argues that Pioneer's theory of a "sponsorship right" that the Commission rejected in Order No. 1000 should have been challenged by Pioneer on rehearing of Order No. 1000.<sup>71</sup>

34. NIPSCO disagrees with Pioneer that obtaining transmission rate incentives in a declaratory order gives Pioneer the ability to trump MISO's Commission-approved transmission planning process and begin collecting charges from MISO load.<sup>72</sup> NIPSCO states that the Commission order approving rate incentives for the Pioneer Project was conditioned on Pioneer obtaining approval for the project through the MISO and PJM transmission planning processes.<sup>73</sup> In addition, NIPSCO argues that when a project is approved as part of a regional transmission plan but where the project has substantially changed from the project originally proposed in an incentive rates application, the

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<sup>67</sup> *Id.* at 49.

<sup>68</sup> *Id.* (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 340).

<sup>69</sup> *Id.* at 51 (citing *Entergy Services, Inc.*, 126 FERC ¶ 61,101, at P 31 (2009); *Michigan Electric Transmission Co.*, 116 FERC ¶ 61,164 (2006)).

<sup>70</sup> *Id.* at 51-52.

<sup>71</sup> *Id.* at 52.

<sup>72</sup> *Id.* at 50.

<sup>73</sup> *Id.* (citing Incentives Order, 126 FERC ¶ 61,281 at P 124).

Commission has found that the developer needs to re-apply for incentives because the facts underlying the Commission's original order have changed.<sup>74</sup>

35. NIPSCO argues that Pioneer's complaint is deficient because Pioneer did not follow the dispute resolution procedures of the Tariff.<sup>75</sup> NIPSCO argues that because Pioneer's complaint appears to be based largely on the argument that NIPSCO was improperly designated to jointly construct and own the Reynolds-Greentown Line, Pioneer's complaint is subject to mandatory dispute resolution procedures under the Tariff.<sup>76</sup> NIPSCO states that section I.A.14 of Attachment FF, regarding the development of the MTEP, states:

Dispute resolution: Consistent with Attachment HH of this Tariff and Appendix D to the [Transmission Owners Agreement], [MISO] shall resolve disputes concerning MTEP issues. The first step will be for designated representatives of the affected parties to work together to resolve the relevant issues in a manner that is acceptable to all parties. If that step is unsuccessful, each affected party shall designate an officer who shall review disputes involving them that their designated representatives are unable to resolve. The applicable officers of the parties involved in such dispute shall work together to resolve the disputes so referred in a manner that meets the interests of such parties, either until such agreement is reached, or until an impasse is declared by any party to such dispute. If such officers are unable to satisfactorily resolve the issues, the matter shall be referred to mediation, in accordance with the procedures described in Appendix D to the [Transmission Owners Agreement]. Parties that are not satisfied with the dispute resolution procedures may only file a complaint with the Commission during the negotiation or mediation steps. If a matter remains unresolved, the affected parties may pursue arbitration pursuant to Appendix D of the [Transmission Owners Agreement].<sup>77</sup>

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<sup>74</sup> *Id.* at 50-51 (citing *Public Serv. Elec. & Gas Co.*, 137 FERC ¶ 61,010 (2011)).

<sup>75</sup> *Id.* at 52-53.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 53.

**B. MISO Answer**

36. MISO states that it takes no position on Pioneer's claim against NIPSCO. However, in regard to MISO's planning process, MISO disagrees with Pioneer's contention that no mechanism exists between PJM and MISO to jointly review the Pioneer Project as a whole. MISO contends that such a mechanism is contained in Article IX of the MISO/PJM Joint Operating Agreement,<sup>78</sup> which deals with the coordinated regional transmission expansion planning process between MISO and PJM and which Pioneer acknowledges that it was unable to satisfy. Further, MISO asserts that it calculated, for informational purposes, a benefit-to-cost ratio for the original project for 2014, considering the combined economic benefits to both MISO and PJM, and the two 765 kV Pioneer options did not meet the required ratio.<sup>79</sup>

37. MISO states that Pioneer refers to "last minute changes" regarding renaming the substation from "New Reynolds" to "Reynolds."<sup>80</sup> MISO claims that the renaming of the connection point is irrelevant to the ownership of the facilities. According to MISO, its original thinking on naming the terminus as New Reynolds was that the existing Reynolds station would need to be substantially expanded and would consist of largely new facilities. MISO asserts that NIPSCO pointed out that MISO had not used the modifier "New" when expanding an existing substation to accommodate a new higher voltage at other locations of the grid where an MVP terminal was involved. MISO agreed with NIPSCO, and for consistency, referred to the terminus as "Reynolds."

38. MISO states that the result of the name change is that the listing of the project in Appendix A to the MTEP report states that the "Geographic Location by TO Member System" for the project is NIPSCO and Duke, and the manner in which the project was modeled in supporting planning studies was between the terminals of Duke's Greentown substation and NIPSCO's existing Reynolds substation.<sup>81</sup> MISO emphasizes that

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<sup>78</sup> *Id.* at 6-7 (citing MISO/PJM Inter-Regional Planning Stakeholder Advisory Committee, Southwestern Indiana Transmission Study Status Update, December 4, 2009, *available at* <https://www.midwestiso.org/Library/Repository/Meeting%20Material/Stakeholder/Special%20Meetings/IPSA/20091204/20091204%20IPSAC%20MISOPJM%20Joint%20Presentation.pdf>).

<sup>79</sup> *Id.* at 7 (citing MISO/PJM Inter-Regional Planning Stakeholder Advisory Committee, Southwestern Indiana Transmission Study Status Update at 17).

<sup>80</sup> *Id.* at 8 (citing Pioneer Complaint at 23).

<sup>81</sup> *Id.* at 9.

ownership of the terminal equipment at either end of the line, or the line itself, is not determined by the Appendix A listing or the power system connection modeling, but by Appendix B of the Transmission Owners Agreement.<sup>82</sup>

39. MISO asserts that contrary to Pioneer's arguments, MISO correctly interpreted the eligibility requirements for Transmission Owners, finding that Pioneer presently does not meet these requirements. Further, MISO contends that no grounds exist to either direct a waiver of these requirements or declare them unjust and unreasonable pursuant to section 206 of the FPA.<sup>83</sup> Accordingly, MISO requests that the Commission:

(1) confirm MISO's interpretation of the transmission owner eligibility requirements; (2) reject Pioneer's request that the Commission "recommend" to the MISO Board to waive these requirements; (3) find that Pioneer has not shown that the eligibility requirements are no longer just and reasonable; and (4) to the extent the Commission finds that Pioneer's claims against NIPSCO merit further examination, dismiss MISO as a respondent in this Complaint.

40. MISO argues that despite Pioneer's assertions that its ownership of certain "paper facilities" make it eligible to become a transmission owner, the Transmission Owners Agreement provisions establishing the eligibility requirements are clear and unambiguous that to be an "Owner," Pioneer must own, operate, or control facilities for the transmission of electricity in interstate commerce as determined by MISO by applying the seven-factor test.<sup>84</sup> MISO states that the Transmission Owners Agreement is a contract that is governed by Delaware law. Thus, MISO argues, as recently explained by the Commission, Delaware law requires it to construct the Transmission Owners Agreement "as it is made by the parties themselves, and to give language that is clear, simple and unambiguous the force and effect which the language clearly demands."<sup>85</sup> MISO asserts that the Commission should reject Pioneer's attempt to unilaterally re-write or amend the Transmission Owners Agreement provisions.

41. MISO asserts that the "Owner status" requirements set forth in Article Two, section V.A.2 of the Transmission Owners Agreement even more explicitly require that a prospective owner's transmission facilities not only be capable of a seven-factor test determination, but also be "physically interconnected with the facilities of an existing

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<sup>82</sup> *Id.* (citing Transmission Owners Agreement at App. B § VI).

<sup>83</sup> MISO Answer at 2 (citing 16 U.S.C. § 824e).

<sup>84</sup> *Id.* at 11-12 (citing Transmission Owners Agreement at Article One § I.P).

<sup>85</sup> *Id.* at 11 (citing *Duquesne*, 138 FERC ¶ 61,111 at P 25).

Owner.” MISO states that the provision further requires that only “[u]pon fulfillment of these conditions, and upon completion of any physical integration of the new Owner’s facilities with the Transmission System..., the Board shall allow the new Member to become a signatory to this Agreement.”<sup>86</sup> MISO asserts that this language removes all doubt that “paper facilities,” by themselves, can never confer owner eligibility, as they cannot be physically interconnected with any other facilities or physically integrated with the transmission system.<sup>87</sup>

42. MISO identifies other sections of the Transmission Owners Agreement in its argument that paper facilities cannot form the basis for transmission owner membership. For instance, MISO states that Article One, Section I.B of the Transmission Owners Agreement provides that by executing the agreement, an Owner declares, among other things, that the transmission system committed to the operation and control of MISO is managed according to the Transmission Owners Agreement.<sup>88</sup> MISO also states that Article One, section I.D and Article Three, section 1.A provide that by executing the Transmission Owners Agreement, an Owner commits its transmission facilities to MISO’s functional control. According to MISO, an Owner with only paper facilities has no transmission facilities that it could contribute to the transmission system or commit to MISO’s functional control.

43. MISO argues that the paper facilities cases relied upon by Pioneer are not relevant to the task of interpreting the Transmission Owners Agreement.<sup>89</sup> According to MISO, a public utility is a statutory term that is instrumental to defining the limits of the Commission’s jurisdiction under the FPA, and “Owner” is a contractual term that defines which entities are eligible to become a transmission owner, whether they are public or non-public. For instance, MISO asserts that a power marketer or generation company can be a public utility by virtue of its jurisdictional sales of electricity, but this would not make it eligible to become a MISO Transmission Owner.

44. In addition, MISO asserts that Pioneer’s reliance on the Incentives Order is unpersuasive. MISO contends that according to *Duquesne*, no outside source, such as the

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<sup>86</sup> *Id.* at 13 (citing Transmission Owners Agreement at Article Two § V.A.2).

<sup>87</sup> *Id.* (citing Transmission Owners Agreement at Article One § I.T).

<sup>88</sup> *Id.* at 14.

<sup>89</sup> *Id.* (citing Pioneer Complaint at 35-37).

Incentives Order, may be used to create ambiguity where none exists.<sup>90</sup> In addition, MISO claims that neither the Incentives Order nor the underlying statutory and regulatory mandates, such as FPA section 219 and Order No. 679, establish an absolute right for Pioneer to recover each of its authorized incentives, regardless of conditions or other applicable requirements.<sup>91</sup> MISO asserts that the Incentives Order stated that “the 100 percent inclusion of CWIP in rate base will not go into effect unless and until the project is approved by the regional transmission planning processes of PJM and MISO and there is a Commission approved cost methodology in place.”<sup>92</sup> According to MISO, the PJM-located segment has not been approved, nor is there a cost allocation methodology presently available for Pioneer to recover its CWIP because it is not yet eligible to become an Owner. Furthermore, MISO states that the Commission explained in the Incentives Order that its findings did not “undermine the criteria established for regional transmission planning process, modify existing tariff procedures, or express a preference for any particular project.”<sup>93</sup> Thus, MISO argues that the Commission did not intend its authorization to re-write MISO’s Owner status requirements. MISO also contends that the Commission made clear in *Desert Southwest Power* that where the Commission has granted the requested CWIP incentive, and applicable eligibility requirements would preclude the applicant’s ability to realize it, does not invalidate the eligibility requirements.<sup>94</sup> Accordingly, MISO asserts that approved CWIP incentives do not provide a mandate to join an RTO as a transmission-owning member regardless of the eligibility requirements on file.

45. MISO raises two issues with Pioneer’s alternative request that the Commission recommend to the MISO Board to waive the eligibility requirements. First, MISO claims that the waiver authority relied upon by Pioneer does not extend to this scenario. MISO acknowledges that “the Board may waive the requirement that facilities be physically interconnected.”<sup>95</sup> However, according to MISO, the more significant issue is that

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<sup>90</sup> *Id.* at 15 (citing *Duquesne*, 138 FERC ¶ 61,111 at P 27 (“To determine whether an agreement is ambiguous, the Commission must look within the four corners of the agreement and not to outside sources.”)).

<sup>91</sup> *Id.* at 16

<sup>92</sup> *Id.* (citing Incentives Order, 126 FERC ¶ 61,281 at P 65).

<sup>93</sup> *Id.* at 17 (citing Incentives Rehearing Order, 130 FERC ¶ 61,044 at P 22).

<sup>94</sup> *Id.* at 17-18 (citing *Desert Southwest Power, LLC*, 135 FERC ¶ 61,143, at P 68 (2011)).

<sup>95</sup> *Id.* at 19 (citing Transmission Owners Agreement § V.A.2).

Pioneer does not have any physical transmission facilities at all, and the MISO Board does not have the authority to waive the requirements of the Owner definition and permit an entity that has only paper facilities to become a MISO Owner.

46. In addition, MISO asserts that even assuming that the MISO Board has the authority to permit Pioneer to become an Owner at this time, the Commission should not prejudge the outcome of this process by issuing any recommendations in this proceeding. MISO claims that the Board is an independent entity that is uniquely positioned to weigh the costs and benefits of a particular waiver request. MISO contends that contrary to Pioneer's suggestion, the MISO Board has never made the Transmission Owners Agreement's requisite significant net benefits finding in regard to Pioneer. Accordingly, MISO argues there is no basis for Pioneer's request.

47. Finally, MISO contends that Pioneer has not met the FPA section 206 requirements demonstrating that the current FERC-approved Owner eligibility requirements have become unjust, unreasonable, unduly discriminatory or preferential, and its alternative "paper facilities" construction is just and reasonable.<sup>96</sup> MISO argues that to be "undue" under FPA section 206, differential treatment for similarly-situated customers must be based on some illegitimate factor.<sup>97</sup> However, MISO argues that its tariff cost recovery mechanism is reserved for Owners that have transferred their transmission facilities to MISO's functional control, and there is no legitimate reason for extending these mechanisms to entities that cannot meet the eligibility requirements because they have no such facilities.

48. MISO asserts that Pioneer is also incorrect when it claims that eligibility requirements inherently favor incumbents over new entrants. MISO states that the requirements merely provide that new entrants must own, operate, or control physical facilities, and thus, a new applicant that has such facilities presumably would be able to obtain the benefits of Owner status prior to commencing construction. Furthermore, MISO asserts that Pioneer's current inability to recover its CWIP incentive does not

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<sup>96</sup> *Id.* at 20 (citing *Interstate Power & Light Co. v. ITC Midwest, LLC*, 127 FERC ¶ 61,043, at P 42 (2009) (finding that "Section 206 of the FPA requires a complainant to satisfy a dual burden in order to obtain the relief it seeks. The complainant must establish that the current rate is unjust and unreasonable and that its alternative rate proposal is just and reasonable.")).

<sup>97</sup> *Id.* at 21 (citing *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,148, at P 40 (2010) (stating that "The Commission has determined that discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor.")).

establish undue discrimination. According to MISO, because Pioneer cannot at this time become a Transmission Owner, it cannot meet the cost allocation requirement. As MISO noted, the *Desert Southwest* decision provides that CWIP incentives do not supersede the Owner eligibility requirements.

### C. Comments and Protests

#### 1. Right to Construct and Own

49. Duke-American Transmission,<sup>98</sup> American Transmission<sup>99</sup> and LS Power<sup>100</sup> argue that Appendix B, section VI of Transmission Owners Agreement should not be interpreted to allow NIPSCO to have an exclusive “right to build.” LS Power requests that the Commission find that the language in the Transmission Owners Agreement does not create an obligation that MISO assign projects to incumbent transmission owners or provide a right of first refusal for such incumbents, but merely reflects a responsibility for the incumbent transmission owner to build *if* designated by MISO.<sup>101</sup> Duke-American Transmission adds that the Transmission Owners Agreement should not be interpreted to prevent third parties from constructing facilities by allowing MISO transmission owners to claim ownership of such facilities.<sup>102</sup>

50. Duke-American Transmission and American Transmission state that the Commission order granting RTO status to MISO (MISO RTO Order) required MISO to remove obstacles to third party construction and ownership. In relevant part, in the MISO RTO Order, the Commission stated:

Second, we find that the [MISO’s planning process] appears to limit construction and ownership of new transmission facilities identified by the plan to [Transmission Owners] only. Merchant transmission projects are only possible if the [Transmission Owners] in direct contact with the proposed project are financially incapable of carrying out the construction or would suffer demonstrable financial harm from such construction. As in PJM, we find that the principle of third-party participation is important

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<sup>98</sup> Duke-American Transmission Comments at 4-5.

<sup>99</sup> American Transmission Comments at 2, 5-7.

<sup>100</sup> LS Power Comments at 2-4.

<sup>101</sup> *Id.* at 2 (emphasis in original).

<sup>102</sup> Duke-American Transmission Comments at 5.

even though we recognize practical obstacles may prevent third parties from competing effectively with incumbent [Transmission Owners], at least in the short-run. For example, obtaining rights-of-way under eminent domain authority may not be possible for some third parties. Nevertheless, as in PJM, we find that our long term competitive goals are better served by RTO expansion plans that allow for third party participation as well as permit merchant projects outside the plan. Accordingly, [MISO] must revise its [planning process] to make it possible for third parties to participate in constructing and owning new transmission facilities identified by the plan.<sup>103]</sup>

51. Duke-American Transmission and American Transmission state that Appendix B, section VI was revised in accordance with the MISO RTO Order and now states “[t]hird parties shall be permitted and are encouraged to participate in the financing, construction and ownership of new transmission facilities as specified in the [MISO Transmission Expansion Plan].”<sup>104</sup> Duke-American Transmission thus argues that NIPSCO’s interpretation of this provision is inconsistent with the MISO RTO Order.

52. Duke-American Transmission and American Transmission argue that MISO acknowledged in its request for rehearing of Order No. 1000 that “it is not for MISO to determine who should build specific transmission projects identified through [MISO’s] transmission planning process. While MISO may approve plans that include needed transmission expansion, MISO has not been vested with any rights by any state legislature or state commission regarding the construction of the facilities that may be deemed necessary as a result of the MTEP process, or any other plan developed by MISO and its stakeholders.”<sup>105</sup> Duke-American Transmission and American Transmission further argue that MISO has not historically taken the position that compels one transmission owner to give another transmission owner 50 percent ownership rights. Moreover, the language in Appendix B, section VI does not apply to projects that have been substantially planned by a single entity from inception, nor was it designed to assign

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<sup>103</sup> Duke-American Transmission Comments at 5-6; American Transmission Comments at 7-8 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326, at 62,520 (2001) (MISO RTO Order)).

<sup>104</sup> Duke-American Transmission Comments at 6; American Transmission Comments at 8.

<sup>105</sup> Duke-American Transmission Comments at 7; American Transmission Comments at 10-11 (citing MISO, Request for Rehearing or Clarification, Docket No. RM10-23, at 7-8 (filed August 22, 2011)).

ownership to another transmission owner simply because it interconnects with the proposed project.<sup>106</sup> Duke-American Transmission and American Transmission argue that if the Commission finds that NIPSCO's interpretation of Appendix B, section VI is correct, it will cause significant harm to projects Duke-American Transmission and American Transmission have proposed in MISO's MTEP.<sup>107</sup>

53. Duke-American Transmission and American Transmission add that language in Appendix B, section VI amounts to a right of first refusal provision and is inconsistent with Order No. 1000.<sup>108</sup> LS Power argues that if the Commission finds that a right of first refusal does exist in MISO, such a right of first refusal cannot be enforced after the effective date of Order No. 1000.<sup>109</sup>

54. Southern Indiana, Indiana OUCC, MISO Transmission Owners, Xcel and the IURC Staff submitted comments opposing Pioneer's complaint. Southern Indiana asserts that the Commission should honor the existing section VI of Appendix B of the Transmission Owners Agreement and NIPSCO's decision to invest in the Project. According to Southern Indiana, the Kozey Letter that Pioneer relies designates Pioneer as the party responsible for construction of the project; however, this determination is at odds with the equivocal provision in section VI of the Transmission Owners Agreement, which provides NIPSCO the right to invest in and own the project because it, unlike Pioneer, is the existing MISO transmission owner with facilities that will connect to the project. Furthermore, Southern Indiana asserts that NIPSCO is eligible under the Transmission Owners Agreement and financially willing and able to construct the facilities, and thus, neither Pioneer nor MISO can rely on the provision in the Transmission Owners Agreement permitting third parties to participate in the financing, construction, and ownership of new transmission facilities.<sup>110</sup>

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<sup>106</sup> Duke-American Transmission Comments at 8; American Transmission Comments at 11.

<sup>107</sup> Duke-American Transmission Comments at 9-10; American Transmission Comments at 14.

<sup>108</sup> Duke-American Transmission at 8-9; American Transmission Comments at 13.

<sup>109</sup> LS Power Comments at 4, n.5. LS Power adds that at the very least, rights of first refusal must be eliminated on the Order No. 1000 compliance date (i.e., October 12, 2012). *Id.* at 4-5.

<sup>110</sup> Southern Indiana Comments at 3-4 (citing Transmission Owners Agreement at App. B § VI).

55. In addition, Southern Indiana asserts that in Order No. 1000, the Commission established a prospective compliance process to eliminate rights of first refusal.<sup>111</sup> Southern Indiana contends that by seeking to eliminate the incumbent transmission provider's right of first refusal, Pioneer is seeking retroactive application of this decision, which is inconsistent with constitutional due process. Furthermore, Southern Indiana argues that by seeking a determination that NIPSCO cannot own or invest in any portion of the line, Pioneer is asking the Commission to provide it, a non-incumbent transmission provider, preferential treatment as compared to the Commission's Order No. 1000 process, which would allow both incumbent and non-incumbent transmission owners to compete to own and invest in such projects.<sup>112</sup>

56. Indiana OUCC urges the Commission to deny the Complaint, thereby protecting the integrity of the MISO planning and MVP processes. To the extent detailed factual allegations are necessary to a Commission decision in this matter, Indiana OUCC urges that the matter be set for hearing.<sup>113</sup>

57. MISO Transmission Owners state that they take no position on whether the Reynolds-Greentown segment of the Pioneer Project should terminate at the Reynolds or New Reynolds substation. MISO Transmission Owners state that the determination of which entities have the obligation to construct and own this line segment is determined by Appendix B, section VI of the Transmission Owners Agreement.<sup>114</sup> MISO Transmission Owners claim that this language is clear and unambiguous, and accordingly, the Commission should apply here its finding in *Duquesne* to determine that section VI establishes what entities have the authority and obligation to build transmission facilities in MISO.<sup>115</sup> Similarly, Xcel states that that it takes no position on Pioneer's claim of ownership of the Pioneer Project or any other claim in the Complaint. However, Xcel notes that the Commission has previously found the provisions in Appendix B, section VI of the Transmission Owners Agreement to be just and reasonable

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<sup>111</sup> *Id.* at 4.

<sup>112</sup> *Id.* at 5 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 294, which provides that "neither incumbent nor non-incumbent transmission facility developers should, as a result of a Commission approved OATT or agreement, receive different treatment in a regional transmission planning process.").

<sup>113</sup> Indiana OUCC Comments at 5.

<sup>114</sup> MISO Transmission Owners Comments at 6.

<sup>115</sup> *Id.* at 6-7 (citing *Duquesne*, 138 FERC ¶ 61,111 at P 25).

and thus, disagrees with Pioneer's alternative request for relief wherein Pioneer requests that the Commission find that language unjust and unreasonable.<sup>116</sup>

58. Both MISO Transmission Owners and Xcel argue that Pioneer's characterization of section VI of the Transmission Owners Agreement as providing a right of first refusal is incorrect. MISO Transmission Owners claim that this section imposes construction, ownership, and maintenance obligations on MISO transmission owners to ensure that transmission projects identified in the MTEP are constructed, and that a transmission owner does not have a right of first refusal to decline to construct, own or maintain transmission facilities. According to MISO Transmission Owners, this is far from being a right of first refusal, which provides existing transmission owners broad discretion to determine which facilities they wish to build and to claim projects ahead of other potential builders.

59. MISO Transmission Owners and Xcel assert that even if section VI is construed as providing NIPSCO with a right of first refusal, in Order No. 1000, the Commission specifically determined that compliance filings removing right of first refusals from Commission jurisdictional agreements are not due until October 11, 2012.<sup>117</sup> Thus, MISO Transmission Owners argue that Pioneer's request to require elimination of the section VI obligations and responsibilities before October 11, 2012 is a collateral attack on Order No. 1000 and would require an unduly discriminatory application of Order No. 1000.<sup>118</sup>

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<sup>116</sup> Xcel Comments at 5 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *order on reh'g and compliance, Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,169 (2003)).

<sup>117</sup> MISO Transmission Owners Comments 9 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 792 (setting compliance deadline for issues other than interregional transmission coordination procedures and interregional cost allocation method for one year after the Order No. 1000's effective date)); Xcel Comments at 6 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 793).

<sup>118</sup> *Id.* at 9-10 (citing *Cal. Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,075 at P 25 (responding to claims that certain tariff provisions created an impermissible right of first refusal that should be eliminated as inconsistent with Order No. 1000, the Commission found that the request "is a collateral attack on Order No. 1000," and that requiring "an abbreviated compliance schedule when other public utility transmission providers have" until October 11, 2012 is "unduly discriminatory.")).

60. MISO Transmission Owners argue that Pioneer's reliance on the Commission's decision in the MVP Rehearing Order proves nothing.<sup>119</sup> According to MISO Transmission Owners, in that order, the Commission held that it did not act improperly in approving MISO's MVP proposal despite the then-pending Order No. 1000 rulemaking.<sup>120</sup> MISO Transmission Owners suggest that the appropriateness of section VI will be addressed in MISO's Order No. 1000 compliance filing as required by the Commission.

61. The IURC Staff state that they are not taking a position on the allegations raised in the Complaint.<sup>121</sup> They note that their comments are intended to provide additional information and points of clarification to the Commission and to raise certain issues and concerns that should be part of the Commission's determination on this matter.

62. The IURC Staff note that the term "Pioneer Project" used in the Complaint refers to both the original 2008 project proposed by Pioneer and the recently-approved MISO MVP.<sup>122</sup> The IURC Staff argue that these are two separate projects and contend that the project proposed by Pioneer in 2008 was not approved as an MVP in December 2011.<sup>123</sup>

63. The IURC Staff disagree with Pioneer that there is no mechanism between PJM and MISO to jointly review the Pioneer Project. The IURC Staff note that PJM and MISO have a FERC-approved JOA that sets out how a cross-border transmission project can be approved in both RTOs planning processes, and how costs can be allocated. The IURC Staff state that Pioneer fails to mention that the Pioneer Project was included in a joint study performed by PJM and MISO in 2009, the Southwestern Indiana Study, and that the results of the study show that the Pioneer Project failed the MISO economic project criteria.<sup>124</sup> The IURC Staff note that because MISO and PJM are currently

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<sup>119</sup> *Id.* at 11.

<sup>120</sup> *Id.* (citing MVP Rehearing Order 137 FERC ¶ 61,074 at P 187).

<sup>121</sup> The IURC Staff note that the comments are not being made by the Indiana Commission, but instead by staff at the Indiana Commission that have been tasked with monitoring and participating in the stakeholder processes at RTOs.

<sup>122</sup> IURC Staff Comments at 4-5.

<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 5-6.

engaged in stakeholder processes leading up to compliance filings by both RTOs to comply with Order No. 1000, Pioneer's complaint may be premature.<sup>125</sup>

64. Midwest TDUs state that their comment does not directly address the ultimate issue of whether Pioneer or NIPSCO should make the investment in the disputed facilities. Instead, Midwest TDUs' comment addresses the perspective and standards that the Commission should bring to its resolution of the ultimate issue. Specifically, Midwest TDUs urge that if the question of who should build the facilities is a close one, the Commission should include in its analysis, alongside other relevant factors, consideration of which of the rival developers would charge ratepayers less. Midwest TDUs state that information from other sources indicates that the disputed facilities would cost ratepayers substantially less if NIPSCO owns them than if Pioneer does.

## 2. Owner Status and CWIP Recovery

65. Duke-American Transmission and American Transmission argue that MISO's reading of the Transmission Owners Agreement precludes Pioneer from implementing rate incentives granted to it by the Commission, and any such provision that precludes Pioneer from collecting those rates is unjust and unreasonable.<sup>126</sup> Duke-American Transmission and American Transmission support the Commission directing the MISO Board to grant a waiver of the requirement in the Tariff that third party transmission facilities be physically interconnected and the requirement in the Transmission Owners Agreement that requires third party transmission developers to own transmission facilities in MISO before allowing the third party to become a MISO transmission owner.<sup>127</sup>

66. Southern Indiana contends that Pioneer does not qualify as a transmission owner in MISO because it does not own or operate transmission assets in the MISO footprint, as required by the definition of Owner under the Transmission Owners Agreement. According to Southern Indiana, Pioneer cannot use its Order No. 679 CWIP incentive as an end-run around this eligibility requirement, and therefore has no right to charge for transmission services under the Tariff and cannot implement its CWIP incentive.

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<sup>125</sup> *Id.* at 15.

<sup>126</sup> Duke-American Transmission at 10-12; American Transmission Comments at 14-15.

<sup>127</sup> Duke-American Transmission Comments at 11-12; American Transmission Comments at 15-16.

67. Indiana OUCC suggests that the Commission dismiss the Complaint on this issue and hold that incentive rate treatments are not portable.<sup>128</sup> According to Indiana OUCC, the line at issue in this case bears “a questionable resemblance” to the Pioneer Project that was awarded rate incentives.<sup>129</sup> Moreover, Indiana OUCC avers that it is not clear that Pioneer was actually awarded this project in MISO’s planning process.<sup>130</sup>

68. MISO Transmission Owners argue that because Pioneer does not own any physical transmission facilities in MISO, it does not meet the clear and unambiguous definition of Owner in the Transmission Owners Agreement.<sup>131</sup> MISO Transmission Owners contend that the fact it has a rate schedule on file with the Commission is not sufficient to meet the requirement that an Owner own transmission facilities, as a rate schedule is incapable of satisfying the seven-factor test and is not used for the transmission of electricity in interstate commerce. Similarly, MISO Transmission Owners claim that section V.A.2 of the Transmission Owners Agreement, which allows entities that own physical transmission facilities that are not directly interconnected with MISO’s system to become Owners if their facilities provide “significant net benefits” to MISO and its members is clearly applicable to entities that own, operate, or control existing physical transmission facilities, and not to entities that own paper facilities only.<sup>132</sup>

69. Illinois Commission opposes Pioneer’s request that the Commission direct the MISO Board to waive the “operating facility” requirements of the Transmission Owners Agreement so that Pioneer can be designated as a transmission owner. Illinois Commission argues that Pioneer has not satisfied the conditions for such a waiver because neither MISO nor Pioneer has provided sufficient data to conclude that Pioneer or the Pioneer Project “will result in significant net benefits to the Midwest ISO and its Members” as required by section V.A.2 of the Transmission Owners Agreement.<sup>133</sup>

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<sup>128</sup> Indiana OUCC Comments at 10.

<sup>129</sup> *Id.* at 11.

<sup>130</sup> *Id.* at 12.

<sup>131</sup> *Id.* at 12.

<sup>132</sup> *Id.* at 13 (citing section V.A.2 of the Transmission Owners Agreement at Article Two § V.A.2).

<sup>133</sup> Illinois Commission Comments at 3, 4 (citing Transmission Owners Agreement at Article Two § V.A.2).

Illinois Commission notes that Pioneer refers to MTEP 2011 as asserting benefits of the MVP Portfolio, but according to Illinois Commission, the benefit data in the MTEP 2011 is provided on a portfolio basis (not on a project basis) and on a sub-regional basis (not on a transmission owner zone or Member basis).

70. The IURC Staff note that MISO's interpretation of the Transmission Owners Agreement raises a number of questions that should be part of the Commission's determination in this proceeding, including: (1) what does Pioneer consider to be its assets, (2) are there other parties to the Transmission Owners Agreement who have comparable assets to Pioneer, (3) would MISO consider Pioneer to be an Independent Transmission Company or a non-incumbent, (4) are there currently any provisions in the MISO Tariff regarding treatment of Independent Transmission Companies or non-incumbents, (5) were there any provisions in the MVP process, for which the project in discussion was approved, or MTEP 2011, that specifically outlines treatment of non-incumbents or Independent Transmission Companies, (6) is the current Transmission Owners Agreement discriminatory, unjust, or unreasonable, (7) was this the same Transmission Owners Agreement that was in place at the time of the MVP approval, (8) would NIPSCO be considered an incumbent transmission owner with an obligation to build, and (9) is the obligation to build the same as the right to build under the Transmission Owners Agreement.<sup>134</sup>

**D. Illinois Commission Answer to Comments of American Transmission**

71. Illinois Commission states that contrary to American Transmission's recommendation, the Commission should not grant Pioneer's request that the Commission direct the MISO Board to waive the "operating facility" requirements of the Transmission Owners Agreement. According to Illinois Commission, in elaborating on this recommendation, American Transmission contends that the Pioneer Project "would provide benefits to the MISO region (otherwise it would not have been included in the MISO MTEP in the first instance)."<sup>135</sup> However, Illinois Commission asserts that Pioneer has not provided the net benefits data required by the Transmission Owners Agreement, which is one of the showings required to qualify for the requested waiver. In addition, Illinois Commission contends that the benefit data in the 2011 MTEP is provided on a portfolio basis (not on a project basis) and on a sub-regional basis (not on a zonal or member basis). Illinois Commission points out that MISO states in its answer, "[c]ontrary to Pioneer's suggestion, the MISO Board has never considered Pioneer from

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<sup>134</sup> IURC Staff Comments at 13-14

<sup>135</sup> Illinois Commission Answer at 2 (citing American Transmission Comments at 15).

the standpoint of the criteria set forth in Article Two, section V.A.2 of the Transmission Owners Agreement and has not made the requisite ‘significant net benefits’ finding.”<sup>136</sup> Accordingly, Illinois Commission argues that contrary to American Transmission’s recommendation, the Commission should not grant Pioneer’s request to direct waiver.

**E. Xcel Answer to Comments of American Transmission and other Comments**

72. Xcel disagrees with American Transmission’s comments that the Appendix B, section VI language, if interpreted pursuant to its plain meaning, would impede transmission investment in the Midwest region.<sup>137</sup> Rather, Xcel argues, MISO’s transmission planning and development process envisioned by such provisions have facilitated investment in new transmission facilities such as the collaborative planning, permitting, engineering, development, and construction of nearly 700 miles of new 345 kV and 230 kV transmission facilities in Minnesota, Wisconsin, North Dakota, and South Dakota.

73. In addition, Xcel asserts that in keeping with the history of regional collaboration, MISO recently designated seven MVPs as being jointly owned, and the majority of the designations have been without conflict. Furthermore, Xcel argues that the Commission should not accept American Transmission’s claim that the Appendix B, section VI language does “not apply to projects that have been substantially planned by a single entity from inception.”<sup>138</sup> Xcel contends that MISO’s planning framework is not a “sponsorship model,” but rather, it takes all of the proposed solutions to identified needs and evaluates and modifies them as necessary to meet all regional needs efficiently and effectively.<sup>139</sup>

**F. Pioneer Answer to NIPSCO February 28 Answer and MISO Answer**

**1. Right to Construct and Own**

74. Pioneer disagrees with NIPSCO’s argument that the project MISO approved in MTEP 2011 is not the Pioneer Project and that the Pioneer Project remains in the MISO

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<sup>136</sup> *Id.* at 3 (citing MISO Answer at 19-20).

<sup>137</sup> Xcel Answer at 3 (citing American Transmission Comments at 13).

<sup>138</sup> *Id.* at 7 (citing American Transmission Comments at 12).

<sup>139</sup> *Id.* at 7-8 (citing MISO Tariff at Attachment FF-4).

MTEP as a separate project that has not been approved.<sup>140</sup> Pioneer claims that it is standard practice for MISO to change a project's number when it advances from Appendix C to Appendix A. In addition, Pioneer argues that the primary reason that Pioneer should be designated to construct the Reynolds-Greentown Line is that the project would not be in the 2011 MTEP if Pioneer had not "championed" the project throughout the planning process.<sup>141</sup> Pioneer argues that the relevant facts confirm that the approved project was viewed by MISO as the Pioneer Project throughout the 2011 MTEP transmission planning process.<sup>142</sup> Pioneer argues that MISO's Answer refutes NIPSCO's claim that the 2011 MTEP identifies Duke and NIPSCO as the owners of the substations at Greentown and Reynolds.<sup>143</sup> Pioneer points out that MISO states in its answer that "MISO would like to emphasize, however, that ownership of the new terminal equipment at either end of the line, or the line itself, is not determined by either [the] Appendix A listing or the power system connection modeling."<sup>144</sup> Thus, Pioneer argues that the only document in which any entity has been designated to construct and own the project is in the Kozey Letter, which designates Pioneer as the owner.<sup>145</sup>

75. Pioneer also disagrees with NIPSCO's interpretation of third-party involvement in MISO's transmission planning process as participation-only, arguing that the Transmission Owners Agreement language, with the exception of merchant transmission projects, allows third parties to not only "participate," but also states that "third parties shall be permitted and encouraged to participate in the financing, construction and ownership of the new transmission facilities as specified in the [MTEP]."<sup>146</sup> Pioneer argues that the Commission did not direct MISO to revise Appendix B of the Transmission Owners Agreement so that MISO could provide a "useless" opportunity for third parties to "participate" without any opportunity to own and invest in projects.<sup>147</sup> In addition, Pioneer argues that the Kozey Letter confirms that MISO understood its

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<sup>140</sup> Pioneer Answer at 4.

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.* at 5-9.

<sup>143</sup> *Id.* at 10.

<sup>144</sup> *Id.* (citing MISO Answer at 9).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 11.

<sup>147</sup> *Id.* at 13.

obligation to allow third parties like Pioneer to be designated to own and construct their own projects and the letter represents MISO's exercise of its responsibility, which Pioneer asserts is the same responsibility the Commission gave PJM in *Primary Power*.<sup>148</sup>

76. Pioneer disagrees with NIPSCO's statement that "[b]ecause the Reynolds-Greentown Line will interconnect with the existing *systems* of NIPSCO and Duke, a straightforward application of the Transmission Owners Agreement assigns responsibility for constructing that line to these two Transmission Owners."<sup>149</sup> Pioneer argues that the Transmission Owners Agreement provision does not apply to the connections of "systems," but refers to "facilities." Pioneer states that NIPSCO does not own any "facilities" to which the Pioneer Project will connect, and the fact that NIPSCO owns the substation property at Reynolds, assuming the project is ultimately constructed there, does not make it the owner of any connecting "facilities."<sup>150</sup> Pioneer asserts that the Reynolds substation consists of a connection to AEP's 345 kV system and NIPSCO's connecting assets that operate at 138 kV are used for local retail service purposes.<sup>151</sup>

77. Pioneer states that the Transmission Owners Agreement provisions do not parallel the SPP provision. Pioneer argues that the SPP provision expressly states that a single transmission owner owning interconnecting facilities will be "designated" to construct a project approved under the regional plan, while MISO's Transmission Owners Agreement provision does not "designate" any entity to build a project.<sup>152</sup> Pioneer argues that the Transmission Owners Agreement does not grant anyone a right to build.

78. Pioneer also contends that it is not seeking to override, amend or bypass the Order No. 1000 compliance process.<sup>153</sup> Pioneer argues that since the Commission has found

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<sup>148</sup> *Id.* at 14-16 (citing *Primary Power*, 131 FERC ¶ 61,226). Pioneer also argues that *Duquesne* is not relevant to the use of the Kozey Letter, as NIPSCO maintains, and, that the letter is a proper and accurate representation of MISO's independent conclusion. *See id.* at 16-18.

<sup>149</sup> *Id.* at 19 (citing NIPSCO February 28 Answer at 3) (emphasis added by Pioneer).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 21.

<sup>153</sup> *Id.* at 26-28.

right of first refusal provisions in FERC-jurisdictional agreements to be unjust and unreasonable in Order No. 1000, the Commission has no discretion to continue to enforce unjust and unreasonable contract provisions.<sup>154</sup> Pioneer argues that it is not asking the Commission to change the compliance deadline in Order No. 1000, but is merely asking the Commission to apply its findings to the facts of the instant proceeding.<sup>155</sup>

79. Pioneer disputes NIPSCO's claim that the Complaint is procedurally deficient because it did not follow the dispute resolution procedures of the Tariff. According to Pioneer, that section applies to the development of the MTEP, but the applicable section for disputes involving ownership or rate issues is section VI of Attachment FF to the Tariff, which covers implementation issues associated with the MTEP. Pioneer points out that section VI of Attachment FF states:

If [MISO] and any Transmission Owner's planning representatives, or other designated entity(ies), cannot reach agreement on any element of the MTEP, the dispute may be resolved through the dispute resolution procedures provided in the Tariff, or in any applicable joint operating agreement, or by the Commission or state regulatory authorities, where appropriate. The MTEP shall have as one of its goals the satisfaction of all regulatory requirements as specified in Appendix B or Article IV, Section I, Paragraph C of the [MISO Transmission Owners Agreement].<sup>156]</sup>

## **2. Owner Status and CWIP Recovery**

80. In response to MISO, Pioneer states that it has demonstrated that a company that has a tariff on file with the Commission is a public utility by virtue of the fact that the tariff is a jurisdictional "facility" under the FPA.<sup>157</sup> Pioneer argues that its corporate organization, paper, and tariff are FERC-jurisdictional transmission facilities. Thus, Pioneer states that its interpretation would allow an entity that has paper facilities in the form of a rate schedule on file with the Commission to join MISO as an Owner if the project has been approved in MISO's MTEP.<sup>158</sup>

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<sup>154</sup> *Id.* at 26-27.

<sup>155</sup> *Id.* at 27.

<sup>156</sup> *Id.* at 28 (citing Tariff at Attachment FF § VI).

<sup>157</sup> *Id.* at 31.

<sup>158</sup> *Id.*

81. Pioneer argues that MISO's interpretation of "Owner" is unduly discriminatory because, without legitimate justification, it treats similarly situated transmission developers (i.e., incumbent and third-party developers) differently.<sup>159</sup> Pioneer states that unless it is allowed to become an Owner, it will be prohibited from recovering, during the design, licensing and construction phases, the CWIP incentive granted to Pioneer by the Commission. In addition, Pioneer asserts that it would be denied the ability to place 50 percent of non-pollution control construction costs as CWIP in rate base even absent the Commission granting incentives.<sup>160</sup>

82. Pioneer argues that MISO's answer attempts to limit the MISO Board's discretion by arguing that MISO's waiver authority extends only to situations where there are "physical transmission facilities" and only to waiver of the interconnection requirement.<sup>161</sup> In addition, Pioneer disagrees with MISO's and Illinois Commission's view of the MISO Board's authority by suggesting that the MISO Board's approval of the MVP portfolio in the 2011 MTEP does not constitute a finding of "significant net benefits."<sup>162</sup>

**G. NIPSCO March 27 Answer**

83. NIPSCO reiterates its position that the project at issue in this docket, Project No. 2202 (Reynolds-Greentown Line), is not the Pioneer Project, which is Project No. 2795.<sup>163</sup> Therefore, NIPSCO contends that regardless of the legal import of the Kozey Letter, it cannot impact this case because it contains a critical caveat when it states "Pioneer will be designated as the party responsible for construction of the Pioneer Project, if and when it is included in the MTEP [2011]."<sup>164</sup> In addition, NIPSCO asserts that the Kozey Letter appears to be predicated on Duke being the only affected MISO transmission owner, but when MISO determined that the project would interconnect two owners, the provision of the Transmission Owners Agreement cited providing that "[o]wnership and the responsibility to construct facilities that are connected to a

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<sup>159</sup> *Id.* at 32.

<sup>160</sup> *Id.* at 33.

<sup>161</sup> *Id.* at 35 (citing MISO Answer at 19).

<sup>162</sup> *Id.* at 36 (citing MISO Answer at 19-20, Illinois Commission Comments at 4-10).

<sup>163</sup> NIPSCO March 27 Answer at 4 and Exh. 5 at 25.

<sup>164</sup> *Id.* at 8 (citing Kozey Letter).

single Owner's system belong to that owner," was inapplicable and the "share equally" provision applied.<sup>165</sup>

84. Furthermore, NIPSCO refutes Pioneer's claim that the Kozey Letter equates to a "planning decision" because planning by bilateral negotiation does not exist in any filed rate and has never been endorsed by the Commission. According to NIPSCO, despite Pioneer's reliance on the Commission's decision in *Primary Power*, all the Commission did in that case was clarify that PJM's tariff "permits, but does not require" PJM to designate non-incumbent transmission project sponsors to construct and own a project if it is included in the planning process.<sup>166</sup> Thus, NIPSCO claims it does not support Pioneer's efforts to circumvent the MISO planning process by private negotiation.

85. NIPSCO refutes Pioneer's position that the *Duquesne* case is inapplicable. According to NIPSCO, nowhere does Pioneer recognize that under Article I, section I.M of the Transmission Owners Agreement that the benefits and burdens are imposed not only on the specific signatory, but also all of its affiliates. Therefore, NIPSCO contends that as an affiliate of Duke, Pioneer is not a "third party" and thus, not able to avoid the clear and unambiguous terms of the Transmission Owners Agreement.<sup>167</sup>

86. Despite Pioneer's claim, NIPSCO contends that MISO designations are done through Appendix A. According to NIPSCO, Pioneer claims that MISO debunks the relevance of Appendix A when MISO stated in its answer that "ownership of the new terminal equipment at either end of the line, or the line itself, is not determined by either this Appendix A listing or the power system connection modeling."<sup>168</sup> However, NIPSCO asserts that Pioneer omits the very next sentence of MISO's pleading in which MISO states that ownership is governed by Appendix B of the Transmission Owners Agreement. In addition, NIPSCO contends that historical practice clearly indicates that MTEP Appendix A is the only recognized means MISO uses to convey which entity shall have the responsibility to develop an approved project, based on the Transmission Owners Agreement and who owns the interconnecting existing assets.<sup>169</sup> NIPSCO

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<sup>165</sup> *Id.* (citing Transmission Owners Agreement at App. B § VI).

<sup>166</sup> *Id.* at 9-10 (citing *Primary Power*, 131 FERC ¶ 61,015 (2010)).

<sup>167</sup> *Id.* at 12.

<sup>168</sup> *Id.* at 14 (citing Pioneer Answer at 10).

<sup>169</sup> *Id.* at 14-15 and Exhibit 7.

refutes Pioneer's claim that it is standard practice to change a project's number when it advances from Appendix C to Appendix A.<sup>170</sup>

87. NIPSCO claims that, despite Pioneer's assertions, it did intervene in Pioneer's incentive rate petition, arguing that the filing was premature and that the Commission should let the existing MISO and PJM planning processes play out before ruling on the petition.<sup>171</sup> Furthermore, NIPSCO notes that Project No. 2795, the project for which Pioneer sought rate incentive treatment, did not connect to any NIPSCO facilities.

88. NIPSCO claims that Pioneer has misstated NIPSCO's position regarding third party rights and that NIPSCO does not believe that third parties should be shut out of the planning process. NIPSCO claims that it merely believes that Duke, as a signatory to the MISO Transmission Owners Agreement, has bound itself to the terms of the agreement and should not be permitted to create an affiliate and claim the planning rules no longer apply.

89. NIPSCO attempts to rebuff Pioneer's argument that even if Project No. 2202 will connect to NIPSCO's "system," the Transmission Owners Agreement does not apply because that provision only governs interconnections to "facilities"<sup>172</sup> by stating that the Reynolds-Greentown Line connects to both NIPSCO's system and facilities because it interconnects to NIPSCO's Reynolds substation. According to NIPSCO, the Reynolds substation has a 345 kV switchyard, a 345 kV to 138 kV transformer, and a 138 kV switchyard.<sup>173</sup>

90. NIPSCO disagrees with Pioneer's claim that the dispute resolution provisions of the Tariff do not apply because the issue is one of "implementation" and not one of the development of the MTEP.<sup>174</sup> NIPSCO argues that the central issue is which entity was designated by MISO in the MTEP in accordance with the Transmission Owners

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<sup>170</sup> *Id.* at 16-20.

<sup>171</sup> *Id.* at 22 (citing NIPSCO, Motion to Intervene and Comments, Docket No. ER09-75-000, at 4 (filed Nov. 5, 2008)).

<sup>172</sup> *Id.* at 26 (citing Pioneer Answer at 18-19).

<sup>173</sup> *Id.* at 26, 36-39; Dehring Aff. at PP 6, 32-34.

<sup>174</sup> NIPSCO March 27 Answer at 36 (citing Pioneer Answer at 28).

Agreement and section V of Attachment FF of the MISO Tariff.<sup>175</sup> Thus, NIPSCO contends that the issue directly relates to the development of the 2011 MTEP.

91. Finally, NIPSCO contends that in Duke-American Transmission's and American Transmission's comments, they both argue that "MISO's authority to order construction and ownership is limited" based on a select passage in MISO's Order No. 1000 rehearing request in which MISO conceded it is currently powerless to determine "who should build specific transmission projects."<sup>176</sup> However, NIPSCO claims both parties left out the preceding sentence, which changes the meaning of the paragraph and undermines Duke-American Transmission and American Transmission's position. According to NIPSCO, in the quoted passage read in full, MISO is stressing to the Commission on rehearing that currently the Transmission Owners Agreement in section VI does provide specific provisions relating to construction obligations and associated rights as maintained by NIPSCO and all the transmission owners, other than Duke-American Transmission and American Transmission. Thus, NIPSCO asserts that MISO's point was that it is only if these are removed prospectively under section 206 in the Order No. 1000 compliance process that MISO would be placed in the role, without the contractual grounding of the Transmission Owners Agreement, of deciding who should build which project.

#### **IV. Discussion**

##### **A. Procedural Matters**

92. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

93. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), we will grant PJM States, American Municipal, and

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<sup>175</sup> *Id.* (citing MISO Tariff at Attachment FF, section V, which provides "For each project included in the recommended MTEP, the plan shall designate, based on the planning analysis performed by the Transmission provider and based on other input from participants, including, but not limited to, any indication of a willingness to bear cost responsibility for the project; and any applicable provisions of the ISO Agreement, one or more Transmission owners or other entities to construct, own and/or finance the recommended project").

<sup>176</sup> *Id.* at 37 (citing Duke-American Transmission Comments at 7; American Transmission Comments at 10).

Alliant's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

94. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Illinois Commission, Xcel, Pioneer, and NIPSCO because they have provided information that assisted us in our decision-making process.

## **B. Substantive Matters**

### **1. Right to Construct and Own**

95. Appendix B, section VI of the Transmission Owners Agreement provides, in relevant part:

Ownership and the responsibilities to construct facilities which are connected between two (2) or more Owners' facilities belong equally to each Owner, unless such Owners otherwise agree, and the responsibility for maintaining such facilities belongs to the Owners of the facilities unless otherwise agreed by such Owners.<sup>177</sup>

96. We find that this language supports NIPSCO's position as to ownership and the responsibility of owners to build facilities when such facilities are connected between two or more owners' facilities. Thus, we agree with NIPSCO that under the plain terms of Appendix B, section VI of the Transmission Owners Agreement, ownership and the responsibilities to construct the facilities belong equally to NIPSCO and Duke. Accordingly, we deny the complaint against NIPSCO.

97. To determine whether an agreement is ambiguous, the Commission must look within the four corners of the agreement and not to outside sources.<sup>178</sup> Furthermore, the Commission must review the entire agreement and particular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested therein.<sup>179</sup> An agreement is

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<sup>177</sup> Transmission Owners Agreement at App. B § VI.

<sup>178</sup> *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011). See, e.g., *Duquesne Light Co.*, 138 FERC ¶ 61,111, at P 27 (2012) (*Duquesne*) (citing *Ophthalmic Surgeons, Ltd.*, 632 F.3d at 35).

<sup>179</sup> *Id.*

ambiguous where it “could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.”<sup>180</sup> We find that Appendix B, section VI of the Transmission Owners Agreement is unambiguous as to ownership and the responsibility of owners to build facilities. The courts and the Commission have found that, when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission is not to consider parol evidence to interpret the contract’s intention.<sup>181</sup>

98. Pioneer argues that if the Appendix B, section VI language on which NIPSCO relies is interpreted as NIPSCO proffers, the third party language would be rendered meaningless.<sup>182</sup> We disagree. A plain reading of the applicable Appendix B, section VI language does not conflict with the third party language in the Transmission Owners

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<sup>180</sup> *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010).

<sup>181</sup> *See, e.g., Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010) (when a contract is unambiguous, that language controls and the court “must give effect to the unambiguously expressed intent of the parties”); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004) (stating “when the language of a contract is explicit and clear . . . then the court may ascertain the intent from its written terms and not go further”); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000) (stating when a contract’s terms are clear, it is to be construed according to its literal terms and extrinsic evidence cannot be used to alter or contradict the contract’s express terms).

<sup>182</sup> Pioneer also argues that the Kozey Letter confirms that Pioneer is eligible and will be designated to build a segment of the Pioneer Project, and therefore MISO does not believe that the Transmission Owners Agreement contains an exclusive right of first refusal provision in favor of connected owners. As noted above, the courts and the Commission have found that, when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission is not to consider parol evidence to interpret the contract’s intention. Accordingly, we will not consider the statements in the Kozey Letter that Pioneer relies on as evidence of MISO’s interpretation and commitment to designate Pioneer as the owner of the Reynolds-Greentown project. Further, even if we were to address the merits of the Kozey Letter, we agree with NIPSCO that the letter simply states that “Pioneer will be designated as the party responsible for construction of the Pioneer Project, if and when it is included in the MTEP 11.” Nothing in the letter states that Pioneer has an exclusive right to build the entire project or that the project would be exempt from the sharing provision of the Transmission Owners Agreement.

Agreement. The Transmission Owners Agreement permits third parties to “participate in the financing, construction and ownership of new transmission facilities as specified in the Midwest ISO Plan,” albeit, when read in conjunction with the “share equally provisions,” only if the interconnecting transmission owner is unwilling or unable to assume responsibility for the project.<sup>183</sup> Although the Commission directed MISO to “revise its Planning Framework to make it possible for third parties to participate in constructing and owning new transmission facilities identified by the plan,”<sup>184</sup> the Commission did not prescribe the terms and conditions of third-party participation. For these same reasons, we are not persuaded by the arguments by Duke-American Transmission and American Transmission that a plain reading of this language conflicts with the MISO RTO Order. Further, we agree with MISO Transmission Owners that Pioneer’s reliance on *Primary Power* is not determinative on the issues in this proceeding. In *Primary Power*, the Commission clarified that PJM’s tariff “permits, but does not require” PJM to designate non-incumbent transmission project sponsors to construct and own a project if it is included in the planning process.<sup>185</sup> Here, the question is whether ownership and the responsibilities to construct the facilities belong to NIPSCO, where MISO has designated NIPSCO and Duke as owners of the facilities.

99. Pioneer argues that the project will not connect with any existing NIPSCO facilities and therefore, the language that NIPSCO relies on does not even apply. We disagree. We agree with NIPSCO that who owns the interconnecting facilities is determinative on this issue. As confirmed by MISO’s answer, the naming of the connection point is irrelevant to the ownership of the facilities.<sup>186</sup> Although the existing Reynolds station will need to be substantially expanded to accommodate the 765 kV bus needed to meet the 765 kV MVP and will consist largely of new facilities, based on MISO’s approved MTEP, NIPSCO is the owner of the Reynolds facility in its current state and we do not believe any required upgrades negates NIPSCO’s ownership of the Reynolds facility. Although Duke-American Transmission and American Transmission claim that MISO’s authority to order construction and ownership is limited, we find that MISO has exercised its designation authority in accordance with section VI of the Transmission Owners Agreement and the Tariff in designating both NIPSCO and Duke as the parties responsible for the Reynolds-Greentown Line.

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<sup>183</sup> See Transmission Owners Agreement at App. B § VI.

<sup>184</sup> MISO RTO Order, 97 FERC at 62,521.

<sup>185</sup> NIPSCO March 27 Answer at 9-10 (citing *Primary Power*, 131 FERC ¶ 61,015).

<sup>186</sup> See MISO Answer at 8.

100. Duke-American Transmission and American Transmission argue that prior to the approval of the MISO MVP process, there are no identified instances in the history of MISO's implementation of the Appendix B planning framework where MISO or any of the transmission owners have taken a position that compels one transmission owner to give another transmission owner 50 percent ownership rights in a locally planned project, and thus, NIPSCO's position is neither consistent with the original intent of the language nor how ownership has been historically attributed to projects in the MISO region. Despite these assertions, the plain language of the Transmission Owners Agreement prevails. The fact that MISO or the transmission owners may not have previously enforced a provision because circumstances had not previously arisen that required MISO or the transmission owners to do so, does not take away the legal force of that provision.

101. Pioneer argues that if section VI is interpreted as NIPSCO proffers, it is more appropriately construed as a "right of first refusal" for transmission owners to own 50 percent of projects merely because the proposed transmission project interconnects with the transmission owner's existing facilities. Pioneer argues that as a "right of first refusal" provision, it is inconsistent with Order No. 1000.<sup>187</sup> We agree with Pioneer that the language in section VI, Appendix B of the MISO TOA acts to establish a right of first refusal. In Order No. 1000, the Commission stated that it is unjust and unreasonable to grant incumbent transmission providers a federal right of first refusal with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation because doing so may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, result in the inclusion of higher-cost solutions in the regional plan.<sup>188</sup> In Order No. 1000-A, the Commission stated that its rationale for requiring the elimination of federal rights of first refusal was not based solely on the economic incentives of incumbent transmission developers/providers, but was also "based on the belief that expanding the universe of transmission developers offering potential solutions can lead to the identification and evaluation of potential solutions to regional needs that are more efficient or cost-effective."<sup>189</sup> The Commission therefore directed public utility transmission providers to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first

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<sup>187</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323.

<sup>188</sup> *Id.* P 284.

<sup>189</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 83.

refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.<sup>190</sup>

102. We note that Order No. 1000 requires public utility transmission providers to implement a planning process that evaluates competing projects in a way that is sufficiently detailed for stakeholders to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.<sup>191</sup> By requiring an open and transparent transmission planning process that produces a regional transmission plan, “Order No. 1000 will provide the Commission and interested parties with a record that we believe will be able to highlight whether public utility transmission providers are engaging in undue discrimination against others.”<sup>192</sup>

103. We further note that the Order No. 1000 compliance filing deadline is October 11, 2012. Thus, while the Commission did require the elimination of a federal right of first refusal in Order No. 1000, it did so on a prospective basis upon Commission acceptance of the compliance filings due on October 11, 2012.<sup>193</sup> The Commission will scrutinize the Order No. 1000 compliance filings and related implementation to ensure that Commission-jurisdictional tariffs and agreements are just and reasonable and not unduly discriminatory.

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<sup>190</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 313. The Commission stated that it was not requiring removal from Commission-jurisdictional tariffs and agreements of federal rights of first refusal as applicable to a local transmission facility. Additionally, the Commission explained that the reforms do not affect the right of an incumbent transmission provider to build, own, and recover costs for upgrades to its own transmission facilities, such as in the case of tower change outs or reconductoring, regardless of whether an upgrade has been selected in a regional transmission plan for purposes of cost allocation. The Commission further noted that the reforms are not intended to alter an incumbent transmission provider’s use and control of its existing rights-of-way, the retention, modification, or transfer of which remain subject to the relevant law or regulation that granted the right-of-way. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 318-319. *See also* Order No. 1000-A, 139 FERC ¶ 61,132 at P 427.

<sup>191</sup> *Id.* P 328.

<sup>192</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 267.

<sup>193</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 65.

104. In response to Duke-American Transmission and American Transmission's claims that NIPSCO's interpretation of the Transmission Owners Agreement impact other recently proposed projects that they recently submitted to MISO, we find that these arguments are outside the scope of this proceeding.

## **2. Owner Status and CWIP Recovery**

105. Pioneer argues that based on MISO's interpretation of the Transmission Owners Agreement, Pioneer is prohibited from implementing the CWIP incentive previously granted to the project. Pioneer asserts that the Commission should rule that Pioneer be permitted to execute the Transmission Owners Agreement, or alternatively, that the Commission recommend that the MISO Board grant waiver of the Transmission Owners Agreement's operating facility requirement. Pioneer requests that if the Commission does not make either of these two findings, the Commission should find that the existing definition of "Owner" in the Transmission Owners Agreement is unjust, unreasonable, and unduly discriminatory and direct MISO to change it.

106. As discussed above, the Transmission Owners Agreement establishes an exclusive right to invest in, construct and own facilities for connected owners, and the line at issue in this complaint is connected to facilities owned by NIPSCO and Duke. Further, we note that in the Incentives Order, the Commission accepted Pioneer's commitment that "the 100 percent inclusion of CWIP in rate base will not go into effect unless and until the project is approved by the regional transmission planning processes of PJM and MISO and there is a Commission-approved cost-allocation methodology in place."<sup>194</sup> However, as acknowledged by Pioneer, the project has not been approved by both PJM and MISO. For these reasons, Pioneer's complaint against MISO on this issue is moot, and we will dismiss it.

### **The Commission orders:**

(A) The complaint against NIPSCO is hereby denied, as discussed in the body of this order.

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<sup>194</sup> Incentives Order, 126 FERC 61,281 at P 65.

(B) The complaint against MISO is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Clark is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.