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October 2, 2026

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VIA ELECTRONIC FILING

The Honorable Debbie-Anne A. Reese
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

Re: Otter Tail Power Company
Construction Management Agreement for the Big Stone South to Alexandria
Transmission Project
Docket No. ER27-[]-000

Dear Secretary Reese:

In accordance with Section 205 of the Federal Power Act ("FPA"),¹ Part 35 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") regulations,² and Rule 205 of the Commission's Rules of Practice and Procedure,³ Otter Tail Power Company ("OTP"), a Minnesota corporation, submits for filing an executed Construction Management Agreement dated as of September 3, 2026, (the "CMA") among OTP as an Owner⁴, Western Minnesota Municipal Power Agency, a municipal corporation and political subdivision of the State of Minnesota ("WMPMA") as an Owner, and OTP in its capacity as the Construction Manager.⁵ OTP and WMPMA are referred to in the CMA and this transmittal letter individually as an "Owner" or a "Party" and collectively as the "Owners" or the "Parties." The CMA governs the construction of an approximately 96 mile long 345 kV transmission line between OTP's Big Stone South Substation

¹ 16 U.S.C. § 824d.

² 18 C.F.R. pt. 35.

³ 18 C.F.R. § 385.205.

⁴ Terms used in this transmittal letter with initial capitalization that are not otherwise defined herein have the meanings specified in the CMA.

⁵ CMA § 10.2.5 and sched. 10.2.5 (representing that no approval, consent or authorization of any Governmental Body or other Person is required for each Owner's execution, delivery and performance of the CMA except approvals already given or obtained and in full force and effect or as set forth in Schedule 10.2.5, which lists "Acceptance for filing with FERC under Section 205 of Federal Power Act").

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and WMMPA's Alexandria Substation (the BSSA Transmission Line).⁶ The BSSA Transmission Line is a "Project Component" under the CMA. The Project Component, together with any Additional Project Components owned by the Owners, constitutes the overall "Project."⁷ The CMA is submitted and designated in accordance with Order No. 714⁸ and the Commission's eTariff filing requirements. WMMPA is not a public utility under the FPA.⁹ OTP is a public utility under Section 201(e) of the FPA.¹⁰ OTP is concurrently submitting for filing the Operation and Maintenance Agreement for the BSSA Transmission Line in a separate Commission docket. OTP has been authorized by WMMPA to state that WMMPA concurs with this filing.

The Owners entered into the CMA to engage OTP, as the Construction Manager, to provide construction management and real property management services necessary for the completion of the design, engineering, and construction of the BSSA Transmission Line. The Services under the CMA are expected to commence on the Effective Date.¹¹ This transmittal letter describes the BSSA Transmission Line as a Project Component, the CMA, and the basis for the requested acceptance and waivers described herein.

The CMA is a construction management agreement of the kind the Commission has previously accepted for filing for other jointly owned transmission lines in the region,¹² including a construction management agreement previously filed by OTP for the jointly owned Bemidji to

⁶ CMA Recitals ¶ A (describing "the new double circuit capable 345 kV transmission line to be constructed from the Big Stone South Substation to the Alexandria Substation").

⁷ CMA § 1.1 (defining "Project" as "the Project Component together with any Additional Project Component(s) constituting or forming a part of the Big Stone South-Alexandria transmission project running from the Big Stone South Substation to the Alexandria Substation" and defining "Additional Project Component" as a project component "developed after the Effective Date and owned by the Owners").

⁸ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. Preambles ¶ 31,276 (2008).

⁹ See 16 U.S.C. § 824(f) ("No provision in this subchapter shall apply to, or be deemed to include . . . a State or any political subdivision of a State . . . unless such provision makes specific reference thereto.").

¹⁰ 16 U.S.C. § 824(e) (defining "public utility" to mean "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter").

¹¹ CMA §§ 2.1 (providing that each Owner "appoints and retains the Construction Manager to provide the Services throughout the Term"), 15.1.1, 15.1.2.

¹² *Otter Tail Power Co.*, Docket No. ER11-2714-000 (Mar. 17, 2011) (delegated letter order) (accepting the construction management agreement for the jointly owned Bemidji to Grand Rapids project); *N. States Power Co.*, Docket Nos. ER11-4077-000 (Aug. 30, 2011), ER11-4724-000 (Nov. 16, 2011) and ER13-1797-000 (Aug. 23, 2013) (delegated letter orders) (Fargo project Phases I through III); *N. States Power Co.*, Docket No. ER13-1065-000 (May 8, 2013) (delegated letter order) (Brookings project), *order on reh'g*, 146 FERC ¶ 61,007 (2014); *N. States Power Co.*, Docket No. ER13-2000-000 (Sept. 5, 2013) (delegated letter order) (La Crosse project); *N. States Power Co.*, Docket No. ER14-2724-000 (Oct. 24, 2014) (delegated letter order) (Big Stone South to Brookings County project); *Am. Transmission Co. LLC*, Docket No. ER16-270-002 (Mar. 9, 2016) (delegated letter order) (Briggs Road-North Madison project); *ALLETE, Inc.*, Docket No. ER17-1147-000 (Apr. 28, 2017) (delegated letter order) (Great Northern Transmission Line); *N. States Power Co.*, Docket No. ER20-534-000 (Feb. 3, 2020) (delegated letter order) (accepting the Huntley-Wilmarth project construction management agreement effective October 31, 2019, its stated effective date).

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Grand Rapids project. OTP is submitting the CMA for filing consistent with the Commission's past practice for those agreements.¹³

The CMA has been duly executed by OTP and WMMPA, and no further agreement of the Parties is required for the filing of the CMA.¹⁴ OTP respectfully requests that the Commission grant waiver of the 60-day prior notice requirement to allow the CMA to become effective on September 3, 2026.

OTP requests that the Commission accept the CMA based on the current versions of the appendices and permit OTP to submit final versions of any updated appendices via the EQR or if necessary in a future compliance filing.¹⁵

I. BACKGROUND AND INSTANT FILING

On July 25, 2022, the board of directors of the Midcontinent Independent System Operator, Inc. ("MISO") approved the Tranche 1 portfolio of MISO's Long Range Transmission Plan as an addendum to the 2021 MISO Transmission Expansion Plan ("MTEP21").¹⁶ The Tranche 1 portfolio includes the Big Stone South to Alexandria to Cassie's Crossing 345 kV project¹⁷. The

¹³ Should the Commission choose not to accept the CMA for filing, OTP alternatively requests that the Commission determine that the CMA is not a jurisdictional agreement under the FPA and the Commission's prior notice policy and dismiss this filing, because no jurisdictional services are provided by OTP in its role as the Construction Manager. *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,978 (1993) ("Prior Notice Order") (describing how a party may obtain a determination on an agreement's jurisdictional status and stating that "[t]he easiest and most efficient way to do this is to file the agreement pursuant to Part 35 of the Commission's regulations, 18 C.F.R. Part 35, and simultaneously request the Commission to disclaim jurisdiction"), *order on clarification*, 65 FERC ¶ 61,081 (1993); *PacifiCorp*, 127 FERC ¶ 61,144, at P 11 (2009) (applying the rule of reason, under which contracts need not be filed 'unless they significantly affect rates and services'); *cf. Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,073, at PP 3, 22-23 (2015) (determining that a joint development agreement for the Badger-Coulee transmission project did not need to be filed under the rule of reason); *ALLETE, Inc.*, 161 FERC ¶ 61,013, at PP 1, 14 (2017) (disclaiming jurisdiction over three pre-construction agreements for the Great Northern Transmission Line as only tangentially related to the Commission's jurisdiction under FPA section 205(c) and therefore not required to be filed under the rule of reason).

¹⁴ CMA §§ 10.1.3, 10.2.3 (representing that the Construction Manager and each Owner have "taken all action required by Applicable Law and its governing documents in order to approve, execute and deliver" the CMA).

¹⁵ *See N. States Power Co.*, Docket No. ER14-2724-000 (Oct. 24, 2014) (delegated letter order) (accepting the Big Stone South to Brookings County project construction management agreement with certain exhibits filed on a preliminary basis and final versions to follow).

¹⁶ MISO, *Long Range Transmission Planning*, available at: <https://www.misoenergy.org/planning/long-range-transmission-planning/> ("Approved in July 2022 as part of MTEP21, the \$10.3 billion Tranche 1 portfolio consists of 18 projects"); *see also* MISO, *MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1 Portfolio Report 3* (2022) (proposing "a Tranche 1 Portfolio of 18 transmission projects").

¹⁷ Cassie's Crossing Substation was subsequently renamed the Big Oaks Substation after MISO's approval. For consistency with MISO's approval of MTEP 21 this letter continues to refer to such substation as Cassie's Crossing in this filing.

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BSSA Transmission Line is the western segment of that project.¹⁸ The Tranche 1 projects meet the criteria for Multi-Value Projects under MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff, and their costs are recovered on a pro-rata basis from load in the MISO Midwest Subregion.¹⁹ The BSSA Transmission Line will be operated as part of the MISO transmission system and under the functional control of MISO.

The BSSA Transmission Line is an approximately 96-mile, 345 kV transmission line, of which approximately three and one half miles will be located in South Dakota and the remainder in Minnesota. The Project will be constructed using double-circuit structures; however, only a single-circuit will be installed initially.²⁰ The BSSA Transmission Line will interconnect with the Big Stone South Substation near Big Stone City, South Dakota, and the Alexandria Substation, near Alexandria, Minnesota. The Project Components, including the BSSA Transmission Line, will be owned by the Owners jointly as tenants in common. The Owners will have individual undivided interests without right of partition in the Project Component. **[BEGIN CUI/PRIV]**

[END CUI/PRIV].²¹

The Minnesota Public Utilities Commission granted a certificate of need for the Big Stone South to Alexandria to Big Oaks project in October 2024 and issued a route permit for the Minnesota portion of the BSSA Transmission Line on June 25, 2026.²² The South Dakota Public

¹⁸ MISO, *MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1 Portfolio Report 4* (2022) (listing the Big Stone South to Alexandria to Cassie's Crossing project as part of the Tranche 1 portfolio).

¹⁹ *Midcontinent Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,124, at PP 71-72 (2022) (accepting Tariff revisions permitting the costs of Multi-Value Project portfolios with subregional benefits to be allocated on a postage stamp basis within the applicable MISO subregion); *see also* MISO, *MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1 Portfolio Report 14* (2022) ("With FERC's approval the costs of the LRTP Tranche 1 Portfolio will be recovered on a pro-rata basis from load in the MISO Midwest Subregion."); MISO, *MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1 Executive Summary 1* (2022) (stating that the portfolio "meets the criteria for Multi-Value Projects defined in the Tariff").

²⁰ CMA Recitals ¶ A (describing "the new double circuit capable 345 kV transmission line to be constructed from the Big Stone South Substation to the Alexandria Substation"); *see also* MTEP21 Appendix A (project database), MTEP Project ID 23369, Facility ID 27045 ("Construct new 345kV single circuit transmission line (constructed with double circuit capable 345kV structures)").

²¹ CMA Recitals ¶ E; *see also* CMA § 1.1.

²² *In the Matter of the Application for a Certificate of Need for the Big Stone South—Alexandria—Big Oaks Transmission Project*, Docket No. E-002, E-017, ET-2, E-015, ET-10/CN-22-538, ET-10/TL-23-159, Order Granting Certificate of Need and Issuing Route Permit (Minn. Pub. Utils. Comm'n Oct. 30, 2024); The Certificate of Need covers the entire Big Stone South to Alexandria to Big Oaks project, of which the BSSA Transmission Line is the western segment. *In the Matter of the Application for a Route Permit for the Big Stone South to Alexandria 345-kV Transmission Project in West-Central Minnesota*, Docket No. E-017, ET-10/TL-23-160, Order (Minn. Pub. Utils. Comm'n June 25, 2026).

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Utilities Commission approved a facility permit for the South Dakota portion of the BSSA Transmission Line on January 30, 2025.²³

Project Component Real Property will generally be acquired in the name of the Owners as tenants in common, and the Construction Manager will use commercially reasonable efforts to cause title to Equipment and Materials to be transferred to the Owners as tenants in common.²⁴ The Big Stone South Substation and the Alexandria Substation are referred to in this letter collectively as the “Substations” and each individually as a “Substation.” The Big Stone South Substation is discretely owned by OTP, and the Alexandria Substation is discretely owned by WMMPA. As such, the Substations are Discretely Owned Substation Assets, which do not constitute part of a Project Component or the Project.²⁵ Each Owner is responsible for the construction of, and the costs associated with, its own Discretely Owned Substation Assets, including any upgrades required to accommodate a Project Component.²⁶

MISO, in coordination with the Owners, have determined that the BSSA Transmission Line and the Discretely Owned Substation Assets are necessary to enhance resiliency and electric service reliability for electric customers in South Dakota, Minnesota, and the surrounding region; to strengthen the transmission network and bulk power electric system to meet demands for electric energy and capacity; and to enhance the bulk power transmission system to support the installation of generation and capacity resources.²⁷ Due to the tenants in common joint ownership structure, the Owners have determined that it is most efficient and effective to construct the Project Component in a collaborative manner.²⁸ WMMPA has designated Missouri River Energy Services as its representative for the performance of WMMPA’s responsibilities and obligations under the CMA.²⁹ Missouri River Energy Services is a separate entity that the CMA treats as an Affiliate of WMMPA.³⁰

²³ *In the Matter of the Application by Otter Tail Power Company and Western Minnesota Municipal Power Agency for a Facility Permit for a 345-kV Transmission Facility and Associated Facilities in Grant County*, Docket No. EL24-015, Order Granting Permit to Construct Facility (S.D. Pub. Utils. Comm’n Jan. 30, 2025).

²⁴ CMA §§ 4.4.2 (providing that Project Component Real Property “shall be acquired in the name of the Owners, as tenants-in-common”), 7.5 (requiring the Construction Manager to use commercially reasonable efforts to cause title to Equipment, Materials and Consumables “to be transferred to the Owners as tenants-in-common”).

²⁵ CMA § 1.1.

²⁶ CMA §§ 5.4.2(iv), 9.12, 9.14.

²⁷ CMA Recitals ¶ B.

²⁸ CMA Recitals ¶ C.

²⁹ CMA § 1.3 (“WMMPA designates Missouri River Energy Services as its representative for the purpose of performing WMMPA’s responsibilities and obligations under this Agreement.”).

³⁰ CMA § 1.1 (providing that, for purposes of the CMA, “Missouri River Energy Services will be considered an “Affiliate” of WMMPA, notwithstanding its relational non-conformity to this definition”).

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The Owners entered into an Operation and Maintenance Agreement (the “OMA”) contemporaneously with the CMA.³¹ OTP is concurrently submitting the OMA for filing in a separate Commission docket, so that the Commission may consider both agreements before construction begins. Consistent with past practice of jointly-owned projects of this nature in which OTP has participated,³² the Parties will enter into a Transmission Capacity Exchange Agreement (“TCEA”) and file it with the Commission. Together, the CMA, OMA and TCEA will govern the construction, operation, maintenance, and capacity rights for the BSSA Transmission Line.

Construction of the BSSA Transmission Line is anticipated to begin in 2028, and the line is expected to be placed in service in 2030.³³

II. THE CONSTRUCTION MANAGEMENT AGREEMENT

A. Engagement of the Construction Manager (Article 2)

The Owners entered into the CMA to appoint OTP as the Construction Manager for the BSSA Transmission Line. Each Owner appoints and retains the Construction Manager to provide the Services throughout the Term.³⁴ OTP is a party to the CMA separately in its capacity as the Construction Manager of the BSSA Transmission Line, and its rights and obligations in that capacity are distinct from its rights and obligations as an Owner thereunder.³⁵ The Construction Manager performs the Services as an independent contractor except to the extent limited agency authority is granted under Sections 2.3, 3.1 and 7.7 of the CMA.³⁶ The Services consist of Construction Management Services and Real Property Management Services. The Construction Management Services include overall coordination and administration of an assigned Project Component, management and coordination of Contractors, management and coordination of the Construction Work Schedule, Scope of Work, development of, and revision of, proposed budgets,

³¹ CMA Recitals ¶ E.

³² OTP and Montana-Dakota Utilities Co. jointly own the Big Stone South to Ellendale 345 kV project. The project agreements for that project were submitted as Section 205 rate filings, beginning with the construction management agreement and following with the operation and maintenance agreement and the transmission exchange agreement. See Combined Notice of Filings #1, 80 Fed. Reg. 45,216, 45,217 (July 29, 2015) (noticing Docket No. ER15-2252-000 (construction management agreement, filed July 23, 2015)); Combined Notice of Filings #1, 80 Fed. Reg. 51,546 (Aug. 25, 2015) (noticing Docket No. ER15-2463-000 (operation and maintenance agreement), Docket No. ER15-2464-000 (transmission exchange agreement) and Docket No. ER15-2465-000 (extension facilities agreement)).

³³ MTEP21 Addendum at 4 tbl.1-1 (listing an expected in-service date of June 1, 2030 for Project 2); see also Otter Tail Power Co., *Otter Tail Power Company and WMPA Receive MN Route Permit Approval for New Transmission Line* (June 2026) (anticipating that construction will begin in 2028, with the line targeted to enter service by the end of 2030).

³⁴ CMA § 2.1.

³⁵ CMA §§ 1.1 (providing that “[r]eference to the Construction Manager excludes any reference to the Construction Manager in any other capacity”), 2.1.

³⁶ CMA § 2.1.

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and reporting to the Management Committee. The Real Property Management Services consist of acquiring the Project Component Real Property required to complete the Project Component, including negotiating and closing Real Property Agreements and managing any condemnation proceedings, as needed.³⁷

The Construction Manager furnishes these Services “at no charge in excess of its costs.”³⁸ The CMA does not provide the Construction Manager a profit margin or a return on investment. When acting under its Agency Authority, the Construction Manager acts as a disclosed agent, and its authority is “limited to binding each of the Owners granting such authority severally (and not jointly) except with the prior written consent of the Management Committee.”³⁹ The Construction Manager may perform Construction Work itself only under a separate contract negotiated and approved by the Management Committee, subject to limited exceptions for minor elements of Construction Work and for Emergency actions.⁴⁰ The Construction Manager provides no performance guarantees and makes no warranty with respect to the Project Component, the Services or the Construction Work.⁴¹

Other principal terms and conditions of the CMA are described below.

B. Contracting Responsibilities (Article 3)

The Construction Manager bids, negotiates, and enters into Construction Agreements on behalf of, and as disclosed agent for, each Owner, generally following a bidding or other competitive proposal process subject to limited exceptions.⁴² Except with respect to Major Contracts, Major Change Orders and Material Actions, each of which requires Management Committee approval, the Construction Manager “has sole authority to approve all Construction Agreements, as well as all amendments and Change Orders thereto.”⁴³ Each Construction Agreement generally must provide that the Construction Manager contracts as agent for the applicable Owners and that the obligations of the applicable Owners are several and not joint.⁴⁴

³⁷ CMA §§ 2.2.1, 2.2.2.

³⁸ CMA §§ 2.2.1, 2.2.2 (each requiring the Construction Manager to furnish the Services “at no charge in excess of its costs”). Section 2.2.1 refers to Section 5.4 for the determination of costs and Section 2.2.2 refers to Appendix D.

³⁹ CMA § 2.3.2.

⁴⁰ CMA §§ 2.4, 2.5.

⁴¹ CMA §§ 11.1.1, 12.2.

⁴² CMA §§ 3.2.1.1, 3.2.1.2.

⁴³ CMA §§ 3.2.1.1, 3.2.4; *see also* CMA § 1.1 (defining “Major Contract” and “Major Change Order” by reference to specified cost and schedule thresholds and, in the case of a Major Contract, to agreements providing that Owner obligations are joint and not several or otherwise designated by the Management Committee).

⁴⁴ CMA § 3.2.5.

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C. Certain Pre-Construction Duties (Article 4)

Article 4 of the CMA addresses duties that precede or accompany the start of the Construction Work. The Management Committee approves the initial Construction Work Schedule and the Scope of Work together with any proposed changes thereto, which together constitute the Project Component Plan. The Construction Manager may propose revisions to the Construction Work Schedule and the Scope of Work to the Management Committee during the Term of the CMA.⁴⁵ The Construction Manager prosecutes, administers, and maintains the Owners' Governmental Approvals applied for, or received before, the Effective Date.⁴⁶ The Construction Manager procures Equipment and Materials, subject to Management Committee approval of Major Contracts, Major Change Orders, and Material Actions, and provides the Management Committee with regular updates on Major Contracts for Procured Materials.⁴⁷ The Construction Manager also implements the Real Property Plan adopted by the Owners, and Real Property Agreements are generally executed and delivered by the Construction Manager on behalf of the Owners.⁴⁸

D. Project Component Budget, CM Costs and Funding (Articles 5 and 6)

Articles 5 and 6 of the CMA govern the budgeting, funding and reimbursement of the costs related to undertaking the activities within the Project Component Plan. The Construction Manager is compensated for the cost of the Construction Work and all costs incurred in the performance of the Services ("**CM Costs**"), except as expressly otherwise provided in the CMA.⁴⁹ The Construction Manager may not incur, or allow to be incurred, CM Costs that exceed the aggregate of the Maximum CM Cost Amount indicated in Appendix B.⁵⁰ Article 5 and Appendix B set forth the Project Component Budget. Costs incurred by each Owner with respect to its Discretely Owned Substation Assets are not CM Costs. Consistent with that allocation, the Discretely Owned Substation Assets are procured, constructed, installed and placed in service by the respective Owner.⁵¹ Costs that arise from the Construction Manager's failure to perform its obligations in accordance with the CMA are excluded where the failure results from the Construction Manager's

⁴⁵ CMA §§ 4.1.1, 4.1.2.

⁴⁶ CMA § 4.2 (providing that the Construction Manager will "prosecute, administer and maintain, as appropriate, each of the Owner Governmental Approvals applied for or received prior to the Effective Date").

⁴⁷ CMA §§ 4.3.1, 4.3.2.

⁴⁸ CMA §§ 4.4.1, 4.4.2.

⁴⁹ CMA §§ 2.2.1, 2.2.2, 6.1 (providing that the Construction Manager "will be compensated for CM Costs expended by it in the performance of the Services or in connection with the Construction Work"); CMA § 5.4.1 (defining "CM Costs" as "the cost of the Construction Work and all costs incurred in the performance of the Services").

⁵⁰ CMA § 5.1.2.

⁵¹ CMA § 9.14 (providing that "[t]he respective Owners are responsible for procuring, constructing, installing and placing in service" each of the Discretely Owned Substation Assets); *see also* CMA §§ 9.8, 9.12.

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gross negligence, willful misconduct, or intentional misconduct.⁵² The Construction Manager is not responsible for cost overruns and “cannot and does not warrant or represent that bids, negotiated prices or the monetary impact of Material Adverse Events will not vary from the estimates of CM Costs” in the approved budget.⁵³ The Construction Manager will provide reasonable assistance and documentation to the Owners in connection with any prudence review relating to matters within the scope of the CMA.⁵⁴

Subject to limited exceptions, the payment obligations of the Owners “are several in proportion to their respective Ownership Percentages.”⁵⁵ The Construction Manager submits monthly Applications for Deposit with supporting documentation, and each Owner deposits funds in proportion to its Ownership Percentage of the invoiced amount into the Main Escrow Account.⁵⁶ The Construction Manager submits a final reconciliation within ninety days after Final Completion.⁵⁷ If an Owner fails to remit amounts due and escrowed funds are insufficient to fund CM Costs, the Construction Manager may suspend its Services and direct suspension of the Construction Work.⁵⁸

E. Construction Manager Duties (Article 7)

Article 7 describes the Construction Manager’s duties in carrying out the Services. The Construction Manager coordinates and observes the work of Contractors, reviews, negotiates, and processes Change Orders and amendments, subject to Management Committee approval of Major Contracts, Major Change Orders and Material Actions, and administers and enforces the terms of the Construction Agreements and Real Property Agreements.⁵⁹ The Construction Manager is required to provide the personnel reasonably necessary to perform the Services but may use CM Subcontractors subject to specified approval requirements.⁶⁰ The Construction Manager is required to comply with the insurance obligations in Appendix E and has specified authority, as agent for the applicable Owners, to investigate, adjust, defend, and settle insured and uninsured Third Party claims against the Owners, subject to the limitations and the maximum settlement

⁵² CMA § 5.4.2(iv), (ix) (excluding from CM Costs “costs incurred by each Owner in performing its obligations with respect to the Discretely Owned Substation Assets” and “costs that arise from the Construction Manager’s failure to perform its obligations in accordance with this Agreement, which failure is the result of the Construction Manager’s gross negligence, willful misconduct or intentional misconduct”).

⁵³ CMA § 5.2.

⁵⁴ CMA § 5.5.

⁵⁵ CMA § 6.11.

⁵⁶ CMA §§ 6.2.2.2, 6.2.3, 6.4.1.

⁵⁷ CMA § 6.5.

⁵⁸ CMA § 6.8.

⁵⁹ CMA §§ 7.1.1, 7.1.2, 7.1.4, 7.1.5.

⁶⁰ CMA §§ 7.2, 7.3.

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authority specified in Section 7.7.⁶¹ Article 7 also addresses safety precautions, title, risk of loss, liens, records retention, and post-term services.⁶²

F. Financial Accounts and Reporting (Article 8)

Under Article 8, the Construction Manager is required to strictly account for all funds it deposits into or withdraws from the Main Escrow Account and reports all receipts and disbursements made under the CMA.⁶³ The Construction Manager must keep current, complete, true and correct books and records, which each Owner is entitled to inspect.⁶⁴ The Construction Manager prepares and submits monthly Progress Reports to the Management Committee and distributes a Final Completion report, including a complete cost report, following termination of the CMA.⁶⁵ Unless the Management Committee determines otherwise, CM Costs undergo an annual agreed upon audit procedure conducted by Independent Accountants selected by the Management Committee.⁶⁶

G. Owners' Rights and Duties (Article 9)

The Owners act through the Management Committee.⁶⁷ The Management Committee may not direct the means, manner or methodology used by the Construction Manager to carry out the Services, by any Contractor to carry out Construction Work, or by any Owner to carry out its Substation Work.⁶⁸ The Management Committee receives monthly Progress Reports and Financial Summary Reports, may inspect the Construction Work, and may order suspension of the Construction Work with or without cause.⁶⁹

⁶¹ CMA §§ 7.6, 7.7.

⁶² CMA §§ 7.4, 7.5, 7.9, 7.12, 7.14.

⁶³ CMA § 8.1 (requiring the Construction Manager to “strictly account for all funds that it deposits in or withdraws from the Main Escrow Account”).

⁶⁴ CMA § 8.1 (requiring that the Construction Manager’s books and records “must be current, complete, true and correct in all material respects” and providing that any Owner “will be entitled to inspect such books and records during business hours on at least five (5) Business Days’ notice”).

⁶⁵ CMA §§ 8.2, 8.3.

⁶⁶ CMA § 8.2.

⁶⁷ CMA §§ 1.1, 9.1.

⁶⁸ CMA § 9.1.1 (providing that the Management Committee will not have the power or authority “to direct the means, manner or methodology used by” the Construction Manager to carry out the Services, any Contractor to carry out Construction Work, or any Owner to carry out the Substation Work).

⁶⁹ CMA §§ 5.1.3, 8.2, 9.1.2(iv), 9.9.

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H. Completion and Acceptance of Work (Article 11)

Under Article 11, the Construction Manager is responsible for supervising, managing, and overseeing the tasks necessary for Commissioning and Energization of a Project Component.⁷⁰ Energization is not allowed to commence until the Management Committee approves the Construction Manager's Notice of Proposed Energization.⁷¹ The Construction Manager must notify the Management Committee when it believes Substantial Completion has occurred and, later, Final Completion has been accomplished. When the Construction Manager provides the Notice of Substantial Completion to the Management Committee, it must include a punch list of the minor items of Construction Work that remain to be completed.⁷² The Construction Manager is to give the Management Committee timely notice of important inspections required to meet Substantial Completion and Final Completion, and each Owner may elect to be present.⁷³

I. Construction Work Warranties (Article 12)

Under Article 12, the Construction Manager is responsible for undertaking commercially reasonable efforts to obtain specified warranties from Contractors in the Construction Agreements, including that the Construction Work conforms to the applicable Construction Agreement and is free from defects in design, workmanship, and materials.⁷⁴ Upon Final Completion the applicable Maintenance Provider assumes primary responsibility for enforcement of any warranties.⁷⁵ The Construction Manager itself expressly disclaims, and each Owner expressly waives, all warranties implied by law, including the warranties of merchantability and fitness.⁷⁶

J. Term and Termination (Article 15)

The CMA becomes effective on the Effective Date and remains in effect until Final Completion unless earlier terminated.⁷⁷ Early termination of the CMA may occur upon the vote of the Management Committee in accordance with Section 15.2 of the CMA. Upon termination, the Construction Manager is required to assist in transitioning the Services as directed by the Management Committee, and wind-up costs are treated as CM Costs.⁷⁸ Upon termination under specified provisions, and unless the termination results solely from a default by the Owner that is

⁷⁰ CMA § 11.1.

⁷¹ CMA § 11.1.2 (providing that Energization of the Project Component “shall not commence until the Management Committee approves the Notice of Proposed Energization”).

⁷² CMA §§ 11.2, 11.3, 11.4.

⁷³ CMA § 11.5.

⁷⁴ CMA § 12.1.

⁷⁵ CMA §§ 12.1.3, 12.1.4.

⁷⁶ CMA § 12.2.

⁷⁷ CMA §§ 15.1.1, 15.1.2 (providing that the CMA “will remain in full force and effect until Final Completion”).

⁷⁸ CMA §§ 15.2.3.1, 15.2.3.4.

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the Construction Manager, the Construction Manager is entitled to a termination payment from each Owner severally, up to their respective Ownership Percentage, for relocation and severance costs and demobilization costs reasonably incurred as a direct result of the termination.⁷⁹

K. Other CMA Provisions

There are other CMA provisions that govern representations and warranties (Article 10), indemnification (Article 13), confidentiality (Article 14), limitations of liability (Article 16), and other miscellaneous provisions (Article 17).

L. Schedules and Appendices

The CMA includes the following schedules and appendices.

- Schedule 1 (Generally Applicable Provisions)
- Schedule 3.1 (Pre-Construction Contracts)
- Schedule 10.2.5 (Required Approvals and Consents)
- Appendix A (Project Component Plan)
- Appendix B (Project Component Budget)
- Appendix C (Project Component Design Criteria Guidelines)
- Appendix D (Reimbursement of Cost for Services)
- Appendix E (Insurance)

III. EFFECTIVE DATE AND REQUESTS FOR WAIVERS

OTP respectfully requests that the Commission accept the CMA for filing effective September 3, 2026 and requests waiver of the 60-day prior notice requirement under Section 35.3 (a) of the Commission's regulations.⁸⁰ Good cause exists to grant this waiver.⁸¹ The CMA was negotiated at arm's length between the unaffiliated Owners, and this filing is being made within thirty (30) days of the CMA's execution. Each of OTP and WMMPA supports the requested effective date. The Owners have received the state regulatory approvals described above. The requested effective date will allow the Services to commence promptly and keep the BSSA Transmission Line on schedule for physical construction anticipated to commence in 2028. The

⁷⁹ CMA § 15.2.3.5.

⁸⁰ 18 C.F.R. § 35.3(a); *see also* 18 C.F.R. § 35.11 (providing that "[u]pon application and for good cause shown, the Commission may, by order, provide that a rate schedule or tariff, tariff or service agreement, or part thereof, shall be effective as of a date prior to the date of filing" or prior to the date it would otherwise become effective).

⁸¹ *See Prior Notice Order*, 64 FERC ¶ 61,139, at 61,974 (stating that "waiver of notice generally will be appropriate when an uncontested filing has no rate impact").

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Parties, together with OTP in its capacity as the Construction Manager, are the only entities whose interests are directly affected by the CMA, and the CMA establishes no rate or charge for jurisdictional service to any third party. Absent waiver, the effectiveness of the CMA would be delayed for sixty days after filing, which could delay the Services, including the Construction Manager's administration of the Pre-Construction Contracts, without any offsetting benefit to any third party. The requested waiver will have no effect on customers under any other rate schedule of OTP. The Commission has granted similar waivers in connection with similar construction management agreements.⁸²

If the Commission denies the requested effective date, OTP seeks waiver of any refund liability. As described above, the Construction Manager is reimbursed for CM Costs on a loaded cost basis, with no profit. A refund requirement would cause OTP to perform the Services at a loss, which would be contrary to Commission policy.⁸³

The appendices to the CMA are subject to updating and refinement as construction of the Project Component proceeds. OTP requests that the Commission accept the CMA based on the current versions of the appendices and permit OTP to submit final versions of any updated appendices via the EQR or if necessary in a future compliance filing. The Commission has granted similar treatment for similar construction management agreements.⁸⁴

OTP also requests waiver of the requirement to file cost-of-service statements under Part 35 of the Commission's regulations, to the extent applicable. The CMA provides for reimbursement of costs actually incurred and does not establish a traditional cost-of-service rate.

⁸² See, e.g., *N. States Power Co.*, 146 FERC ¶ 61,007 (2014); *N. States Power Co.*, Docket No. ER20-534-000 (Feb. 3, 2020) (delegated letter order) (accepting the Huntley-Wilmarth construction management agreement effective October 31, 2019, a date prior to the date of filing); see also *Pheasant Run Wind, LLC*, 146 FERC ¶ 61,215, at P 8 (2014) (finding good cause to grant waiver of the prior notice requirement due to the need to meet a commercial operation date).

⁸³ See *Int'l Transmission Co.*, 152 FERC ¶ 61,043, at PP 34-38 (2015) (holding that, for late-filed agreements governing the construction, ownership, operation and maintenance of transmission facilities serving a specific customer, where the utility's costs are passed through with no profit component, the utility would necessarily operate at a loss if required to make time value refunds); *CED Corcoran Solar, LLC and CED Corcoran Solar 2, LLC*, 152 FERC ¶ 61,075, at P 10 (2015) (declining to require time value refunds where the utility recovered only its costs without profit and would otherwise operate at a loss); *Mimwind I, LLC*, 149 FERC ¶ 61,109, at P 24 (2014) (the time value refund policy does not require a utility to operate at a loss); *DanMar Transmission, LLC*, Docket Nos. ER16-716-000, et al. (Feb. 26, 2016) (delegated letter order) (finding that, because the utility "received only the cost of work it performed under the Transmission and Interconnection Agreements without profit, no time-value refunds are due").

⁸⁴ *N. States Power Co.*, Docket No. ER14-2724-000 (Oct. 24, 2014) (delegated letter order) (accepting the Big Stone South to Brookings County project construction management agreement with exhibits filed on a preliminary basis and final versions to follow); *Am. Transmission Co. LLC*, Docket No. ER16-270-002 (Mar. 9, 2016) (delegated letter order) (same for the Briggs Road-North Madison project); see also *N. States Power Co.*, Docket No. ER20-534-000 (Feb. 3, 2020) (delegated letter order) (accepting the Huntley-Wilmarth construction management agreement with certain exhibits to be submitted in a post-construction compliance filing).

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It involves no rate or rate design for jurisdictional service.⁸⁵ To the extent this filing requires waivers of Section 35.12(b) of the Commission's regulations,⁸⁶ OTP respectfully requests such waivers. OTP believes that this filing provides a sufficient basis for the Commission to accept the CMA for filing.

To the extent any waiver of the Commission's rules and regulations is necessary for acceptance of this filing and the CMA, OTP respectfully requests such waiver.

IV. REQUEST FOR CONFIDENTIAL AND CEII TREATMENT

OTP is submitting both a public version of the CMA, included as Attachment A, and a non-public version of the CMA, included as Attachment B. Pursuant to 18 C.F.R. § 388.112, OTP requests privileged treatment of the non-public version of the CMA. The non-public version includes commercially sensitive information in various sections and appendices of the CMA, including the definitions of "Major Contract" and "Major Change Order" in Section 1.1 of the CMA, Sections 3.2.1.2, 3.2.3, 7.7.2, and 12.1.3 of the CMA, and Appendices D and E to the CMA. Sections 3.2.1.2 and 3.2.3 contain contracting, bidding and bid list requirements. Section 7.7.2 addresses uninsured claims against the Owners and the maximum settlement authority. Section 12.1.3 discusses duration of warranties. Appendix D contains the reimbursement methodology for the Services. Appendix E contains the insurance requirements for the Project. The disclosure of commercially sensitive information could have a material adverse effect on the Parties and could adversely affect their ability to negotiate similar transactions in the future. The non-public version of this transmittal letter includes commercially sensitive information regarding the Ownership Percentage of the BSSA Transmission Line. This information is held by the Parties confidentially. Many state right-of-first-refusal laws allow incumbent transmission owners to negotiate ownership percentages when a transmission line connects facilities owned by two or more separate transmission owners.⁸⁷ The disclosure of the Ownership Percentages, therefore, could adversely affect the Parties' ability to negotiate incumbent transmission owner rights in the future. In accordance with Section 388.112(b)(1) of the Commission's regulations, the cover page and each page of the non-public version are labeled in bold, capital lettering to indicate that they contain privileged information and are marked "DO NOT RELEASE." In accordance with the Commission's document labeling guidance, each page of the non-public version of the CMA bears a top center header reading CUI//PRIV.⁸⁸

⁸⁵ Rates, rate design, and cost recovery for the Project Component are not at issue in this docket and will be addressed through the MISO formula rates of the individual Owners or in proceedings before regulatory agencies with jurisdiction over the individual Owners.

⁸⁶ 18 C.F.R. § 35.12(b).

⁸⁷ See, e.g., Minn. Stat. § 216B.246, subd. 2; S.D. Codified Laws § 49-32-20.

⁸⁸ *Notice of Document Labelling Guidance for Documents Submitted to or Filed With the Commission or Commission Staff*, 83 Fed. Reg. 28,631 (June 20, 2018) (directing that documents containing CEII bear a top center header on each page reading "CUI//CEII," documents containing privileged information a header reading "CUI//PRIV" and documents containing multiple information types a combined header such as "CUI//CEII/PRIV").

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Further, the Parties have designated the design criteria, drawings and related engineering materials set forth in Appendix C to the CMA, included as Attachment C, as Critical Energy/Electric Infrastructure Information (‘CEII’) pursuant to 18 C.F.R. § 388.113. That information provides specific engineering and detailed design information about the proposed transmission facilities, relates details about the transmission of energy, which information could be useful to a person planning an attack on critical infrastructure and does not simply give the general location of the critical infrastructure. That information is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552. The designated material relates to facilities that will be used for the transmission of electric energy for so long as the BSSA Transmission Line remains in service, a period that will extend well beyond five years. In accordance with Sections 388.113(d)(1)(i) and (ii) of the Commission’s regulations, OTP has segregated the CEII from public information and requests that CEII treatment apply for five years from the date of this filing, the maximum initial designation period under Section 388.113(e)(1). OTP will request re-designation of the material before the expiration of that period to the extent the material continues to warrant CEII treatment. Each page of the designated material bears a top center header reading CUI//CEII in accordance with the Commission’s document labeling guidance. The cover page and each page containing CEII are labeled in bold, capital lettering to indicate that they contain CEII and are marked “DO NOT RELEASE.”

To the extent any appendix designated for Confidential or CEII treatment has not been finalized as of the date of this filing, OTP requests that the requested Confidential or CEII treatment apply immediately upon any subsequent filing of such appendix. OTP will include with any such subsequent filing the justification required by Section 388.112(b)(1) and Section 388.113(d)(1)(i) of the Commission’s regulations.

OTP requests that the Commission notify OTP before any contemplated disclosure of the material for which privileged or CEII treatment is requested. Similar privileged and CEII treatment was requested for corresponding provisions of similar construction management agreements accepted by the Commission.⁸⁹

As required by Sections 388.112(b)(2)(i) and 388.113(d)(1)(iii) of the Commission’s regulations, a proposed form of protective agreement relating to the receipt of the material designated in this filing is included as Attachment D. All matters concerning this request for privileged and CEII treatment should be directed to the undersigned counsel.

V. INFORMATION INCLUDED WITH THIS FILING

This filing is comprised of the following materials.

- This transmittal letter;

⁸⁹ *N. States Power Co.*, Docket No. ER20-534-000 (Feb. 3, 2020) (delegated letter order) (Huntley-Wilmarth project); *N. States Power Co.*, Docket No. ER14-2724-000 (Oct. 24, 2014) (delegated letter order) (Big Stone South to Brookings County project).

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- Attachment A. The public version of the CMA, excising the privileged and CEII material;
- Attachment B. The non-public version of the CMA, containing the privileged material;
- Attachment C. The non-public version of Appendix C of the CMA, containing the CEII material; and
- Attachment D. The proposed form of protective agreement relating to the receipt of the material designated in this filing.

VI. COMMUNICATIONS AND CORRESPONDENCE

All communications regarding this filing should be directed to the following individuals by placement of these individuals on the official service list for this proceeding.⁹⁰

On behalf of Otter Tail Power Company

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⁹⁰ OTP requests waiver of 18 C.F.R. § 385.203(b)(3), to the extent necessary, to permit the designation of more than two individuals to receive service in this proceeding.

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OTPtransmissionagreement@otpc.com

VII. SERVICE

A copy of this filing has been served upon WMMPA and upon each of the state commissions with jurisdiction over OTP, including the Minnesota Public Utilities Commission, the North Dakota Public Service Commission, and the South Dakota Public Utilities Commission. Consistent with Section 388.112(b)(2)(ii) of the Commission's regulations, the public version of this filing and the proposed form of protective agreement have been provided to each entity required to be served. A courtesy copy will be provided to the Division of Electric Power Regulation (Central) in the Commission's Office of Energy Market Regulation. In addition, a copy of this filing is available at the offices of OTP at 215 South Cascade Street, Fergus Falls, MN 56537. The names and addresses of the persons served are as follows. Western Minnesota Municipal Power Agency, c/o Missouri River Energy Services, 3724 West Avera Drive, P.O. Box 88920, Sioux Falls, SD 57109-8920. Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, MN 55101. North Dakota Public Service Commission, 600 E. Boulevard Avenue, Dept. 408, Bismarck, ND 58505-0480. South Dakota Public Utilities Commission, 500 E. Capitol Avenue, Pierre, SD 57501.

VIII. CONCLUSION

For all of the foregoing reasons, OTP respectfully requests that the Commission accept the CMA for filing effective September 3, 2026 and grant the requested waivers, together with such other relief as may be appropriate. Please direct any questions regarding this filing to the undersigned counsel.

Respectfully submitted,

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Attorneys for Otter Tail Power Company

cc: Director, Division of Electric Power Regulation (Central),
Office of Energy Market Regulation

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SOUTH DAKOTA PUBLIC
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Attachment A

Public Version of CMA

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Execution

BIG STONE SOUTH TO ALEXANDRIA PROJECT

CONSTRUCTION MANAGEMENT AGREEMENT

Dated as of September 3, 2026

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Appendix C	Design Criteria Guidelines
Appendix D	Reimbursement of Cost for Services
Appendix E	Insurance

Public Version
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CONSTRUCTION MANAGEMENT AGREEMENT

THIS CONSTRUCTION MANAGEMENT AGREEMENT (this “**Agreement**”) is entered into and effective at 12:01 a.m. Central Time as of September 3, 2026 (the “**Effective Date**”), between and among Otter Tail Power Company, a corporation organized and existing under the laws of the State of Minnesota (“**OTP**”), and Western Minnesota Municipal Power Agency, a municipal corporation and political subdivision of the State of Minnesota (“**WMMPA**”), and OTP in its capacity as the Construction Manager (as defined below). WMMPA and OTP shall be referred to herein: (i) individually as an “**Owner**” and collectively as the “**Owners**,” and (ii) individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

A. The Owners desire to document the terms that will govern the construction of the new double circuit capable 345 kV transmission line to be constructed from the Big Stone South Substation to the Alexandria Substation (each as defined below). Such transmission line, as further described in Appendix A, is the “**Project Component**”. The Project Component together with any Additional Project Components shall comprise the Project (each as defined below).

B. The Owners have determined that the Project and the Discretely Owned Substation Assets (as defined below) are necessary to: (i) enhance resiliency and electric service reliability for electric customers in South Dakota and Minnesota and the surrounding region; (ii) strengthen the transmission network and bulk power electric system to meet demands for electric energy and capacity; and (iii) enhance the bulk power transmission system to support the installation of generation and capacity resources.

C. The Owners have further determined that because the Project is regional in nature, it is most efficient and effective for the Owners to construct the Project Component in a collaborative manner.

D. The Owners have entered into the Project Development Agreement (as defined below) pursuant to which they have undertaken Development Work (as defined below), and the Management Committee (as defined below) has determined that Development Work has progressed to a point where the Services (as defined below) should be commenced.

E. Contemporaneously herewith, the Owners have entered into: (i) the Project Ownership Agreement; (ii) the Operation and Maintenance Agreement; and (iii) such other agreements as the Owners have deemed necessary.

F. Each Owner desires to enter into this Agreement with the Construction Manager to facilitate the completion of the Project Component.

AGREEMENT

In consideration of the foregoing Recitals, the mutual covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each Owner and the Construction Manager agree as follows.

ARTICLE 1
DEFINITIONS

1.1 **Definitions.** In addition to the other terms defined herein, the following terms, whether in the singular or in the plural, when used herein, in Schedule 1 (**Generally Applicable Provisions**), in

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the appendices attached hereto or in notices given under this Agreement and initially capitalized, have the meanings specified below:

“Actual Reimbursable Costs” has the meaning given in Section 6.2.2.2(ii).

“Additional Project Component” means a Project Component (as defined in the Project Ownership Agreement) which is developed after the Effective Date and owned by the Owners pursuant to the terms of the Project Ownership Agreement. For the avoidance of doubt, the Project Component, as defined in this Agreement, does not constitute an Additional Project Component.

“Affiliate” means any Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with, an Owner. For purposes of this Agreement, Missouri River Energy Services will be considered an “Affiliate” of WMMPA, notwithstanding its relational non-conformity to this definition.

“Agency Authority” has the meaning given in Section 2.3.2.

“Agreement” means this Construction Management Agreement, as it may be supplemented or amended.

“Alexandria Substation” means the 345/115 kV substation located near Alexandria, Minnesota commonly known as the Alexandria Substation and owned by WMMPA, which substation is not a part of the Project.

“Applicable Energy Regulations” means the rules, Orders, regulations, practices, procedures and protocols established in compliance with Applicable Law by applicable Transmission Providers (such as the Midcontinent Independent System Operator, Inc.), electric reliability organizations (such as the North American Electric Reliability Corporation and the Midwest Reliability Organization) and comparable Persons that are applicable to the Services, the Maintenance Services, the Control Center Services, the Construction Work, the Discretely Owned Substation Assets, the Project Component or the performance of the obligations of the Parties hereunder.

“Applicable Law” means: (i) any and all laws (including all statutory enactments and common law), ordinances, constitutions, regulations, treaties, rules, codes, standards, Governmental Approvals, requirements and Orders that (a) have been adopted, enacted, implemented, promulgated, ordered, issued, entered or deemed applicable by or under the authority of any Governmental Body having jurisdiction over a specified Person (or the Property of such Person) and (b) are applicable to the Services, the Construction Work, the Discretely Owned Substation Assets, the Maintenance Services, the Control Center Services, the Project Component, or the performance of the obligations of the Parties (each in its respective capacities) under this Agreement; and (ii) Applicable Energy Regulations.

“Application for Deposit” means an application for deposit under this Agreement, which is to be used to request funds pursuant to Sections 6.2 and 6.5.

“Authorized Owner Representatives” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Bidders List” has the meaning given in Section 3.2.3.

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“Big Stone South Substation” means a substation located near Big Stone City, South Dakota, commonly known as the Big Stone South Substation and owned by OTP, which substation is not a part of the Project.

“Business Day” means any day other than a Saturday, Sunday, December 24, or federal holiday.

“Capital Expenses” means expenses incurred in connection with Capital Improvements.

“Capital Improvements” means capital additions or modifications to the Project Component that are undertaken after the applicable In-Service Date and will be funded by the Owners according to Ownership Percentages set forth in the Project Ownership Agreement for the Project Component and in accordance with a Final Budget. Capital Improvements include Modifications that are required by Applicable Law, but exclude (i) work undertaken pursuant to this Agreement or the Construction Agreements in accordance with the Project Component Plan, (ii) Upgrades, and (iii) Non-Project Modifications.

“Cause” has the meaning given in Section 15.2.1.3.

“CEII” has the meaning given in Section 14.6.2.

“Change in Law” means any change in, or enactment of, any Applicable Law or official published policy regarding the interpretation or enforcement of any Applicable Law by a Governmental Body that takes place after the Effective Date and affects or relates to the performance of the obligations of the Owners (individually or collectively) or the Construction Manager under this Agreement, including the imposition of any new Governmental Approval requirements; **provided, however**, a change in Applicable Law affecting only a tax payable or any other cost of performance hereunder will not constitute a Change in Law.

“Change Order” means a document issued pursuant to the terms and conditions of a Construction Agreement that proposes to modify the sums to be paid, the scope of work (including quantities) or the time permitted for performance of Construction Work thereunder.

“CM Costs” has the meaning given in Section 5.4.1.

“CM Subcontract” means, with respect to the Project Component, each contract, agreement or other arrangement with the Construction Manager or a CM Subcontractor on the one hand, and any CM Subcontractor on the other hand, establishing the terms of performance of any part of the Services.

“CM Subcontractor” means, with respect to the Project Component, each and every supplier, subcontractor, vendor, consultant or contractor of any tier performing any part of the Services, directly or indirectly, for the Construction Manager. Reference to an Owner as a “CM Subcontractor” excludes any reference to the Owner’s Affiliates and to such Owner in any other capacity.

“Commission” or “Commissioning” (or any derivation thereof) means the process of verifying the safety, reliability and performance (including testing) of the Project Component in accordance with the applicable Construction Agreements and Good Utility Practice.

“Confidential Information” has the meaning given in Section 14.1.

“Construction Agreements” means all contracts, agreements or arrangements establishing the terms of performance of any part of the Construction Work, including but not limited to CM Subcontracts,

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Subcontracts and Pre-Construction Contracts, but specifically excluding (i) this Agreement, (ii) the Project Ownership Agreement, (iii) the Real Property Agreements and (iv) construction contracts arising from the Substation Work.

“Construction Aids” means all tangible equipment (including Equipment, construction equipment and machinery), tools, supplies, utilities, support services, field office equipment and supplies, structures, apparatus, protective fencing and other goods and items that are required to construct, Commission, Energize, or test the Project Component, but which are not incorporated into the Project Component.

“Construction Management Services” has the meaning given in Section 2.2.1.

“Construction Manager” means OTP in its capacity as the Person who is responsible, in accordance with the terms of this Agreement, for performance of the Services. Reference to the Construction Manager excludes any reference to the Construction Manager in any other capacity.

“Construction Manager Internal Costs” means, collectively, all costs incurred by the Construction Manager and its Affiliates reasonably necessary for the performance of, or to enable the Construction Manager and its Affiliates to perform, the Construction Work and the Construction Management Services under this Agreement including: (i) fully loaded management personnel costs; (ii) other direct labor determined on a fully loaded hourly basis; (iii) reasonable allocations of general administrative overhead and support costs, determined on an hourly basis; and (iv) out-of-pocket costs and expenses that are reasonably incurred or attributed by the Construction Manager and its Affiliates in fulfilling the obligations under this Agreement (provided that the forgoing (i)-(iv) are each as calculated in accordance with Appendix D, Reimbursement of Cost for Services). Construction Manager Internal Costs will not include: (w) Third Party Costs; (x) any costs incurred by the Construction Manager in connection with participating in any Proceeding relating to the Discretely Owned Substation Assets; (y) costs incurred by any Party in connection with the negotiation of this Agreement, or the negotiation of any Project Component Agreements between the Parties; or (z) costs incurred by any Party in participation on the Management Committee. The Construction Manager Internal Costs will be determined in accordance with the principles set forth in Appendix D of this Agreement.

“Construction Work” means all activities that are necessary, desirable or incidental to placing the Project Component in service and achieving Final Completion in accordance with Good Utility Practice and the Project Component Plan, other than: (i) the Services and (ii) the obligations of the Owners (individually or collectively through the Management Committee) under this Agreement.

“Construction Work Schedule” has the meaning given in Section 4.1.1.

“Consumables” means items such as compressed chemicals, oils, lubricants, cleaning supplies, gaskets, valve packing, light bulbs and comparable items that, by normal industry practices, are considered consumables, are replaced on a regular basis, and are required for cleaning or preparing the Project Component to be placed in service.

“Contractor” means any Person with whom the Owners (or the Construction Manager, on the Owners’ behalf) enter into a Construction Agreement. Reference to an Owner as a “Contractor” excludes any reference to such Owner in any other capacity.

“Contractor Lien” means a Lien upon the Project Component (or a portion thereof) or the Ownership Percentage of an Owner filed in connection with the performance of the Services or the Construction Work.

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“Control Center Authority” means a Person designated as a “Control Center Authority” in the OMA, which Person, when acting under the OMA in such capacity, will have day-to-day operational control over the Project Component, including a Person that executes a joinder in a form acceptable to such Person and the Management Committee to become a Control Center Authority. Reference to a Control Center Authority excludes any reference to a Control Center Authority in any other capacity.

“Control Center Services” means the services to be provided by a Control Center Authority as set forth in the OMA.

“Curable Construction Period Payment Default” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Current Month” has the meaning given in Section 6.2.2.2.

“Damages” means any loss, charge, deficiency, tax, fine, interest, assessment, judgment, award, demand, liability, penalty or costs and expense, including amounts paid in settlement, reasonable attorneys and other professional fees and reasonable costs of investigation.

“Debt” means for any Person, without duplication:

- (i) indebtedness of such Person for borrowed money;
- (ii) obligations of such Person evidenced by bonds, debentures, notes, mortgages or other similar instruments;
- (iii) obligations of such Person to pay (a) amounts due under financing leases, (b) the deferred purchase price of Property or services (other than accounts payable in the ordinary course of business) or (c) amounts due under capitalized or operating leases;
- (iv) obligations of such Person under direct or indirect guarantees in respect of, and obligations (contingent or otherwise) of such Person to purchase or otherwise acquire, or otherwise to assure a creditor against loss in respect of, indebtedness or obligations of another Person;
- (v) obligations of such Person under interest rate or currency protection agreements or other hedging instruments;
- (vi) obligations of such Person to purchase securities (or other Property) that arise out of, or in connection with, the sale of the same or substantially similar securities (or Property); or
- (vii) deferred obligations of such Person to reimburse any bank or other Person in respect of amounts paid or advanced under a letter of credit or other instrument.

“Design Criteria Guidelines” means the requirements established in Appendix C of this Agreement, as such requirements are amended by the Management Committee.

“Development Work” means the matters, actions and activities undertaken by the Owners under the Project Development Agreement in furtherance of the development of the Project Component.

“Discretely Owned Substation Assets” means those assets identified and further described in Exhibit D to the Project Ownership Agreement, which include the Alexandria Substation and the Big Stone South Substation. Discretely Owned Substation Assets do not constitute part of the Project Component.

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"Discretely Owned Substation Owner" shall mean the Owner of each Discretely Owned Substation Asset as set forth in Exhibit D to the Project Ownership Agreement.

"Effective Date" has the meaning given in the first paragraph of this Agreement.

"Emergency" means any circumstance or condition that will or could imminently be expected to materially harm the safe and reliable operation of all or a portion of the Project Component, the Transmission Grid or otherwise endanger public safety, Property or the environment.

"Energization," or **"Energize,"** means, with respect to the Project Component, the approval by the Management Committee that the Project Component has met all requirements for electrical energization.

"Engineering and Operating Committee" or **"E&O Committee"** means the Engineering and Operating Committee established pursuant to the Project Ownership Agreement, which committee has been delegated authority by the Management Committee to undertake the obligations and exercise the rights accorded to it in the OMA or as otherwise determined by the Management Committee.

"Equipment" means any product that: (i) is to be incorporated into the Project Component; (ii) is an assembly of operational or non-operational parts, whether motorized or manually operated; and (iii) requires service connections such as wiring.

"Escrow Agreement" means that certain Escrow Agreement associated with the Project Component, by and between the Owners and the Escrow Agent, effective as of the Effective Date of that specific Escrow Agreement.

"Escrow Agent" means U.S. Bank National Association or such other bank as determined by the Management Committee for establishment and maintenance of the Project Accounts.

"Estimated Reimbursable Costs" has the meaning given in Section 6.2.2.2(i).

"FERC" means the Federal Energy Regulatory Commission, a regulatory Governmental Body of the United States, or any successor thereto.

"Final Budget" means the "Final Project Component Budget," as that term is defined in the Project Ownership Agreement, as applied to the Project Component.

"Final Completion" means the achievement of the following conditions with respect to the Project Component: (i) Substantial Completion has occurred; (ii) the Construction Work has been completed, including Punch List items, in accordance with the applicable Construction Agreements; (iii) the Project Component Design Book is final and complete and has been delivered as directed by the Management Committee; (iv) all final Lien Waivers, releases, indemnity agreements and written certifications that the conditions set forth in clauses (i) through (iii) have been satisfied as required of any Contractor and Subcontractor under the applicable Construction Agreements have been delivered to the Management Committee; and (v) the Management Committee has determined that Final Completion has been achieved as contemplated in Section 11.4.

"Final Completion Date" means the date determined in accordance with Section 11.4 as the date on which Final Completion of the Project Component occurs.

"Final Order" means an Order as to which: (i) no request for stay is pending before the issuing Governmental Body, no such stay is in effect and, if any deadline for filing any such request is designated

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by Applicable Law, such deadline has passed; (ii) no petition for rehearing or reconsideration of such action is pending before the issuing Governmental Body, and if any deadline for filing any such petition is designated by Applicable Law, such deadline has passed; (iii) the issuing Governmental Body does not have the action under reconsideration on its own motion; and (iv) no appeal to a court, or request for stay by a court, of the issuing Governmental Body's action is pending or in effect and, if any deadline for filing any such appeal or request is designated by Applicable Law, such deadline has passed.

"Financial Summary Report" has the meaning set forth in Section 5.1.3.

"Financing" means: (i) Debt on terms acceptable to an Owner, the proceeds of which are intended to be used, in whole or in part, to finance the costs of construction of the Project Component (including Capital Improvements that become part of the Project Component), (ii) Debt as to which the Liens (including Permitted Owner Liens) of one or more Financing Parties have previously been perfected and which Liens will attach to or encumber that Owner's Ownership Percentage, (iii) Debt heretofore or hereafter secured under a mortgage, deed of trust or security agreement or instrument which grants a Lien on substantially all of the tangible property of either Owner or (iv) any refinancing, renewal or continuation, in whole or in part, of any of the foregoing.

"Financing Parties" means any and all lenders, bondholders, underwriters and financing institutions, including credit enhancers and institutional investors, providing or facilitating a Financing and any trustee(s) or agent(s) acting on any of their behalf, and any successors, assigns or other transferees of any of the foregoing.

"Financing Party Agent" means any Person designated by a Financing Party to review the progress of and payments for the Services or the Construction Work.

"Following Month" means the Month following the Current Month.

"Force Majeure" means the occurrence of an event or series of events that is beyond the reasonable control of the Person affected that hinders the performance under contract of such Person and does not result from the fault, negligence, intentional misconduct or willful misconduct of the affected Person or such Person's failure to comply with Applicable Law or Good Utility Practice; and such event or series of events could not have been avoided by the affected Person through the exercise of reasonable diligence, including the expenditure of reasonable monies and/or taking reasonable precautionary measures, including (to the extent that such events satisfy the foregoing criteria), the following:

- (i) acts of God or the public enemy;
- (ii) epidemics, pandemics, quarantines, widespread contagion, illness, or disease (**provided, however**, that each Party acknowledges the effects of COVID-19 as of the Effective Date, and that no delay or failure in performance is expected based on the scope of such effects known as of the Effective Date, **provided, further**, that Force Majeure relief related to COVID-19 and its effects shall be permitted only to the extent of material direct impacts of COVID-19 of which the Party was not aware, and should not reasonably have anticipated, as of the Effective Date);
- (iii) expropriation or confiscation of the Project Component or Discretely Owned Substation Assets;
- (iv) war, terrorism, rebellion, sabotage, civil unrest or riot;

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- (v) fires, explosions, hurricanes, floods, tornadoes, microbursts, other abnormally severe weather events or other natural catastrophes;
- (vi) actions or inaction of a Governmental Body affecting performance required in connection with the Services, the Construction Work, the Discretely Owned Substation Assets or the obligations of the Parties under this Agreement;
- (vii) as to the Construction Manager, the failure of a Contractor or Subcontractor to perform Construction Work in accordance with the provisions of the Construction Agreements unless proximately caused by the intentional misconduct, willful misconduct or gross negligence of the Construction Manager;
- (viii) a Change in Law;
- (ix) as to the Construction Manager, delays in the delivery of Procured Materials unless proximately caused by the intentional misconduct, willful misconduct or gross negligence of the Construction Manager;
- (x) conditions at, on or affecting the Project Component Real Property that could not have been reasonably anticipated, including the existence of Hazardous Substances or archeological materials;
- (xi) unreasonable delays by the Owners in applying for Owner Governmental Approvals for reasons other than the failure of the Construction Manager to materially satisfy its obligations under this Agreement or the failure of any Contractor or Subcontractor to satisfy its obligations under any Construction Agreement;
- (xii) operating conditions on the Transmission Grid that restrict outages, testing, commissioning or access; and
- (xiii) strikes and other labor disturbances.

Under no circumstance will an event of Force Majeure excuse a Person's obligations to make payments when due under this Agreement, unless such Force Majeure event results in a failure of the Federal Reserve wire system or other failure of the banking system that deprives a Person of access to otherwise available funds.

"Funding Amount" has the meaning given in Section 6.1.

"Good Reason" has the meaning given in Section 15.2.1.5.

"Good Utility Practice" means any of the practices, methods or acts engaged in or approved by a significant portion of the electric utility industry in the region during the relevant time period, or any of the practices, methods or acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition in a manner that: (i) is consistent with Applicable Law; (ii) makes due consideration for reliability, safety and protection of the Project Component and the Transmission Grid; and (iii) is consistent with manufacturer's recommendations and warranties. Good Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a range of acceptable practices, methods or acts generally accepted in the region.

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“Governmental Approval(s)” means all waivers, franchises, variances, permits, authorizations, certificates, licenses and Orders of or from any Governmental Body having jurisdiction over either Owner, the Construction Manager, the Maintenance Provider, the Control Center Authority, the Services, the Maintenance Services, the Control Center Services, the Construction Work, any portion of the Project Component or the Discretely Owned Substation Assets, or any CM Subcontractor, Contractor, or Subcontractor, as may be in effect from time to time.

“Governmental Body” means any: (i) nation, state, county, city, town, village, district or other jurisdiction of any nature; (ii) federal, state, local, municipal, tribal, foreign or other government; or (iii) governmental or quasi-governmental authority of any nature (including any governmental agency (including, without limitation, FERC, the North American Electric Reliability Corporation, and state regulatory authority commissions), branch, board, commission, department, instrumentality, office or other entity, and any court), in any such case exercising, or entitled to exercise, regulatory compliance, rate-making, reliability, administrative, executive, judicial, legislative, police, regulatory or taxing authority or power of any nature over this Agreement, any part of the Project Component, the performance of the Services, the Construction Work, the Project Component Real Property, the Construction Manager or either of the Owners. For purposes of this definition, a Person that establishes Applicable Energy Regulations will be deemed to be a Governmental Body; **provided, however**, an Owner will never be deemed to be a Governmental Body except when an Owner is a Transmission Provider establishing Applicable Energy Regulations in its capacity as a Person entitled to exercise functional control over a portion of the Transmission Grid in accordance with Applicable Law established by other Governmental Bodies that have jurisdiction over such Owner.

“Hazardous Substance” means petroleum hydrocarbons, including crude oil or any fraction thereof, asbestos, radon, polychlorinated biphenyls (PCBs), methane and all other substances which now are or in the future may be defined by Applicable Law as “hazardous substances,” “hazardous wastes,” “extremely hazardous wastes,” “toxic substances,” “infectious wastes,” “biohazardous wastes,” “medical wastes,” “radioactive wastes” or which are otherwise listed, defined or regulated in any manner pursuant to any Applicable Law that pertains to the protection of human health and safety or the environment.

“Indemnified Person(s)” has the meaning given in Section 13.1.5.

“Indemnifying Person(s)” has the meaning given in Section 13.1.5.

“In-Service Date” means the date on which the Project Component is placed in service and the Maintenance Provider and the Control Center Authority begin performance of the Maintenance Services and Control Center Services, respectively.

“Independent Accountants” has the meaning given in Section 8.2.

“Insolvency Event” means, with respect to a Person: (i) the Person’s (a) failure to generally pay its debts as they become due, (b) admission in writing of its inability to pay its debts as they become due or (c) making a general assignment for the benefit of creditors; (ii) any Proceeding being instituted by or against the Person seeking (a) to adjudicate it as bankrupt or insolvent, (b) liquidation, winding up, reorganization, arrangement, adjustment, protection, relief or composition of it or its debts under any Applicable Law relating to bankruptcy, insolvency, reorganization or relief of debtors or (c) the entry of an order for relief or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its Property and, in the case of any such Proceeding instituted against the Person, either such Proceeding remains undismissed for a period of thirty (30) days or any of the actions sought in such Proceeding occur; or (iii) the Person’s taking any action to authorize any of the actions set forth above in this definition.

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“Insurance” means the insurance coverage required to be obtained by the Construction Manager as the Construction Manager in accordance with Appendix E, as it may be amended by the Management Committee.

“Late Payment Rate” means the lesser of: (i) the Prime Rate plus two percent (2%) per annum or (ii) the highest per annum interest rate allowed by Applicable Law.

“Lien” means any lien (including a mechanic’s lien, a materialmen’s lien and a supplier’s lien), security interest, option, easement, restriction on transferability, defect of title or other claim, demand, charge or encumbrance of any nature whatsoever, including any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership.

“Lien Waiver” means a written waiver of Liens substantially in a form approved by the Management Committee from time to time.

“Main Escrow Account” means an account established by the Owners pursuant to the Escrow Agreement for the purpose of receiving funds for the payment or reimbursement of Project Component Costs (or such other escrow account as previously established by the Owners and approved by the Management Committee).

“Maintenance Costs” has the meaning set forth in the OMA.

“Maintenance Provider” means, with respect to the Project Component, the Person designated as the “Maintenance Provider” for the Project Component in the OMA. Reference to a Maintenance Provider excludes any reference to a Maintenance Provider in any other capacity.

“Maintenance Services” means the services set forth in the OMA applicable to a Maintenance Provider with respect to the Project Component.

“Major Change Order” means any Change Order or series of Change Orders that relate(s) to the same Construction Agreement and: (i) was/were not previously subject to review by the Management Committee and (ii) increase(s) the total amount to be paid under such Construction Agreement by an amount greater than [REDACTED] or specifies a date for placing the Project Component in service more than sixty (60) days after the placed in service date specified therefor in the Construction Work Schedule.

“Major Contract” means any Construction Agreement that: (i) at the time of execution has a total [REDACTED]; (ii) provides that the obligations of the Owners are joint and not several; (iii) specifies a date for placing the Project Component in service more than sixty (60) days after the placed in service date specified therefor in the Construction Work Schedule; or (iv) the Management Committee otherwise designates as a “Major Contract” for the Project Component. If any Construction Agreement referred to above is a time and materials contract, the total cost of such contract, for purposes of this Agreement, will be reasonably estimated in good faith by the Construction Manager for purposes of determining whether it is a Major Contract.

“Management Committee” means the Management Committee as defined in and established pursuant to the Project Ownership Agreement.

“Material Action” means: (i) any amendment to a Major Contract, Pre-Construction Contract, or Real Property Agreement that could materially and adversely affect any Owner by modifying any provision that (a) provides for indemnity, limits liability (including liability for consequential damages), specifies the

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terms of insurance, or provides remedies or (b) is expressly required to be contained in such agreements under the terms of this Agreement; or (ii) an action by the Construction Manager releasing, reducing or waiving the obligation or liability of a Contractor with respect to any of the provisions described in clause (i) above, except to the extent such action is taken with respect to (a) a Construction Agreement pursuant to the authority granted to the Construction Manager pursuant to Section 7.7.2.1 or (b) a CM Subcontract and, in each case, the financial consequence of such action is within the monetary limit established in the second sentence of Section 7.7.2.5, as it may be adjusted by the Management Committee.

“Material Adverse Events” has the meaning given in Section 5.1.3.

“Materials” means any products, supplies or materials that are to be incorporated into the Project Component, whether or not substantially shaped, cut, worked, mixed, finished, refined or otherwise fabricated or processed. The term “Materials” is intended to include any item that is to be incorporated into the Project Component that is not an item of Equipment or a Consumable.

“Maximum CM Cost Amount” has the meaning given in Section 5.1.2.

“Modifications” means any capital additions or modifications to the Project Component that are undertaken after the In-Service Date, including (i) Capital Improvements, (ii) Upgrades, (iii) New Interconnections; (iv) Co-Owned Substation Assets, and (v) Non-Project Modifications.

“Month” means a calendar month.

“New Interconnection” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Non-Pro Rata Upgrade” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Non-Project Modification” has the meaning given to “Non-Project Modification” in the Project Ownership Agreement, as applied to the Project Component, and in the context of this Agreement refers to a Modification that is not approved by the Management Committee for inclusion in the Final Budget and that is undertaken by one but not both of the Owners as permitted by the Project Ownership Agreement for Non-Project Modifications. A Non-Project Modification will not constitute part of the Project Component and is not governed by the Project Component Agreements, except as provided in Section 4.4 of the Project Ownership Agreement, as applied to the Project Component.

“Notice of Energization Completion” has the meaning given in Section 11.1.2.

“Notice of Final Completion” has the meaning given in Section 11.4.

“Notice of Proposed Energization” has the meaning given in Section 11.1.2.

“Notice of Substantial Completion” has the meaning given in Section 11.2.

“Operating Expenses” means all expenses of operating and maintaining the Project Component, without duplication, including all amounts payable under Project Component Agreements (other than this Construction Management Agreement); expenses of obtaining and maintaining Governmental Approvals; expenses of performance of obligations under the Project Component Agreements (other than this Construction Management Agreement); Maintenance Costs, as defined in the OMA; expenses associated with Project Component Real Property and other assets of the Project Component; Insurance premiums and

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deductibles, and self-insured retentions as provided in Appendix E; taxes; utilities; licenses; impositions; general, administrative and management expenses; consulting and professional fees; and all other fees, costs and expenses, in each case necessary for the operation and maintenance of the Project Component and the conduct of the business of the Owners as tenants-in-common. The following do not constitute Operating Expenses: (i) expenses of any Financing sought or obtained by an Owner; (ii) amounts paid by either Owner to a Transmission Grid operator or a regional transmission organization; (iii) expenses of either Owner that are not related to the Project Component; (iv) expenses of an Owner that are related to the Project Component but are not due and owing to such Owner pursuant to a written contract between the Owners, where one Owner acts in such Owner's capacity as a provider of goods or services to the other Owner; (v) expenses of either Owner that are related to the Project Component but have not been approved by the Management Committee or approved pursuant to a dispute resolution process; (vi) expenses for which an individual Owner, the Construction Manager, a Maintenance Provider or a Control Center Authority is solely responsible under a Project Component Agreement (other than in respect of its Ownership Percentage); (vii) CM Costs; or (viii) costs and expenses incurred by a Party in connection with improvements to a Discretely Owned Substation Asset.

"Operation and Maintenance Agreement," or **"OMA,"** means that certain Operation and Maintenance Agreement, effective as of the Effective Date with respect to the Project Component, by and between the Owners, Maintenance Provider and Control Center Authority, and as may be amended and restated from time to time.

"Order" means any judgment, award, decision, directive, consent decree, injunction (whether temporary, preliminary or permanent), ruling, writ or order adopted, enacted, implemented, promulgated, issued, entered or deemed applicable by or under the authority of any Governmental Body that is binding on any Person or its Property under Applicable Law.

"OTP" has the meaning given in the first paragraph of this Agreement.

"Owner" means each Person set forth in the preamble to this Agreement; **provided, however**, the term "Owner": (i) excludes any Person whose Ownership Percentage in the Project Component becomes zero from and after the effective date when its Ownership Percentage became zero; **provided, further**, that any such Person whose Ownership Percentage becomes zero is not released from its obligations under this Agreement or the Transmission Capacity Exchange Agreement to the extent the same arose, accrued or first became performable prior to the effective date when its Ownership Percentage became zero, and (ii) includes a Person that later executes a Transfer Agreement (as transferee) with respect to the Project Component in accordance with the provisions of the Project Ownership Agreement from and after the date set forth in such Transfer Agreement. Reference to an "Owner" means an owner of an Ownership Percentage in the Project Component, as set forth in the Project Ownership Agreement and excludes reference to any other capacity of such Person, including serving as a Construction Manager, Contractor, Subcontractor, Maintenance Provider or Control Center Authority.

"Owner Governmental Approvals" has the meaning given in Section 7.1.7.

"Ownership Percentage" has the meaning given the Project Ownership Agreement as applied to the Project Component.

"Party" or **"Parties"** has the meaning set forth in the preamble.

"Permitted Liens" has the meaning given in Section 7.9.

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“Permitted Owner Lien” means a Lien against the Ownership Percentage of either Owner that such Owner grants, or has granted, to a Financing Party.

“Person” means any individual, corporation, partnership, limited liability company, association, joint stock company, escrow, unincorporated organization, joint venture, Governmental Body or other entity with legal constitution under Applicable Law.

“Pre-Construction Contracts” has the meaning given in Section 3.1.

“Prime Rate” means the per annum (365 or 366 days, as appropriate) prime rate as published on the last banking day of the applicable Month in the “Money Rates” table of *The Wall Street Journal*; **provided, however**, if more than one such prime rate is published, the mean will be used for purposes of this Agreement, until the Management Committee specifies a different reference publication or equivalent bank rate.

“Prior Month” means the Month prior to the Current Month.

“Pro Rata Upgrade” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Project” means the Project Component together with any Additional Project Component(s) constituting or forming a part of the Big Stone South-Alexandria transmission project running from the Big Stone South Substation to the Alexandria Substation.

“Proceeding” means any suit, litigation, arbitration, hearing, audit, investigation or other action (whether civil, criminal, administrative or investigative) commenced, brought, conducted, heard by or before, or otherwise involving, any Governmental Body or arbitrator.

“Procured Materials” has the meaning given in Section 4.3.2.

“Progress Report” has the meaning given in Section 8.2.

“Project Component” has the meaning given in the Recitals.

“Project Component Agreements” means this Agreement, the Project Ownership Agreement, the OMA, the Transmission Capacity Exchange Agreement, Transmission Easement Agreements and any other contract or agreement designated as a “Project Component Agreement” for the Project Component by the Management Committee, which in no event may include (i) the Construction Agreements, (ii) the Real Property Agreements, or (iii) any contract or agreement that relates to the Discretely Owned Substation Assets or Non-Project Modifications, except in the case of agreements between the Owners with respect to such assets.

“Project Component Budget” has the meaning given in Section 5.1.1.

“Project Component Costs” means the CM Costs, Operating Expenses, Capital Expenses, Construction Work costs and any other amounts related to the Project Component incurred at the direction of the Management Committee; **provided, however**, (i) costs incurred in connection with Discretely Owned Substation Assets do not constitute Project Component Costs and (ii) costs incurred by an Owner, Construction Manager, Maintenance Provider or Control Center Authority in negotiation of the commercial terms of: (A) the Project Component Agreements; (B) the Construction Agreements; or (C) any other

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contract regarding the operation or maintenance of the Project Component does not constitute a Project Component Cost unless the counterparty is a Third Party.

“Project Component Design Book” means the compilation, in electronic format, of documents, drawings, GPS coordinates, route maps, access routes and associated contact information and information that reflects the final specifications and design of the Project Component, including “as built” design, engineering and construction documents, required to be delivered by any Contractor in accordance with the provisions of the applicable Construction Agreement.

“Project Component Plan” has the meaning given in Section 4.1.1.

“Project Component Real Property” means the fee interests, licenses, rights-of-way, easements, access and egress rights and other real property interests on which the Project Component is to be located, including any licenses, rights-of-way, easements and other real property interests necessary for access to and egress from the Project Component.

“Project Development Agreement” or **“PDA”** means that certain Project Development Agreement between OTP and WMMPA dated May 7, 2024.

“Project Ownership Agreement” or **“POA”** means that certain Project Ownership Agreement, effective as of the Effective Date, by and between the Owners, as may be amended and restated from time to time.

“Property” means any kind of property or asset, whether real, personal, mixed, tangible or intangible.

“Proposed Increase in the Maximum CM Cost Amount” has the meaning given in Section 5.1.4.

“Punch List” has the meaning given in Section 11.3.

“Real Property Agreements” means contracts, agreements, instruments or arrangements providing for the acquisition of Project Component Real Property.

“Real Property Management Services” has the meaning given in Section 2.2.2.

“Real Property Plan” has the meaning given in Section 4.4.1.

“Records” has the meaning given in Section 7.12.1(xi).

“Sales Taxes” means the sales, consumer or use taxes that have been paid in connection with the CM Costs.

“Scope of Work” has the meaning given in Section 4.1.1.

“Services” means the Construction Management Services and the Real Property Management Services.

“South Dakota CET” means contractor excise tax due and payable under the laws of the State of South Dakota.

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“Subcontract” means each contract, agreement or arrangement between any Contractor or Subcontractor, on the one hand, and any Subcontractor, on the other hand, establishing the terms of performance of any part of the Construction Work.

“Subcontractor” means each and every supplier, subcontractor, vendor, consultant or contractor of any tier performing any part of the Construction Work, including providing any studies, reports, plans, evaluations or Procured Materials in connection with the Construction Work, directly or indirectly, for or to any Contractor. Reference to an Owner as a “Subcontractor” excludes any reference to such Owner in any other capacity.

“Substantial Completion” means the achievement of the following conditions as to the Project Component: (i) completion of Construction Work to the extent required for the safe, reliable and continuous operation of the Project Component consistent with Good Utility Practice and Applicable Law; (ii) completion of Commissioning of the Project Component; (iii) vendor and construction documentation (including start-up procedures and copies of applicable portions of the Project Component Design Book) and any special tools necessary to support continuous, safe and reliable operation of the Project Component has been delivered to the applicable Maintenance Provider; (iv) the Project Component has been Energized and placed in service (unless otherwise specified by the Management Committee); and (v) unless waived by the Management Committee as to any Lien or indemnity agreement (such waiver only to be effective as to establishing the existence of Substantial Completion and for no other purpose), the Construction Manager has received from each Contractor under a Construction Agreement and Subcontractor under a Subcontract, in each case, with a contract value equal to or greater than **One Hundred Thousand Dollars (\$100,000)**, duly executed Lien Waivers.

“Substation Work” means all activities that are necessary, desirable or incidental to complete the obligations of each Owner to construct its respective Discretely Owned Substation Assets.

“Term” has the meaning given in Section 15.1.2.

“Third Party” means any Person that is neither a Party nor an Affiliate of a Party to this Agreement.

“Third Party Claim” means any claim asserted by a Third Party, other than a Third Party Environmental Claim, and resulting Damages, including claims arising from: (i) personal injury to persons, including death; (ii) theft or loss of or damage to Property; or (iii) violations of Applicable Law, in each case, that relate to the Project Component.

“Third Party Costs” means all reasonably incurred fees, costs, liabilities, claims, expenses and amounts paid to (i) Third Party Contractors and Subcontractors for the design, engineering, construction, and procurement of all Equipment, Materials, Consumables or Services provided in connection with the construction of the Project Component, and (ii) any Third Party cost incurred in connection with the construction of the Project Component, including: (a) the acquisition of all Project Component Real Property and Real Property Agreements; (b) the costs and expenses of consultants; (c) the costs and expenses associated with due diligence investigations, environmental and feasibility studies, transmission corridor assessments; and (d) the development and preparation of permit applications, application fees, filing fees and any fees, charges or costs imposed by a Governmental Body in connection with efforts of the Construction Manager to obtain Governmental Approvals required for the construction of the Project Component. Third Party Costs will not include costs incurred in connection with the procurement of any Debt or capital, however procured, that is required by an Owner which is necessary or desirable to finance such Owner’s participation in the Project Component.

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“Third Party Environmental Claim” means any claim asserted by a Third Party, and resulting Damages, arising from: (i) the spill, discharge or other release of a Hazardous Substance into the environment or (ii) conditions related to Hazardous Substances that give rise to strict or vicarious liability, in each case, that relate to the Project Component and give rise to personal injury to individuals, including death, loss of or damage to property or other liability under Applicable Law.

“Transfer Agreement” has the meaning given in the Project Ownership Agreement, as applied to the Project Component.

“Transmission Capacity Exchange Agreement” means that certain Transmission Capacity Exchange Agreement by and between the Owners to be entered into after the Effective Date and as may be further amended and restated from time to time, whereby each Owner grants to the other Owner all rights and benefits of ownership of a Project Component in proportion to each Owner’s Owner Percentage, as more particularly described therein.

“Transmission Easement Agreements” has the meaning given in the Project Ownership Agreement.

“Transmission Grid” means the electric transmission system to which the Project Component will be directly interconnected and of which the Project Component will become a part.

“Transmission Information” has the meaning given in Section 14.6.1.

“Transmission Provider” means any Person, including an Owner, who exercises functional control over the operation of a portion of the Transmission Grid as necessary to effectuate transmission transactions that it administers and provides transmission service under a tariff, rate schedule or other agreement.

“Upgrade” means a Modification undertaken after the In-Service Date that increases the Project Component capacity, whether such Upgrade is a Pro-Rata Upgrade or a Non-Pro Rata Upgrade.

“WMMPA” has the meaning given in the first paragraph of this Agreement.

- 1.2 **Generally Applicable Provisions.** Schedule 1 contains dispute resolution and other general provisions, all of which are incorporated by reference as if set forth herein in their entirety.
- 1.3 **Representative Designation.** WMMPA designates Missouri River Energy Services as its representative for the purpose of performing WMMPA’s responsibilities and obligations under this Agreement.

ARTICLE 2
ENGAGEMENT OF THE CONSTRUCTION MANAGER

- 2.1 **Engagement of the Construction Manager.** Each Owner hereby appoints and retains the Construction Manager to provide the Services throughout the Term on the terms and conditions set forth in this Agreement. The Construction Manager hereby accepts such appointment and agrees to perform the Services as an independent contractor, except to the extent agency authority is specifically provided in Sections 2.3, 3.1 and 7.7, in accordance with the terms and conditions of this Agreement. In providing the Services, the Construction Manager recognizes the necessity of a close working relationship between the Construction Manager and the Owners. The fact that any Owner is serving in the capacity of the Construction Manager, as well as an Owner, does not in any

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way change, modify or release such Person from its rights, interests and obligations in its capacity as an Owner under this Agreement.

2.2 Services.

2.2.1 Construction Management Services – General Duties. The Construction Manager shall furnish to the Owners, at no charge in excess of its costs as provided in Section 5.4, the Services, in conjunction with CM Subcontractors, to coordinate, manage, administer, oversee and enforce the performance of Construction Work through Final Completion of the Project Component and to carry out its Agency Authority (“**Construction Management Services**”). In performing Construction Management Services, the Construction Manager shall apply the skill and judgment of its organization to the Construction Management Services in accordance with the provisions of this Agreement and Good Utility Practice. Subject, where applicable, to the specific provisions of this Agreement establishing the terms and conditions for the performance of same, the Construction Management Services include the obligation of the Construction Manager (itself or through CM Subcontractors) to:

- (i) provide overall coordination and administration of the Project Component, including coordination of the Construction Work Schedule;
- (ii) manage and coordinate Contractors and any CM Subcontractors engaged in providing Project Component engineering and design;
- (iii) manage and coordinate the Construction Work Schedule and Scope of Work in accordance with Section 4.1;
- (iv) develop and revise proposed budgets, including the Project Component Budget in accordance with Section 5.1;
- (v) assist the Owners (individually or collectively) regarding rights, duties and obligations with respect to (a) representation before Governmental Bodies, in connection with the preparation, prosecution, administration and maintenance of Governmental Approvals in accordance with Sections 4.2 and 7.1.7; (b) insured and uninsured claims against the Owners or Third Parties in accordance with Sections 7.7 and 7.8; and (c) providing assistance pertaining to any prudency review in accordance with Section 5.5;
- (vi) provide an Equipment and Materials procurement plan to the Management Committee in accordance with Section 4.3.1 for the procurement of Procured Materials;
- (vii) select Contractors and award Construction Agreements providing for the performance of Construction Work, including negotiation, execution and delivery of Construction Agreements in accordance with the provisions of Sections 3.2.1, 3.2.3, 3.2.4, 3.2.5 and 4.5;
- (viii) advise and make recommendations to the Management Committee and provide direction, as appropriate, to Contractors regarding labor, environmental, safety and quality control matters in accordance with Section 7.4;

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- (ix) exercise commercially reasonable efforts to obtain satisfactory performance from Contractors by exercising the Owners' rights and enforcing the Contractors' obligations pursuant to the authority granted under Section 2.3, in accordance with Sections 3.2.2, 7.1 and 12.1.4, including administering the Change Order process in accordance with Section 3.2.4;
- (x) enforce the warranties for Construction Work and Procured Materials, and keep the Management Committee informed as to the status of any enforcement proceedings;
- (xi) keep and organize Records associated with the Construction Work in accordance with Sections 7.12 and 8.1;
- (xii) coordinate with and report to the Management Committee on a periodic basis with respect to the Project Component Plan, including fulfilling the reporting requirements set forth in Sections 3.2.2.2, 4.1, 5.1.3, 5.1.4, 6.2.3, 8.2, 8.3 and 11.1.2;
- (xiii) coordinate with the Management Committee and Contractors upon any suspension of performance of Construction Work during the Term or upon termination of this Agreement, including Project Component wind-up coordination and assistance in accordance with Section 15.2;
- (xiv) coordinate with the Maintenance Provider and Control Center Authority to transfer care, custody or control of the Project Component to the applicable Maintenance Provider and Control Center Authority at the In-Service Date;
- (xv) manage surplus Procured Materials in accordance with Section 7.13;
- (xvi) prepare and use construction and procurement contract forms and purchase order forms that the Management Committee has approved as the basis of negotiations with Contractors (including with vendors of Procured Materials) in accordance with Section 4.5;
- (xvii) perform such other Construction Management Services as are necessary and consistent with Good Utility Practice to cause Substantial Completion and Final Completion of the Project Component to occur or as otherwise requested by the Management Committee and consistent with Good Utility Practice;
- (xviii) exercise commercially reasonable efforts to (a) oversee Commissioning and Energization in accordance with Section 11.1; (b) coordinate with the Management Committee regarding determinations of Substantial Completion and Final Completion pursuant to Sections 11.2 and 11.4; (c) develop the Punch List; and (d) exercise the applicable Owners' rights and enforce the counterparties' obligations under the Pre-Construction Contracts in accordance with Section 3.1;
- (xix) develop the Bidders List in accordance with Section 3.2.3;
- (xx) receive bids; prepare bid analyses; and make recommendations to the Management Committee with respect to the award or rejection of any solicited bid or proposal for any Major Contract; and

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(xxi) negotiate the Construction Agreements appropriate to procure labor, Equipment, Materials, Consumables and Construction Aids (including Procured Materials in accordance with Section 4.3) necessary or desirable to perform, complete or enhance the timely performance of Services or the Construction Work, subject to and in accordance with the provisions of Sections 2.3, 3.2.1, 3.2.2, and 3.2.4, and other applicable provisions of this Agreement.

2.2.2 Real Property Management Services. The Construction Manager shall furnish to the Owners, at no charge in excess of its costs as described in Appendix D, its Services (“**Real Property Management Services**”) to acquire the Project Component Real Property required to complete the Project Component. In performing the Real Property Management Services, the Construction Manager shall apply the skill and judgment of its organization to the Real Property Management Services in accordance with the provisions of this Agreement and Good Utility Practice. Subject, where applicable, to the specific provisions of this Agreement establishing the terms and conditions of the performance of same, the Real Property Management Services include the obligations of the Construction Manager (itself or through CM Subcontractors) to:

- (i) perform the Real Property Management Services pursuant to the Real Property Plan for the acquisition of all Project Component Real Property necessary to: (a) complete construction of the Project Component and (b) provide access for maintenance and improvement of the Project Component;
- (ii) implement, manage, oversee, coordinate and complete all aspects of the Real Property Plan, including site identification and identification of land owners and required crossing permits; communicate with such land owners and their representatives to obtain required permissions; conduct due diligence; arrange for all necessary surveys; draft and negotiate the Real Property Agreements (to the extent permitted by Applicable Law) and close the acquisition of the Project Component Real Property and make all monetary payments associated therewith;
- (iii) represent the applicable Owners before Governmental Bodies in connection with the acquisition (including condemnation) of Project Component Real Property;
- (iv) administer and oversee CM Subcontracts entered into in connection with the Real Property Management Services;
- (v) initiate and/or manage litigation to condemn Project Component Real Property (including obtaining evidence and testimony regarding valuation, prior negotiations and other matters related to the condemnation);
- (vi) exercise commercially reasonable efforts to enforce the rights of the Owners under the Real Property Agreements, including litigation and settlement of disputes arising out of such agreements;
- (vii) keep the Management Committee reasonably apprised of significant issues and events which have occurred or are anticipated to occur in connection with the execution of the Real Property Plan;

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- (viii) request, on reasonable notice, each Owner, as applicable, to provide documents, instruments or take other actions necessary for the Construction Manager to timely complete performance of the Real Property Plan;
- (ix) keep, coordinate, organize, and make accessible to each Owner the Records associated with the execution of the Real Property Plan, including documenting all Project Component Real Property by files and maps, in accordance with formats that the Management Committee has voted to approve; and
- (x) assist at the request of an Owner (at such individual Owner's expense) with filings and/or recordings required by such Owner's Financing Party.

2.3 Agency Authority.

2.3.1 Agency Authority. Subject to the terms and conditions set forth in this Agreement, each Owner designates and appoints the Construction Manager as its designated and disclosed agent to carry out, on behalf of each Owner, the following services, and the Construction Manager accepts such appointment and agrees to execute such authority and to act on behalf of each Owner as such Owner's agent with respect to the following:

- (i) the administration of all Pre-Construction Contracts in accordance with Section 3.1.
- (ii) the execution and delivery of all Construction Agreements, amendments and Change Orders thereto to procure labor, Equipment, Materials, Consumables and Construction Aids (including Procured Materials) necessary or (as determined by the Construction Manager) desirable to perform and complete the Construction Work in accordance with the provisions of this Agreement, including Section 3.2;
- (iii) to the extent permitted by Applicable Law, the execution and filing of all applications (and amendments and supplements thereto), certifications and instruments for, and submittal of all associated documentation required to obtain, Owner Governmental Approvals from all Governmental Bodies;
- (iv) execution, delivery and recordation of all contracts, documents and instruments necessary or (as determined by the Construction Manager) desirable in order to perform or cause to be performed all Real Property Management Services, including the execution and delivery (to the extent permitted by Applicable Law) of the Real Property Agreements; and
- (v) exercising the rights of the Owners under Construction Agreements and enforcing the obligations of the Contractors thereto, and when necessary, instituting, defending and settling disputes and Proceedings with respect to any right, obligation or other matter arising therefrom or from any Real Property Agreements or claims of the Owners (individually or collectively) or Third Parties arising out of or, attributable to, the Project Component, all in accordance with Section 7.7.

2.3.2 Agency Authority Limited. The Construction Manager's authority to act as agent for and on behalf of each Owner is specifically set forth in Sections 2.3.1, 3.1 and 7.7 ("Agency Authority"). No authority to act as an agent hereunder is created, implied or bestowed on the Construction Manager by this Agreement to: (a) act as agent for an Owner in such Owner's capacity as a Discretely Owned Substation Owner or any other purpose

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whatsoever, or (b) act as legal counsel to and on behalf of the Owners in any arbitrated or litigated Proceeding (and investigations related such Proceedings), provided that the Construction Manager is authorized and obligated to manage and administer such arbitrated or litigated Proceedings associated with the Project Component. In all matters where the Construction Manager will exercise Agency Authority: (i) such Services will be undertaken as a disclosed agent for and on behalf of each of the Owners and (ii) the Agency Authority of the Construction Manager is limited to binding each of the Owners granting such authority severally (and not jointly) except with the prior written consent of the Management Committee. The Owners, acting through the Management Committee, retain the right to further limit the scope of the Agency Authority granted herein. The Construction Manager and each Owner must agree in writing to the terms of any expansion of the Agency Authority granted to the Construction Manager hereunder.

- 2.3.3 **Covenant to Cooperate with Agent.** To the extent the performance of the Services by the Construction Manager, acting pursuant to Agency Authority, requires the cooperation or assistance (including execution of documents) of any Owner (with respect to matters set forth in Section 2.3.1, 3.1 or 7.7), such Owner individually agrees to give its prompt and reasonable assistance to the Construction Manager.
- 2.4 **Construction Manager as Contractor.** The Construction Manager is entitled to perform Construction Work, but only pursuant to a separate contract negotiated and approved by the Management Committee. Such contract must be separate and distinct from this Agreement and, as such, will be separately enforceable by the Owners (acting through the Management Committee) in accordance with its terms. In the performance of such Construction Work, the Construction Manager, in its capacity as a Contractor, may enter into a Subcontract for any portion of the Construction Work (such as design, engineering or environmental work), but may not enter into one or more Subcontracts for all or substantially all of the Construction Work (taken as a whole); **provided**, that Construction Manager, in its capacity as a Contractor, remains liable to the Owners for any such Construction Work performed (or failed to be performed) by its Subcontractors. Construction Work subcontracted to an Affiliate of the Construction Manager must be approved by the Management Committee.
- 2.5 **Minor Elements of Construction Work; Emergency.** Notwithstanding Section 2.4, the Construction Manager, without approval of the Management Committee, may perform: (i) minor elements of Construction Work or (ii) take actions in an Emergency that could constitute Construction Work if necessary for the preservation of public safety or Property, including the environment, or to avoid a delay in the critical path of the Construction Work Schedule. To be considered minor elements of Construction Work, the cost incurred to accomplish such Construction Work, as estimated by the Construction Manager in good faith, must not exceed **Five Hundred Thousand Dollars (\$500,000)**. The entire cost of minor elements of Construction Work performed by the Construction Manager will be billed in accordance with Appendix D. The Construction Manager shall promptly give notice to the Management Committee when the Construction Manager undertakes minor elements of Construction Work or Emergency actions under this Section 2.5.
- 2.6 **Instructions.** The Construction Manager may request: (i) a meeting with the Management Committee or (ii) instruction from the Management Committee, in each case prior to taking action (to the extent practicable) with respect to any matter that is not required to be brought to the Management Committee pursuant to the terms of this Agreement. All requests for a meeting or instruction must be in writing and describe the matter requiring discussion or instruction. The notice must be delivered to the Authorized Owner Representatives. The Construction Manager may defer

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action (to the extent practicable) that is dependent upon such discussion or instruction pending such meeting or receipt of written instruction from the Management Committee. The Management Committee shall meet with the Construction Manager or issue its written instruction five (5) Business Days after receipt of the written request therefor. If the Management Committee delays issuance of its instruction and the Project Component Plan, the cost of Services or the cost of Construction Work is adversely impacted by the Management Committee's delay, the Construction Manager will be entitled to equitable relief therefor to the extent it was unable to prevent or mitigate such impact.

ARTICLE 3
CONTRACTING RESPONSIBILITIES

3.1 **Pre-Construction Contracts.** Prior to the Effective Date, the Owners entered into certain contracts under the Project Development Agreement and prior to the Project Development Agreement that remain in effect as of the Effective Date, each of which is identified in Schedule 3.1 of this Agreement (the "**Pre-Construction Contracts**"). As of the Effective Date, each Owner that is then party to any of the Pre-Construction Contracts hereby confers on the Construction Manager the authority to act as its agent under each such contract equivalent to the authority granted to the Construction Manager pursuant to Sections 2.3.1 or 7.7, as appropriate, subject to any limitation or requirement in this Agreement in respect of such authority, including Section 2.3.2. The Construction Manager hereby accepts such grant of authority and agrees to exercise the rights of the applicable Owners and enforce the obligations owed to the applicable Owners under the Pre-Construction Contracts as if they constituted Construction Agreements.

3.2 **Construction Work Contracts.**

3.2.1 **Contracts and Bidding Requirements.**

3.2.1.1 **Construction Work Contracts.** Subject to Sections 2.3, 2.4, 3.2.2, 3.2.3, 3.2.4, and 3.2.5, the Construction Manager shall, on behalf of and as the disclosed agent for each Owner, bid, negotiate, enter into contracts for, and otherwise arrange for (including, at the Construction Manager's discretion, the Construction Manager's employees, any Owner or Third Parties) the resources necessary to cause the performance and completion of the Construction Work. Except with respect to Major Contracts, Major Change Orders and Material Actions, the Construction Manager has sole authority to approve all Construction Agreements, as well as all amendments and Change Orders thereto.

3.2.1.2 **Bidding Requirements.** The Construction Manager shall engage in a bidding or other competitive proposal process with respect to all Construction Agreements and CM Subcontracts, except: (i) for any contract with a total contract value of [REDACTED] or less; (ii) for Construction Work permitted to be performed directly by the Construction Manager pursuant to Section 2.4; (iii) for Construction Work that in the reasonable opinion of the Construction Manager must be "sole-sourced" because (a) there is only one practical source of expertise or supply for the intended scope or (b) undertaking a bidding process would jeopardize the critical path of the Construction Work Schedule and the Construction Manager provides reasonable substantiation to the Management Committee on (a) and (b) above and that the associated pricing is competitive in the market; or (iv) with the prior consent or at the request of the Management Committee.

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3.2.2 Administration and Reporting of Contracts.

3.2.2.1 Contract Administration. The Construction Manager shall: (i) administer and enforce, in all material respects, all Construction Agreements (including contracts for the acquisition of Procured Materials) and Real Property Agreements and undertake such other matters relating to such agreements as more particularly set forth in Section 7.1 and (ii) furnish a conformed copy of all executed Construction Agreements, Real Property Agreements and all amendments and Change Orders thereto to the Management Committee. The posting of such agreements, amendments and Change Orders to a secure website maintained by or on behalf of the Construction Manager throughout the Term will be sufficient to comply with the requirements of this Section 3.2.2.1.

3.2.2.2 Reporting. In each Progress Report, the Construction Manager shall provide a listing of each of the Construction Agreements, Real Property Agreements, Change Orders and amendments it has entered into under and pursuant to this Agreement since the preceding Progress Report. Such listing must include the title, date of such instrument, the contracting parties, a summary of the scope of Construction Work to be performed, Services to be provided, Procured Materials to be obtained or Project Component Real Property rights to be acquired and the contract price and payment terms corresponding thereto; **provided, however**, if the Construction Manager has posted such documents on the website in accordance with Section 3.2.2.1, the Construction Manager is not required to provide information other than the title, date, contracting parties and contract price.

3.2.3 Preparation of Bid List. The Construction Manager shall prepare and submit to the Management Committee for its review a proposed lists of bidders with respect to the scope of the Major Contracts (“**Bidders List**”).

3.2.4 Procedures for Major Contracts, Major Change Orders and Material Actions. All Major Contracts, Major Change Orders and Material Actions will be reviewed, approved and entered into only in accordance with the procedures set forth in this Section 3.2.4. Such procedures will not apply to the execution of any contracts, amendments and change orders executed and delivered before the Effective Date.

3.2.4.1 Major Contract Change Orders and Material Actions. The Construction Manager shall present all Major Contracts, Major Change Orders and Material Actions to the Management Committee for approval by making each such Major Contract, Major Change Order or description of Material Action available prior to Management Committee vote on a secure website accessible to each Party, accompanied by an explanation of the Construction Manager’s recommendation. The Construction Manager will make such materials available on the secure website for review by the Parties in advance of any Management Committee action on such materials. The Management Committee will vote on any Major Contract, Major Change Order or Material Action within ten (10) days after receipt of the contract and request and the Construction Manager’s recommendation. Without otherwise limiting its authority to undertake minor elements of the Construction Work or actions in the event of any Emergency in accordance with Section 2.5, the Construction Manager, subject to the provisions of Section 2.3, shall have the authority, as agent for and on behalf of each Owner, to enter into or undertake such Major Contract, Material Action or Major Change Order approved by the

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Management Committee; **provided**, that it is substantially in the form approved by the Management Committee (with due consideration to modifications necessary to reflect the results of final negotiations and revisions in the ordinary course of business which do not, in aggregate, constitute a material modification to the document presented by the Construction Manager and approved by the Management Committee).

3.2.5 **Contract Requirements.** Without the prior approval of the Management Committee, the Construction Manager shall not enter into agreements pursuant to its authority under this Agreement that do not substantially meet the following requirements, as applicable:

- (i) each Construction Agreement with a Third Party must provide that: (a) services must be performed prior to payment therefor, other than payment of customary mobilization costs and an initial progress payment made in the ordinary course of business and (b) the final payment or final release of retention (or other security) for goods must not be due or released prior to the earlier of shipment or delivery;
- (ii) each Construction Agreement for the purchase of Procured Materials must provide that such Procured Materials are being procured by the Construction Manager as agent of the Owners for the Project Component;
- (iii) Construction Agreements and CM Subcontracts must require, at a minimum, contractors and vendors (other than the Construction Manager pursuant to Section 2.4) to indemnify each Owner for: (a) Third Party Claims arising from such contractor's or vendor's negligence, intentional misconduct or willful misconduct and (b) violations of Applicable Law occurring in the performance of, or failure to perform, their obligations under their respective agreements;
- (iv) each Construction Agreement must provide that the Construction Manager is entering into the contract as agent for the applicable Owner or Owners and that the obligations of the applicable Owner or Owners are several (and not joint);
- (v) each Construction Agreement must provide that payments by or on behalf of the Owners do not constitute acceptance of the Construction Work to the extent not in conformance with the Construction Agreement; and
- (vi) the applicable portion of the Construction Work provided or constructed will comply with Applicable Law.

ARTICLE 4
CERTAIN PRE-CONSTRUCTION DUTIES

4.1 **Project Component Plan.**

4.1.1 **Construction Work Schedule and Scope of Work.** The Management Committee will approve the: (i) initial schedule for the execution of the Construction Work (the "**Construction Work Schedule**") and (ii) scope of work for the Project Component (the "**Scope of Work**" and, together with the Construction Work Schedule, collectively, the "**Project Component Plan**"). The Parties acknowledge and agree that the Project Component Plan, as of the Effective Date is attached hereto as Appendix A and is a

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preliminary plan developed by the Management Committee and may be amended from time to time by the Management Committee.

- 4.1.2 **Revision of Project Component Plan.** During the Term, the Construction Manager, in accordance with Good Utility Practice and Applicable Law, may propose to the Management Committee for consideration revisions to the Project Component Plan to reflect any modifications that, in the good faith judgment of the Construction Manager, are necessary or desirable in accomplishing the Construction Work, including revisions resulting from: (i) the effect of construction of the Project Component; (ii) the timing of commencement of Construction Work and completion requirements of Contractors and Subcontractors; (iii) the ordering and delivery of Procured Materials having long lead time constraints; (iv) the availability of labor; (v) Project Component Real Property acquisition progress; or (vi) the occurrence and impacts of Changes in Law.
- 4.2 **Development Period Governmental Approvals.** The Construction Manager hereby agrees to prosecute, administer and maintain, as appropriate, each of the Owner Governmental Approvals applied for or received prior to the Effective Date. In furtherance of the foregoing, the Construction Manager shall deliver, to the extent necessary, such notices and instruments of license and assumption to the Third Parties or Governmental Bodies to each of such Governmental Approvals as required by Applicable Law.
- 4.3 **Equipment and Materials Procurement.**
- 4.3.1 **Equipment and Materials Procurement Plan.** To the extent Procured Materials have not been procured prior to the Effective Date, the Construction Manager shall provide the Management Committee with regular updates in regards to Major Contracts for Procured Materials as part of its monthly update. As determined by the Management Committee, the monthly updates will include both retrospective information regarding procurements completed, and prospective information regarding procurements to be completed.
- 4.3.2 **Procurement Responsibility.** The Construction Manager will procure Equipment and Materials, subject to the requirement of Management Committee approval of Major Contracts, Major Change Orders, Material Actions or as may otherwise be necessary to comply with Section 3.2.5 or 7.5 (the “**Procured Materials**”). The Construction Manager shall use commercially reasonable efforts to secure available discounts, rebates or similar economic advantages that may be available in connection with Procured Materials.
- 4.4 **Real Property Plan.**
- 4.4.1 **Real Property Plan Implementation.** The Construction Manager shall diligently proceed to implement the plan adopted by the Owners for the acquisition of the Project Component Real Property (the “**Real Property Plan**”), as such may be modified from time to time by the Management Committee in consultation with the Construction Manager. The Construction Manager shall be responsible for negotiating the terms for the acquisition of the Project Component Real Property in accordance with the Real Property Plan.
- 4.4.2 **Project Component Real Property Acquisition.** Except as otherwise required by Applicable Law, previously performed pursuant to the Project Development Agreement, or approved by a vote of the Management Committee, all Real Property Agreements will be executed and delivered by the Construction Manager on behalf of the Owners and all such Project Component Real Property shall be acquired in the name of the Owners, as

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tenants-in-common. Amounts owed to landowners and others in respect of the acquisition of Project Component Real Property constitute CM Costs and will be invoiced and paid in accordance with Article 6. The interest of each Owner in Project Component Real Property associated with the Project Component will be in accordance with the Project Ownership Agreement.

- 4.5 **Standard Forms.** The Construction Manager shall use commercially reasonable efforts to utilize form documents approved by the Management Committee as the basis for contracting with Third Parties in connection with the Real Property Agreements. The Parties understand that notwithstanding the commercially reasonable efforts of the Construction Manager, variances from such forms may be necessary. The Construction Manager may modify the terms of a standard form or subsequently amend any such instrument without the approval of the Management Committee, subject however to the requirement of Management Committee approval of Major Contracts, Major Change Orders, Material Actions or as may otherwise be necessary to comply with Section 3.2.5 or 7.5.

ARTICLE 5
PROJECT COMPONENT BUDGET AND MANAGEMENT OF CM COSTS

5.1 **Approval of the Project Component Budget; Adjustments.**

- 5.1.1 **Approval of the Project Component Budget.** The initial Project Component Budget is set forth in Appendix B (as modified by the Management Committee, the “**Project Component Budget**”). Subject to the provisions of Section 5.1.2, the Construction Manager may from time to time propose to the Management Committee for consideration revisions to the Project Component Budget based on: (i) additional data received or developed during the performance of the pre-construction period activities performed pursuant to Article 4; (ii) modifications of assumptions previously used to establish the Project Component Budget; and (iii) consultations with and directives from the Management Committee. The Construction Manager shall submit any proposed changes to the Project Component Budget for review and a vote. The vote of the Management Committee shall also be subject to the provisions of Section 5.1.2, Section 5.1.3, and Section 5.1.4.
- 5.1.2 **Maximum CM Cost Amount.** The Construction Manager shall not incur, or allow to be incurred, CM Costs that exceed, in the aggregate, the Maximum CM Cost Amount as indicated in Appendix B (the “**Maximum CM Cost Amount**”). Any change in the Maximum CM Cost Amount must be made in accordance with Sections 5.1.3, 5.1.4, and 5.3. Among other reasons, the prohibition against incurring CM Costs that exceed the Maximum CM Cost Amount is intended to allow the deliberative processes set forth in Sections 5.1.3, 5.1.4 and 5.1.5 to take place at the earliest possible time before the Maximum CM Cost Amount is exceeded and while there is still an opportunity to consider and implement a reconfiguration of the Project Component.
- 5.1.3 **Financial Reports; Projections.** In accordance with Section 6.2.3, the Construction Manager shall deliver to the Management Committee a monthly financial summary report in a form approved by the Management Committee (the “**Financial Summary Report**”). Unless otherwise determined by the Management Committee, the Financial Summary Report must contain the current Project Component Budget, updated and revised in accordance with this Agreement, and: (i) a summary of actual CM Costs incurred to date; (ii) a cash flow forecast, by Month, of CM Costs projected to be incurred through Final

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Completion; (iii) variance reports, including comparisons of actual CM Costs to the then current Project Component Budget and forecasted CM Costs to the then current Project Component Budget; and (iv) the amount of and explanation for any funds received from Third Parties, including Damages under Construction Agreements. Variances should be individually identified and explained. If a Force Majeure, an Emergency, or a Third Party Claim (whether insured or uninsured) ("**Material Adverse Events**") adversely affects the performance of the Services or the Construction Work, the Construction Manager shall give prompt notice of the occurrence of such Material Adverse Event and provide its assessment of the impact thereof to the Management Committee and shall factor such assessment into each subsequent Financial Summary Report. Adjustments arising from Material Adverse Events will be specifically identified and the Construction Manager shall provide information concerning the impact of each such Material Adverse Event and amount expended as a result thereof together with each subsequent Application for Deposit until the full impact of such Material Adverse Event is known and incurred.

- 5.1.4 **Notice of Maximum CM Cost Increase.** If a Financial Summary Report prepared by the Construction Manager indicates that the Maximum CM Cost Amount is projected to be exceeded, the Construction Manager shall provide to the Management Committee an estimate of the amount of an increase in the Maximum CM Cost Amount which, based on estimates and information then known to the Construction Manager, reasonably would be necessary to achieve Final Completion ("**Proposed Increase in the Maximum CM Cost Amount**") and the monthly cash flow impact of such increase. Within forty-five (45) days of receipt of the Construction Manager's estimate of the Proposed Increase in the Maximum CM Cost Amount, the Management Committee shall review and vote on whether to approve such Proposed Increase in the Maximum CM Cost Amount or implement other procedures, including modification of the Project Component Plan.
- 5.1.5 **Action by the Management Committee.** If the Management Committee votes to approve a Proposed Increase in the Maximum CM Cost Amount for the Project Component (or a further increase to any previously established maximum) and the amount is fully subscribed, the Construction Manager will continue to perform the Services in accordance with the Project Component Plan required under this Agreement. If the Management Committee does not vote to approve the Proposed Increase in the Maximum CM Cost Amount for the Project Component, then the Management Committee shall determine within ninety (90) days after the date of its receipt of the Construction Manager's Proposed Increase in the Maximum CM Cost Amount, what alternative action is to be taken, including the potential of revising the Project Component Plan to achieve Final Completion within the then remaining limit of the Maximum CM Cost Amount. Upon receiving such direction from the Management Committee, the Construction Manager shall promptly prepare revisions to the Project Component Plan with the objective of providing an alternative configuration of the Project Component that can be brought to Final Completion within the then existing Maximum CM Cost Amount. The Construction Manager shall submit such alternative(s) to the Management Committee. The Construction Manager is further authorized to take such other action with respect to Construction Work, including re-bidding or renegotiating the Construction Agreements with the objective of minimizing costs, and mitigating cost overruns, including those resulting from potential construction delays and changes in the Project Component Plan. Each Owner shall cooperate with the Construction Manager in the Construction Manager's efforts to accomplish the same. The provisions of Sections 4.1 will apply to changes in the Project Component Plan arising from this Section 5.1.5.

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- 5.2 **Construction Manager Not Responsible for Cost Overruns.** The Project Component Budget and the cash flow projections prepared by the Construction Manager shall represent the Construction Manager's commercially reasonable judgment as to the amounts reflected therein in light of its experience and the application of estimation practices consistent with Good Utility Practice. Each Owner acknowledges that the assumptions used in developing the budgets required hereunder are forward-looking projections and that neither the Construction Manager nor the Owners (individually or collectively) have control over the cost of labor, Materials, Equipment, the acquisition cost of Project Component Real Property, competitive bidding or market or negotiating conditions pursuant to which such assumptions relate. Accordingly, the Construction Manager cannot and does not warrant or represent that bids, negotiated prices or the monetary impact of Material Adverse Events will not vary from the estimates of CM Costs incorporated in the Project Component Budget approved by the Management Committee and the Construction Manager will not be liable to any Owner for such variances.
- 5.3 **Construction Manager's Adjustments.** If the Construction Manager believes that a modification of the Project Component Plan or the Maximum CM Cost Amount is necessary, it shall deliver a request to the Management Committee and: (i) any proposed change to the Maximum CM Cost Amount will proceed according to the terms and procedures of Section 5.1, and (ii) any proposed material change to the Project Component Plan will proceed according to the terms and procedures of Section 4.1.
- 5.4 **Costs.**
- 5.4.1 **CM Costs.** Except as otherwise provided in this Agreement, the cost of the Construction Work and all costs incurred in the performance of the Services ("CM Costs") specifically include, without duplication, the following:
- (i) amounts incurred by the Construction Manager in connection with the performance of the Services, as determined in accordance with Appendix D;
 - (ii) amounts due to Contractors (including Subcontractors), CM Subcontractors, consultants, legal counsel and other Persons performing portions of the Services or Construction Work in connection and in accordance with this Agreement or the Construction Agreements, as applicable, and approved by the Construction Manager;
 - (iii) costs related to the acquisition of Procured Materials;
 - (iv) costs related to the acquisition of Project Component Real Property;
 - (v) costs of Insurance procured by the Construction Manager in accordance with Appendix E, as it may be amended by the Management Committee, and the cost of Owner-required insurance coverages, which are part of the Construction Manager's administrative and general costs chargeable to the Project Component in accordance with Appendix E, except as otherwise therein provided;
 - (vi) costs of the Construction Manager attributable to the Services or Construction Work and relating to discharging and paying any liability, loss, damage, or expense, including attorneys' fees and other costs of defending, settling or otherwise administering Third Party Claims or Third Party Environmental Claims, except to the extent the Construction Manager is obligated to indemnify the Owners pursuant to Section 13.1.2;

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- (vii) Sales Taxes and other taxes other than South Dakota CET arising from and payable to any Governmental Body, payments in lieu of taxes, and fees related to Governmental Approvals arising out of the performance of the Services or Construction Work under this Agreement, the Construction Agreements, Real Property Agreements or otherwise attributable to the performance of the Services or Construction Work, excluding income, gross receipts, franchise or taxes similarly imposed or assessed on the results of operations of the Construction Manager, any Owner, Contractor, CM Subcontractor or any Subcontractor;
- (viii) any other costs incurred by the Construction Manager in connection with the performance of the Services, including (net of any reductions or adjustments received with respect thereto) rental charges, royalties and fees, field office costs, travel and relocation costs, professional services fees and costs incurred in connection with, or arising out of, performance bonds, security, utilities, safety, transport, storage and telecommunications;
- (ix) costs that are (a) stated to be CM Costs pursuant to this Agreement or (b) determined by the Management Committee to be CM Costs;
- (x) costs of Insurance deductibles and self-insured retentions for Insurance and self-insured retentions for Owner Insurance required by Appendix E (to the extent actually incurred by any or both Owners as provided in Section 5.4.1(v)), as it may be amended by the Management Committee; and
- (xi) costs incurred in connection with the termination of this Agreement as described in Section 15.2.3.4.

5.4.2 Costs Not Chargeable to Project Component. The provisions of Section 5.4.1 to the contrary notwithstanding, the following do not constitute CM Costs:

- (i) to the extent not specifically provided under Section 5.4.1, costs of studies conducted by any Owner to determine for such Owner the usefulness, economics, legality and/or feasibility of participating in the Project Component;
- (ii) costs of the Construction Manager associated with the preparation or negotiation of Project Component Agreements or amendments thereto;
- (iii) costs incurred by each Owner in performing functions of the Management Committee or any other committees established pursuant to this Agreement or the other Project Component Agreements and expenses of its personnel while performing such functions on its behalf;
- (iv) costs incurred by each Owner in performing its obligations with respect to the Discretely Owned Substation Assets;
- (v) costs of insurance (including premiums, deductibles and self-insured retentions) purchased by any individual Owner or other Person other than as required by Appendix E, as it may be amended by the Management Committee;
- (vi) costs incurred by the Construction Manager in connection with its indemnification obligations set forth in Article 13;

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(vii) the cost of complying with conditions specified in any Owner Governmental Approval granted or issued by Final Order that are not generally applicable to the Owners collectively, but are imposed on an individual Owner;

(viii) costs associated with South Dakota CET;

(ix) without duplication of the costs described in clause (vi) above, costs that arise from the Construction Manager's failure to perform its obligations in accordance with this Agreement, which failure is the result of the Construction Manager's gross negligence, willful misconduct or intentional misconduct; and

(x) costs that are excluded as CM Costs by the express terms of this Agreement or the Project Ownership Agreement.

5.4.3 **Insurance Proceeds Not Constituting CM Costs.** To the extent that proceeds of insurance required to be procured or maintained pursuant to Appendix E are paid or recovered in respect of CM Costs, such proceeds will be deducted or offset against the CM Costs incurred therefor.

5.5 **Prudency Review Undertaking.** The Construction Manager shall provide reasonable assistance and documentation to the Owners (individually or collectively) in connection with any prudency review or similar process relating to matters within the scope of this Agreement, in order to address the issues identified by any reviewing Person, including any Governmental Body. To the extent Services provided under this Section 5.5 are provided to the Owners collectively for the benefit of the Project Component, the cost of providing such Services are CM Costs. Services under this Section 5.5 provided for the benefit of less than all of the Owners will be charged to and payable by each such individual Owner.

ARTICLE 6
FUNDING

6.1 **Funding Amount.** The Construction Manager will be compensated for CM Costs expended by it in the performance of the Services or in connection with the Construction Work (the "**Funding Amount**"), except as expressly otherwise provided in this Agreement.

6.2 **Applications for Deposit.**

6.2.1 **Funds Availability.** Subject to Section 6.4, funds will be available to the Construction Manager in installments following completion and delivery to the Management Committee of Applications for Deposit in accordance with the payment procedures set forth in this Article 6, or unless otherwise agreed by the Management Committee.

6.2.2 **Applications for Deposit.**

6.2.2.1 **Initial Application for Deposit.** By the fourteenth (14th) Business Day of the month after receipt of all consents listed on Schedule 10.2.5 of this Agreement, the Construction Manager shall electronically submit an Application for Deposit to the Owners for the Estimated Reimbursable Costs the Construction Manager expects to expend through: (i) the end of the Current Month in which the Owners receive the last of all consents listed on Schedule 10.2.5; and (ii) the Following Month less, in the case of both (i) and (ii) above, amounts previously made available to the

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Development Manager (as that term is defined in the Project Development Agreement) under the Project Development Agreement, including remaining funds in the Main Escrow Account, that are not committed to expenses to be paid on or prior to the day on which the Owners receive the last of all consents listed on Schedule 10.2.5. Within eight (8) Business Days following the day on which the Application for Deposit is submitted, each Owner shall make payment of its Ownership Percentage of the aggregate amount of the Application for Deposit. Thereafter, commencing in the Month following the Month in which the Effective Date occurs, Applications for Deposit, including reconciliations between Estimated Reimbursable Costs and Actual Reimbursable Costs, will be made as contemplated by this Section 6.2.2.

6.2.2.2 **Monthly Applications for Deposit.** By the fourteenth (14th) Business Day of each Month after the Effective Date (the “**Current Month**”), the Construction Manager shall electronically submit to the Parties and such other representatives of each Owner as it may designate, an Application for Deposit that includes an invoice that sets forth:

- (i) the Construction Manager’s good faith estimate of the CM Costs to be expended in the performance of the Services and in connection with the Construction Work (the “**Estimated Reimbursable Costs**”) during the Following Month;
- (ii) the amount equal to the difference between the aggregate Estimated Reimbursable Costs previously invoiced to the Owners and the aggregate CM Costs expended (or committed to be expended) by the Construction Manager (the “**Actual Reimbursable Costs**”) prior to the last day of the Month in which the Application for Deposit is submitted. If the difference is a: (a) positive number (aggregate Estimated Reimbursable Costs exceed aggregate Actual Reimbursable Costs), then the amount of such difference will be subtracted from the amount of Estimated Reimbursable Costs requested in the current Application for Deposit by the Construction Manager pursuant to **clause (i)** above or (b) negative number (aggregate Actual Reimbursable Costs exceed aggregate Estimated Reimbursable Costs), the amount of such difference will be added to the amount of Estimated Reimbursable Costs requested in the current Application for Deposit by the Construction Manager pursuant to **clause (i)** above.

6.2.2.3 **Continuing Reconciliation Process.** In reconciling Estimated Reimbursable Costs to Actual Reimbursable Costs for any period, the Construction Manager shall use commercially reasonable efforts to provide as complete of a reconciliation as is practicable, it being understood that further reconciliation may be necessary for amounts in dispute and for other amounts as to which information is not available at the time of reconciliation.

6.2.2.4 **Account Transfer on Termination.** Upon any termination of this Agreement and at such time as the Construction Manager has finished taking the actions required by the Management Committee pursuant to Section 15.2.3, if, after submission of its final Application for Deposit and the Owners’ payment thereof, the Construction Manager has received funds in excess of the Actual Reimbursable Costs to which it is entitled under this Agreement, the Construction Manager shall pay to the

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Owners the appropriate portion of such excess according to the Owners' Ownership Percentages, unless otherwise directed by the Management Committee, within thirty (30) days of the demand for such amount by one or more of the Owners.

6.2.3 Supporting Documentation. The Construction Manager shall provide to the Management Committee each Month:

- (i) the monthly Progress Report required pursuant to Section 8.2 for the Prior Month;
- (ii) a summary of the status of any disputes and settlements with Contractors as described in Section 7.1.8;
- (iii) the Financial Summary Report as required pursuant to Section 5.1.3;
- (iv) documentation reasonably required to allow the Management Committee to verify the reconciliation of Actual Reimbursable Costs compared to the Estimated Reimbursable Costs; and
- (v) such other information as may be reasonably requested by the Management Committee or an Owner; **provided**, that in respect of Actual Reimbursable Costs, the Construction Manager will not be required to provide information that, in the first instance, must be obtained from the counterparties to the Construction Agreements or Real Property Agreements, if the Construction Manager is not entitled to such information under such agreements (provided that the foregoing proviso shall not apply in the event such counterparty is an Affiliate of the Construction Manager).

6.2.4 Effect of the Application for Deposit.

6.2.4.1 Limited Representations of the Construction Manager. Subject to Article 16, the delivery of an Application for Deposit by the Construction Manager will constitute representations made by the Construction Manager to the Owners, based on the Construction Manager's observations of the Construction Work that: (i) the Construction Work has progressed to the point reflected in such Application for Deposit; (ii) Procured Materials reflected as having been delivered have been delivered; (iii) Project Component Real Property rights reflected as having been acquired have been acquired; and (iv) the amounts reflected as due are due and payable in accordance with the Construction Agreements and the Real Property Agreements in the Following Month. The Construction Manager shall use commercially reasonable efforts to review Construction Contract invoices that are included in the basis for an Application for Deposit for material accuracy in accordance with Good Utility Practice. The foregoing representations are subject to (a) an evaluation of the Construction Work for compliance with the Construction Agreements upon Substantial Completion; (b) the results of subsequent tests and inspections including those contemplated in Article 11; (c) deviations from the Construction Agreements and/or Real Property Agreements that are not materially adverse, individually or in the aggregate, or that are otherwise capable of correction prior to Final Completion; (d) specific qualifications expressed by the Construction Manager in the documentation supporting any such Application for Deposit; and (e) the provisions of Section 6.2.4.2. In making representations under

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this Section 6.2.4.1, the Construction Manager may reasonably rely upon the advice and representations of CM Subcontractors.

6.2.4.2 Limitations on Construction Manager Representations. The delivery of an Application for Deposit is not a representation that the Construction Manager has: (i) made exhaustive or continuous on-site inspections to check the quality or quantity of the Construction Work or the conformance of the Construction Work to the Construction Agreements; (ii) reviewed Contractors' construction means, methods, techniques, sequences or procedures; (iii) except as provided in Section 6.2.4.1, reviewed invoices from Subcontractors; or (iv) except in connection with Section 6.2.3(i), made examination to ascertain how or for what purpose any Person has used money previously paid to it by the Construction Manager pursuant to previous Applications for Deposit.

6.3 **Management Committee Review.** Without prejudicing the Management Committee's other rights under this Agreement, for purposes of determining the amount of payment to which the Construction Manager is entitled in respect of an Application for Deposit, an Owner may promptly notify the Construction Manager concerning any invoiced amount or portion thereof that is in dispute (including where such Owner contends that there is a deficiency with respect to such Application for Deposit and/or the supporting documentation) and the basis for such dispute as soon as reasonably practicable with the objective of allowing time for the Owners to resolve such dispute prior to the date on which payment on the disputed matter would otherwise be due.

6.4 **Monthly Payments.**

6.4.1 **Deposits.** Except with respect to those amounts properly withheld or offset hereunder, each Owner shall make payment of its Ownership Percentage of the amounts invoiced by the Construction Manager in an Application for Deposit for the Estimated Reimbursable Costs in immediately available funds to the Main Escrow Account on the first (1st) Business Day of the Following Month. If the Construction Manager has received written notice from an Owner specifying with particularity the failure of the Construction Manager to fulfill some or all of its specified CM Cost reporting obligations to the Management Committee hereunder, and such failure has not been remedied within thirty (30) days of the receipt of such notice, the Management Committee may authorize the Owners to withhold an equitable amount from the Funding Amount in respect of amounts to be paid to the Construction Manager for the performance of the Services until such failure is cured; **provided**, that the Owners will not be entitled to withhold (but may dispute) amounts to be paid to Third Parties in respect of the Services, Construction Agreements or Real Property Agreements.

6.4.2 **Withdrawals.** Each Owner grants the Construction Manager the authority to withdraw funds from the Main Escrow Account, in accordance with the terms of the Escrow Agreement (or the terms of the escrow agreement previously established by the Owners and approved by the Management Committee), only: (i) to pay for CM Costs; (ii) to distribute funds in accordance with Section 6.2.2.4; or (iii) as directed by the Management Committee. Except with respect to funds deposited by the Owners in accordance with Section 6.4.3 which may be withdrawn by the Construction Manager as necessary, the Construction Manager shall not withdraw funds more than ten (10) days prior to the date it reasonably estimates such funds are needed to make the payments or reimbursements described in clauses (i) - (iii) above. To effect a withdrawal of funds from the Main Escrow Account, the Construction Manager shall tender to the trustee an executed certificate in the

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form attached to the Escrow Agreement, as such form may be modified by the Owners and the trustee from time to time, together with such additional information as is required under the Escrow Agreement.

- 6.4.3 **Extraordinary.** If the Construction Manager: (i) incurs CM Costs arising from Emergency or other exigent circumstances or (ii) wishes to take advantage of discounts, rebates or similar economic advantages for which the Estimated Reimbursable Costs requested in the last Application for Deposit are inadequate, and the expenditures resulting from such causes will be required before the Funding Amount from the next Application for Deposit is to be deposited, then the Construction Manager may request in writing to the Management Committee to direct the Owners to deposit the estimated funds needed for such purposes in the Main Escrow Account. Upon Management Committee direction, each Owner shall deposit its proportionate share as directed by the Construction Manager's written request of the estimated amount within five (5) Business Days of receipt by each Owner of a notice specifying the estimated amount needed. Amounts actually spent must be reconciled against the estimated payments made as soon as practical in connection with the monthly reconciliation process set forth in Section 6.2.2.
- 6.5 **Final Payment.** Within ninety (90) days after the Final Completion of the Project Component, the Construction Manager shall submit a reconciliation to the Management Committee which shows: (i) all Actual Reimbursable Costs to which the Construction Manager is entitled through the Final Completion Date and (ii) all Estimated Reimbursable Costs withdrawn from the Main Escrow Account by the Construction Manager through the Final Completion Date. To the extent that there is a differential between such total amounts, the Construction Manager shall, as appropriate and within ten (10) days following submission of the reconciliation to the Management Committee, refund such differential amount to the Owners in proportion to their Ownership Percentages, or submit an Application for Deposit to the Management Committee for each Owner's proportionate share of such differential amount, by way of a final Application for Deposit for Services and/or Construction Work performed through the Final Completion Date. The Owners will not be required to make the final payment to the Construction Manager until the Final Completion Date occurs and the Construction Manager has delivered all items and satisfied all conditions required under Section 11.4. The final Application for Deposit submitted by the Construction Manager must be accompanied (to the extent not previously provided) by (a) a final Lien Waiver from the Construction Manager that is applicable to all of the Services and Construction Work performed by the Construction Manager through Final Completion, conditioned solely on receipt of such final payment and (b) a final Lien Waiver and release from each Contractor, Subcontractor (with an aggregate Subcontract value equal to or exceeding **One Hundred Thousand Dollars (\$100,000)**) and CM Subcontractor (with an aggregate Subcontract value equal to or exceeding \$100,000) for all Services or Construction Work, as applicable, performed through Final Completion as approved by the Management Committee.
- 6.6 **Delinquent Payments.** Payments not made when due under this Agreement will bear interest from the due date thereof until the date paid at the Late Payment Rate.
- 6.7 **Payment Not Acceptance.** Payment hereunder neither constitutes acceptance of the Services nor forecloses any right of audit or dispute with respect to such payments. Except as otherwise provided hereunder, no Owner will withhold amounts (including disputed amounts) from its payments in respect of Applications for Deposit.
- 6.8 **Owner's Failure to Remit; Construction Work Stoppage.** If any Owner fails to remit any amounts due by such Owner and, as a result thereof, there are insufficient funds on deposit in the

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Main Escrow Account to permit the Construction Manager to fund CM Costs properly payable hereunder, the Construction Manager may, upon five (5) Business Days' notice to the Management Committee: (i) suspend performance of the Services under this Agreement; (ii) direct the Contractor(s) to suspend performance of Construction Work under any Construction Agreement; and (iii) cause the Subcontractors to suspend performance under their respective Subcontracts. In the event a suspension of the Services or Construction Work occurs pursuant to this Section 6.8, the Construction Manager will have no liability to any Owner for delay or Damages resulting from the suspension of the Services or Construction Work.

- 6.9 **Optional Payment by Owners.** If the Construction Manager defaults or neglects to fulfill its obligation to make undisputed payments of amounts required to be paid to Third Parties under any Construction Agreement or Real Property Agreement, then either Owner may cause such obligation to be satisfied by paying such amounts, and such contributing Owner shall have a right of contribution against the other Owner with respect to such payment. To the extent the amount of such payments has previously been deposited in the Main Escrow Account, the Owners may set off such amounts against the Funding Amount next due by the Owners to the Construction Manager.
- 6.10 **Amounts to be Deposited.** Within fifteen (15) Business Days after receipt thereof, the Construction Manager shall, as directed by the Management Committee, deposit into the Main Escrow Account the following sums, which the Construction Manager shall hold in constructive trust for the Owners:
- (i) funds recovered from Contractors, Subcontractors, CM Subcontractors and other counterparties, including back charges and Damages, except with respect to amounts recovered in respect of an indemnification obligation owed to the Construction Manager on the part of a Contractor, Subcontractor, CM Subcontractor or other counterparty to a Construction Agreement;
 - (ii) proceeds of the sale of surplus Procured Materials;
 - (iii) refunds of sales or use taxes for which the Construction Manager has authority to obtain on behalf of the Owners; and
 - (iv) any other amounts received by the Construction Manager arising out of or in connection with this Agreement, which amounts are to accrue to the benefit of the Owners, collectively.
- 6.11 **Owner Obligations Several.** Except as otherwise expressly provided in this Agreement, and for Construction Management Services performed for an individual Owner, the payment obligations of the Owners hereunder are several in proportion to their respective Ownership Percentages. Each Owner is severally obligated (to the extent of its Ownership Percentage as determined in the Project Ownership Agreement) for the payment of CM Costs. The failure of any Owner to pay any amount for which it is obligated hereunder will not relieve any other Owner from its several payment obligations hereunder.
- 6.12 **Interest Attribution.** The Construction Manager shall use the earned interest in the Main Escrow Account to offset any amounts owed by either Owner to Construction Manager under this Agreement based on each Owner's Ownership Percentage, unless otherwise directed by the Management Committee.

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- 6.13 **South Dakota Excise Tax.** The Owners hereby acknowledge that the South Dakota CET shall be due and payable to the State of South Dakota with respect to the Services provided by the Construction Manager to WMMPA with respect to the portion of the Project Component located in South Dakota, and that any such amounts due pursuant to the South Dakota CET shall be: (a) invoiced by the Construction Manager, with such invoice reflecting only CM Costs related to that portion of the Project Component located in South Dakota, (b) payable solely by WMMPA, and (c) remitted by the Construction Manager to the State of South Dakota.

ARTICLE 7
DESCRIPTION OF CONSTRUCTION MANAGER DUTIES

7.1 Contract Administration.

- 7.1.1 **Coordination of Activities.** The Construction Manager shall provide for coordination of the activities of the Contractors engaged in Construction Work.
- 7.1.2 **Site Visits.** The Construction Manager shall visit the physical sites where Construction Work is ongoing in accordance with Good Utility Practice at regular intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the Construction Work and to determine in general if the Construction Work is being performed in a manner indicating that the Construction Work, when completed, will be in accordance with the Construction Agreements, the Project Component Plan, and Good Utility Practice.
- 7.1.3 **Performance by Contractors and Subcontractors.** Except with respect to any Construction Work undertaken by the Construction Manager or an Affiliate of the Construction Manager, and without limiting the Construction Manager's responsibility to perform the Construction Management Services in accordance with Good Utility Practice, the Construction Manager will not have control over or charge of and will not be responsible for: (i) construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Construction Work, which duties and responsibilities will be allocated by the Construction Manager to Contractors; (ii) any Contractor's or any Subcontractor's failure to carry out Construction Work in accordance with the Construction Agreements; (iii) acts or omissions of any Contractor, Subcontractor or any Owner acting in the capacity as a Contractor or Subcontractor, or their respective agents or employees; or (iv) any other Person performing portions of the Construction Work.
- 7.1.4 **Change Orders and Amendments.** Subject to the provisions of Sections 3.2.4 and 2.5:
- (i) **Change Orders.** The Construction Manager shall review, negotiate and process all requests for Change Orders arising under the Construction Agreements; **provided, however,** the Construction Manager shall not enter into any Major Change Order until the Management Committee approves such Major Change Order, unless such agreement by the Construction Manager for a Major Change Order is conditioned on a Management Committee approval of such Major Change Order; and
 - (ii) **Amendments.** The Construction Manager shall negotiate and process all amendments to Construction Agreements and Real Property Agreements; **provided, however,** the Construction Manager shall not undertake any Material Action until the Management Committee approves such Material Action, unless such undertaking of Material

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Action is conditioned on Management Committee approval of the undertaking of such Material Action.

- 7.1.5 **Enforcement of Construction Agreements and Real Property Agreements.** The Construction Manager shall administer and enforce, in all material respects, each: (i) Construction Agreement and (ii) Real Property Agreement (and other agreements associated with the performance of the Real Property Management Services) to which it or the Owners are a party (whether as agent or otherwise), including the design, supply, construction, warranty and other obligations of the counterparties thereto. The Construction Manager shall pursue remedies available to it or the Owners with respect to the breach of those obligations, in each case, as deemed appropriate by the Construction Manager in its reasonable good faith discretion or as otherwise directed by the Management Committee.
- 7.1.6 **Performance of Real Property Management Services.** The Construction Manager shall perform the Real Property Management Services in accordance with Section 2.2.2.
- 7.1.7 **Governmental Approvals.** Subject to Section 2.3.1, during the Term, the Construction Manager shall (to the extent permitted by Applicable Law) prepare, or cause to be prepared, all applications for all Governmental Approvals relating to the performance of the Services or Construction Work that are required in furtherance of the Project Component and that are customarily or otherwise required to be obtained by or in the name of the Owners or that are required to be obtained by the Owners pursuant to the applicable Construction Agreements (“**Owner Governmental Approvals**”). Subject to Section 2.3.1(iii) and after reasonable notice to the Management Committee, the Construction Manager will have the right to execute and file applications for all such Governmental Approvals on behalf of the Owners; **provided, however**, if the Management Committee instructs the Construction Manager not to file such application, the Construction Manager shall not file such application prior to approval by the Management Committee. Subject to Section 2.3.1, the Construction Manager shall take whatever actions are necessary or desirable (as determined by the Construction Manager) to maintain or otherwise fulfill the performance and compliance requirements under and in connection with the Owner Governmental Approvals on behalf of the Owners. The Construction Manager shall, or shall cause its designee to, participate in meetings with Governmental Bodies and other Persons to assure that presentations, reports and data relating to construction of the Project Component, or other aspects of the Project Component, are appropriately and properly identified and presented. Each Owner shall provide its support, cooperation and assistance in accordance with Section 2.3.3. The Construction Manager shall keep the Management Committee reasonably apprised of the occurrences and events occurring at such meetings and the status of the approval process of all such Governmental Approvals and significant issues or events that are anticipated to occur.
- 7.1.8 **Remedies.** In accordance with Section 2.3, the Construction Manager will have the right to pursue any and all rights of any Owner under the Construction Agreements and Real Property Agreements with respect to any breach thereof, in each case as deemed appropriate by the Construction Manager in its reasonable good faith discretion, including disapproving or rejecting Construction Work or Procured Materials where the Construction Work or the Procured Materials are, in the Construction Manager’s opinion, defective or non-conforming to the Construction Agreements. Subject to any limitations set forth in this Agreement, the Construction Manager will have the right to enforce and defend any and all duties, rights and obligations under the Construction Agreements and Real Property

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Agreements. Notwithstanding the foregoing provisions of this Section 7.1.8, the maximum amount for which the Construction Manager may settle or consent to the entry of judgment for any individual claim under the Construction Agreements or Real Property Agreements will be initially established at Five Hundred Thousand Dollars (\$500,000) and the maximum amount for which the Construction Manager may release any party to a Construction Agreement or Real Property Agreement from liability or potential liability will be initially established at Two Hundred and Fifty Thousand Dollars (\$250,000). The Parties recognize that the Management Committee may, from time to time, vote to reduce or increase either or both of such maximum amounts set forth in this Section 7.1.8, which revised amounts will be deemed to be the applicable amounts under this Agreement without further action by the Parties hereto.

- 7.2 **CM Subcontractors.** Subject to the terms and conditions set forth herein, the Construction Manager will have the right to utilize CM Subcontractors to perform the Services; provided, that the Construction Manager: (i) requests and obtains approval of the Management Committee if the CM Subcontract would constitute a Major Contract or if the Construction Manager proposes to execute a Major Change Order or undertake a Material Action with respect thereto; (ii) procures the Services under agreements that the Construction Manager utilizes to procure such services in its non-Project Component-related business and as to which the Construction Manager's internal, generally applicable, competitive selection procurement procedures have been followed in all material respects; and (iii) manages and coordinates the Services performed by CM Subcontractors and remains liable to the Owners for any Services performed (or failed to be performed) by its CM Subcontractors to the same extent as if the Construction Manager had performed such Services directly.
- 7.3 **Labor and Personnel.** The Construction Manager shall provide and make available all professional, supervisory, superintendent, field service, managerial, administrative and other personnel as are reasonably necessary to perform the Services. Personnel provided by the Construction Manager must be qualified and experienced in the duties to which they are assigned. The Construction Manager shall enforce reasonable discipline and good order among the Construction Manager's employees and other Persons carrying out Services hereunder. The Construction Manager shall take prompt action to remove or reassign unfit Persons or Persons not skilled in tasks assigned to them. The Construction Manager shall provide monthly (and otherwise upon the reasonable request of a Party) a summary of payroll information for the Services rendered.
- 7.4 **Safety Precautions and Requirements.** The Construction Manager shall, in conjunction with Contractors that perform Construction Work on Project Component Real Property, coordinate the development and implementation of such programs as necessary to comply with Applicable Law and Good Utility Practice, including programs: (i) seeking to ensure the maintenance of commercially reasonable safeguards for the protection of the environment, workers and the public, including first-aid for workers at the various Project Component work sites, and (ii) requiring Contractors to exercise commercially reasonable efforts to eliminate or abate all reasonably foreseeable safety hazards created by, or otherwise resulting from, the performance of Construction Work. Such programs shall provide for keeping adequate records of incidents requiring medical attention in connection with the performance of the Services, the Construction Work and methods of communication to the Owners with respect to same. The Construction Manager shall orally notify the Management Committee of any incident involving serious injury or death to any individual performing Services or Construction Work as soon as reasonably possible but not later than twenty-four (24) hours after it learns of the occurrence and shall thereafter provide a written report to the Management Committee of the cause of the incident (if known) and the actions taken or to be taken to prevent repetition. The Construction Manager shall promptly give notice to the

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Management Committee of any hazardous conditions on the Project Component Real Property immediately after it becomes aware of such conditions.

- 7.5 **Title/Risk of Loss.** Title to and risk of loss with respect to the Project Component and all other Property rights created through performance of Construction Work (including all Procured Materials to be incorporated therein) will be determined in accordance with the provisions of the respective Construction Agreements and Real Property Agreements. The Construction Manager shall use commercially reasonable efforts to cause title to Equipment, Materials and Consumables for the Project Component to be transferred to the Owners as tenants-in-common in accordance with the Project Ownership Agreement. The Construction Manager shall require that such title will transfer free and clear of Liens (other than Permitted Liens). The Construction Manager shall promptly advise the Management Committee if it is unable to secure provisions for such transfer of title and shall thereafter take direction from the Management Committee with respect thereto. The Construction Manager shall take any and all actions it deems appropriate under its power to effect the intent of this Section 7.5, including execution and delivery of any necessary documents of transfer and recordation of the same.
- 7.6 **Insurance Obligations of the Construction Manager.** The Construction Manager shall comply with the insurance obligations imposed on the Construction Manager in Appendix E, as it may be amended by the Management Committee.
- 7.7 **Settlement of Insured and Uninsured Third Party Claims Against Owners; Maximum Settlement Authority.**

7.7.1 **Insured Claims Against Owners.**

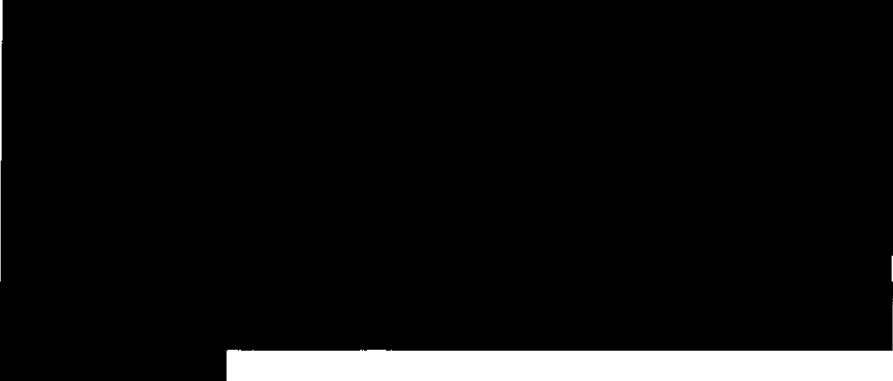
- 7.7.1.1 Construction Manager Rights and Obligations. Subject to Section 2.3, the Construction Manager, through tender of claims insured under Insurance to (and cooperation with) one or more applicable insurers, shall investigate, and, as agent for and on behalf of the applicable Owners and subject to Section 7.7.1.2, adjust, defend and settle insured claims against any Owner, arising out of or attributable to the Services and the Construction Work, asserted by any Person (other than an Owner) against any one or more of the Owners, so long as such claim is within the scope of coverage and policy limits provided by any of the applicable insurance policies maintained in accordance with Appendix E, as it may be amended by the Management Committee, and to the extent such claim is monetary in nature only.
- 7.7.1.2 Limitation on Construction Manager Rights and Obligations. The right of the Construction Manager to settle insured claims as described in Section 7.7.1.1 is conditioned upon: (i) payment of the claim within the coverage limits of the insurance policies described in Section 7.7.1.1; **provided, however**, the existence of commercially reasonable deductibles, self-insured retentions and co-insurance limits will not affect such settlement rights; (ii) monetary relief being the sole relief provided; and (iii) the satisfaction of the conditions set forth in Section 7.7.2.2(i) and (iii).
- 7.7.1.3 No Right to Settle Independently. No Owner has the right to independently settle any claim for which the Construction Manager has authority to adjust, defend and settle under the provisions of this Section 7.7.1.

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7.7.2 Uninsured Claims Against Owners.

7.7.2.1 Construction Manager Rights and Obligations. The Construction Manager shall investigate and, subject to the provisions of Section 2.3 and Section 7.7.2.2, as agent for and on behalf of the applicable Owners, adjust, defend and settle uninsured claims of Third Parties arising out of or attributable to the Services or the Construction Work, against any one or more of the Owners and for which no insurance coverage is available for payment of such claim or claims or for which an insurance carrier has issued notice denying coverage for such claim or claims.

7.7.2.2 Limitation on Construction Manager Rights and Obligations. Except with the written consent of each Owner affected thereby, the Construction Manager does



7.7.2.3 Limitation on Owner Rights.



7.7.2.4 Owner Limited Right Participation. Each Owner will be entitled to participate in the prosecution, defense or settlement of any claim or Proceeding undertaken by the Construction Manager pursuant to Section 7.7.1 or 7.7.2 (subject to an Owner's right to independently act on its own behalf with respect to claims against it as described in Section 7.7.2.3); **provided**, that such participation will be limited to observation, comment to, and consultation with the Construction Manager and its counsel (subject to an Owner's right to independently act on its own behalf with respect to claims against it as described in Section 7.7.2.3) and the counsel selected by such Owner will not appear on such Owner's behalf in any Proceeding related to such claim. Each Owner shall bear the fees and expenses of any additional counsel retained by it to participate in the prosecution or defense of any claim or Proceeding. Notwithstanding the foregoing, if any affected Owner delivers an

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opinion of counsel to the Construction Manager and the other Owners stating that there is a conflict of interest that would make it inappropriate under applicable standards of professional conduct for such affected Owner to be represented by common counsel, then: (a) each Owner will be entitled to employ counsel of its own choosing and the costs of counsel and defense for each Owner will not constitute CM Costs and (b) the Construction Manager shall not prosecute such claims for the Owners but will reasonably assist each Owner in connection with its prosecution, defense or settlement of such claims.

7.7.2.5 Maximum Amounts.



- 7.8 **Claims Against Third Parties.** The Construction Manager has the authority to investigate, present, prosecute, settle (subject to satisfaction of the conditions set forth in Section 7.7) and enforce (directly or indirectly) any and all claims on behalf of the Owners against any Contractor or Subcontractor or CM Subcontractor (including WMMPA or its Affiliate acting in such capacity, but not including OTP or its Affiliate acting in such capacity) arising out of the Services or the Construction Work. The Construction Manager shall also pursue claims against any other Person upon the direction of the Management Committee.
- 7.9 **Prohibition Against Liens.** The Construction Manager shall make commercially reasonable efforts not to permit Liens filed in connection with the Services or the Construction Work to remain in effect other than: (i) Liens for taxes or assessments not yet delinquent; (ii) Liens for workers' compensation awards, unemployment insurance and other types of social benefit obligations not yet delinquent; (iii) unperfected Liens incurred in the ordinary course of business and not in connection with the borrowing of money, including Liens arising from the employment of labor or the acquisition of Equipment, Materials or Consumables; (iv) Liens for Services or Construction Work for which the Owners have not deposited funds for payment; and (v) Permitted Owner Liens (collectively, **'Permitted Liens'**); **provided, however,** the Construction Manager will not be required to discharge or otherwise satisfy a Lien filed in connection with the Services or Construction Work as long as the Construction Manager is timely contesting such Lien in accordance with Applicable Law and the Property subject to such Lien is not subject to imminent sale or foreclosure; **provided, further,** if any such Lien has been perfected and has not been discharged or otherwise satisfied within one hundred twenty (120) days of its perfection, the Construction Manager, after consultation with the Management Committee, shall make adequate provision to discharge or otherwise satisfy such Lien. The cost to discharge or otherwise satisfy a Lien of record is a CM Cost, except to the extent the filing of the Lien was caused by the intentional misconduct or willful misconduct of the Construction Manager.
- 7.10 **Compliance with Applicable Law.** The Construction Manager shall comply with Applicable Law in the performance of its obligations under this Agreement.

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- 7.11 **Business Standards.** The Construction Manager, in performing its obligations under this Agreement, shall establish and maintain in effect appropriate business standards, procedures and controls to avoid: (i) any real or apparent impropriety that might materially and adversely affect the reputation of any of the Owners or (ii) violation of any Applicable Law. The Construction Manager shall ensure compliance by all of the Construction Manager's personnel and CM Subcontractors with the obligations set forth in this Section 7.11, which obligations will apply to the activities of all such personnel and CM Subcontractors with other Construction Manager personnel, each Owner and its respective Affiliates relating to this Agreement or the Project Component. Such obligations include establishing precautions to prevent any Construction Manager personnel from making, receiving, providing or offering any gifts, entertainment, payments, loans or other consideration that could constitute any real or apparent impropriety that might adversely affect the reputation of any of the Owners or violate any Applicable Law.
- 7.12 **Responsibility for Project Documents and Records.**
- 7.12.1 **Retention of Records.** The Construction Manager shall, in accordance with Good Utility Practice, maintain or cause to be maintained, all material Project Component-related records generated or received by it in connection with its performance of the Services, the Construction Work or both, including:
- (i) drawings, plans, specifications, other design documentation, other construction documentation, including schedules, correspondence, minutes of meetings, daily logs, Progress Reports, currently marked and as-built documentation and similar construction or technical data;
 - (ii) Construction Agreements and Change Orders and amendments thereto and CM Subcontracts and change orders and amendments thereto, including all records relating to the procurement of Equipment and Materials;
 - (iii) Real Property Agreements and amendments thereto, closing documentation pursuant to which Project Component Real Property is acquired, surveys, title insurance policies and other documents related to the acquisition, use, title or restrictions upon Project Component Real Property;
 - (iv) financial records pursuant to which the Construction Manager will seek payment or reimbursement hereunder for the performance of Services (including Services performed by its CM Subcontractors), including payroll records, other personnel records, books of account, records of monies expended or received, financial obligations incurred, credits accrued, as well as other documentation used by the Construction Manager to accumulate financial and statistical data in connection with the Services;
 - (v) records required pursuant to Section 8.1, including financial records in support of amounts it is required to pay or approve for financial credit as CM Costs, including payments to Contractors, CM Subcontractors or other Persons; together with all documentation provided by such Persons to justify either the payment of amounts owed to them or the amounts incurred by them for which they are entitled to credit;
 - (vi) all Governmental Approvals relevant to the design or construction of the Project Component together with related applications, notices of violation and related correspondence with Governmental Bodies;

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- (vii) all sales and use tax records, including documents relating to payments, refunds, exemptions or other communications with Governmental Bodies relating to such taxes;
- (viii) all records relating to Third Party Claims and Third Party Environmental Claims by or against the Construction Manager or the Owners arising out of this Agreement;
- (ix) all records relating to Insurance policies or claims thereunder;
- (x) all records of incidents requiring medical attention in connection with the performance of the Services or Construction Work; and
- (xi) all other documents relating to the Project Component or any portion thereof, generated or received by the Construction Manager in connection with the performance of its obligations under this Agreement (collectively, all of the foregoing, “**Records**”).

All Records maintained by the Construction Manager are to be maintained in accordance with the Construction Manager’s standard document retention practices. Subject to Section 7.12.3, the Construction Manager shall provide copies (by hard copy or in electronic format) of Records to each Party with a reasonable period of time after request therefore, at such Owner’s expense.

7.12.2 Transfer and Disposal. The Construction Manager may destroy or dispose of Records if they have been retained for at least five (5) years after Final Completion if it has first offered to transfer such Records to those Owners that require such Records for its or their purposes in lieu of destroying or disposing of them and no Owner, within thirty (30) days of receipt of the Construction Manager’s offer, requests such Records to be transferred to it. Otherwise, the Construction Manager shall transfer such Records to the Owner that requests them. If more than one Owner requests them, the Management Committee shall vote to decide which Owner will become the custodian of such Records. Any Owner accepting custody of such Records shall provide access to them to the other Owner on the terms set forth in this Section 7.12 and must make them available for transfer to the other Owner on substantially the same conditions as set forth in this Section 7.12.2 if at any time it no longer wishes to retain custody of such Records.

7.12.3 Record Availability. The Construction Manager shall make all Records it is required to retain under this Agreement pursuant to Section 7.12.1 available to: (i) the Independent Accountants and (ii) except as provided below, the Owners for inspection (and copying) and audit. The Construction Manager will make the Records available at the Construction Manager’s principal place of business or other agreed location provided that the requesting Owner provides at least ten (10) Business Days’ notice of its request therefor. The Construction Manager shall not make the Records described in Sections 7.12.1(iv) and (v) (and other financial records) available to any other Party except in accordance with a protocol adopted by the Management Committee that will be designed to avoid use of such information by the receiving Owner in any manner that could violate Applicable Law. If no such protocol is adopted by the Management Committee, the terms of the preceding sentence will not restrict a Party’s right to access the records described therein.

7.13 Surplus Items. The Construction Manager, in the performance of the Construction Management Services, shall take commercially reasonable precautions to minimize the amount of surplus

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Equipment, Materials, Construction Aids and Consumables. Subject to the prior approval of the Management Committee, the Construction Manager shall: (i) provide surplus items to the Maintenance Provider, as it or they may request, and (ii) sell or otherwise properly dispose of the remainder. Proceeds received by the Construction Manager in connection with any sale or other disposition must be deposited in the Main Escrow Account as directed by the Management Committee, for the benefit of the Owners according to their Ownership Percentages, within fifteen (15) Business Days after receipt.

- 7.14 **Post-Term Services.** The Parties recognize that upon expiration of the Term certain of the Services may not have been entirely performed and additional Services may be necessary. Without limiting the generality of the foregoing, the Parties recognize, for example, that disputes arising from the Services and the Construction Work may not be entirely resolved and Sales Tax and other tax related matters may still be pending. Accordingly, each Owner and the Construction Manager agree to discuss the need and applicable terms and conditions for post-Term Services no less than ninety (90) days prior to the projected expiration date of the Term. The Parties further agree in good faith to enter into an agreement for the performance of such additional services by the Construction Manager on substantially the same payment and liability terms as are set forth in this Agreement.

ARTICLE 8
FINANCIAL ACCOUNTS; REPORTING; INDEPENDENT ACCOUNTANTS

- 8.1 **Accounts.** The Construction Manager will strictly account for all funds that it deposits in or withdraws from the Main Escrow Account and report all receipts and disbursements made under this Agreement, including all funds paid for the Services and the Construction Work. The Construction Manager's books and records of account with respect to the Services and the Construction Work and other financial, Construction Work, and Project Component Real Property acquisition records must be current, complete, true and correct in all material respects. All such books and records must be organized and indexed, and consistent with all financial and other reports provided hereunder. Subject to Applicable Law, all books and records of the Construction Manager required to be maintained under this Agreement will be maintained at its principal place of business. Any Owner, at its own expense, will be entitled to inspect such books and records during business hours on at least five (5) Business Days' notice to the Construction Manager.
- 8.2 **Progress Reports.** The Construction Manager shall prepare and submit to the Management Committee monthly written reports (each, a "**Progress Report**") in accordance with Section 6.2.3(i) and in a form reasonably acceptable to the Management Committee. Each Progress Report shall include a narrative description of the status of the Project Component, information regarding key activities performed during the month in question, updates on progress towards achieving key milestones, a summary of the financial status of the Project, including a comparison of actual costs incurred to the Project Component Budget, a summary of payroll information for the Services rendered, identifying, at a minimum, total costs for all labor and specifying hours and employee labor classification, and such additional information as an Owner may reasonable request. The Progress Report shall include updates in regards to procuring Major Contracts and items procured for the Project Component including both retrospective information regarding procurements completed and prospective information regarding procurements to be completed. Each Progress Report shall include forecasted cash flows for at least the next two months. Unless the Management Committee determines it is unnecessary, after the completion of each calendar year (or other "agreement year" established by the Management Committee) during the Term, the CM Costs paid under this Agreement or credited in accordance with the Project Ownership Agreement will undergo an annual agreed upon audit procedure determined by the Management Committee and to be conducted by a public accounting firm experienced in utility and regulated

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industry accounting (the '**Independent Accountants**'). The Independent Accountants will be selected by the Management Committee and then retained by the Construction Manager pursuant to a written engagement letter for the applicable year. The audit report of the Independent Accountants will be completed and issued to the Construction Manager and each of the Owners within seventy-five (75) days after the applicable annual review period. The Owners and the Construction Manager shall all reasonably cooperate with the Independent Accountants' requests as part of such reporting process, including providing access to Records.

- 8.3 **Final Completion Report.** The Construction Manager shall prepare and distribute to the Management Committee and each Owner a Final Completion report within a commercially reasonable period of time following termination of this Agreement, which must include a complete cost report for the Services, the Construction Work and the acquisition of the Project Component Real Property together with such other amounts that may be paid upon termination as provided in Sections 15.2.3.4 and 15.2.3.5.

ARTICLE 9
OWNERS' RIGHTS AND DUTIES

- 9.1 **Owners Act Through Management Committee.** Oversight and management of matters arising under this Agreement by the Owners will, except as otherwise provided in this Agreement, be determined by the Management Committee.

9.1.1 **Restriction on Rights, Duties and Responsibilities of the Management Committee.**

Notwithstanding anything to the contrary in this Agreement, the Management Committee will not have the power or authority to direct the means, manner or methodology used by: (i) the Construction Manager to carry out the Services; (ii) any Contractor to carry out Construction Work; or (iii) any Owner to carry out the Substation Work.

- 9.1.2 **Rights.** In carrying out the duties and responsibilities set forth in this Article 9, the Management Committee (unless otherwise provided in this Agreement) has all requisite rights, power and authority, including:

- (i) the right to receive such information (subject to Section 7.12.3) from the Construction Manager as the Management Committee may reasonably request;
- (ii) the right to provide direction to, and develop policies for, the Construction Manager with respect to the Construction Manager's authority to act as an agent pursuant to Sections 2.3, 3.1 and 7.7;
- (iii) the right to develop policies for the Construction Manager with respect to any matter under this Agreement; and
- (iv) the right to inspect Construction Work during the Term at reasonable times and without unduly hindering ongoing Construction Work, which right will extend, subject to reasonable coordination by the Management Committee, to each Owner, the Financing Parties and Financing Party Agents (as required in connection with an Owner's Financing).

- 9.1.3 **Owners bound by Management Committee** . In all matters concerning or arising under this Agreement that require direction or a vote of the Management Committee to be

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effective, each Owner will be bound by the written communications, directions, requests and decisions made by the Management Committee.

- 9.2 **No Direct Owner Contact with Contractors and Subcontractors.** Except as otherwise provided in the Construction Agreements, except upon reasonable notice to, and when direct communications have been specifically authorized by, the Construction Manager, with respect to all matters pertaining to the Construction Work, an individual Owner will not give direction to Contractors, CM Subcontractors or Subcontractors except through the Construction Manager, but each Owner will be permitted to communicate with Contractors, CM Subcontractors and Subcontractors as reasonably necessary for the coordination of its Substation Work.
- 9.3 **Authorized Personnel.** Each Owner shall file with the Construction Manager a list of all individuals who are authorized to sign documents such as contracts, certificates, Governmental Approvals and affidavits on behalf of such Owner and to fully bind such Owner to all conditions and provisions of such documents. In all matters concerning or arising under this Agreement, each Owner will be bound by the written communications, directions, requests and decisions made by its respective Owner designee. The appointment of each Owner designee will remain in full force and effect until a written notice of substitution is delivered by such Owner to the Construction Manager and the Authorized Owner Representatives of the other Owner.
- 9.4 **Property Interests.** All Property of the Project Component (which includes any and all rights and licenses, express or implied) that arises as a result of the Services, Construction Work or both, accrues to the benefit of the Owners as set forth in the Project Component Agreements. During the Term, each Owner hereby authorizes the Construction Manager to use all such Property rights and interests as necessary for the Construction Manager to perform its obligations under this Agreement.
- 9.5 **Project Component Real Property.** Each Owner shall cooperate with, support and assist the Construction Manager in obtaining all Project Component Real Property that, in accordance with Applicable Law, must be obtained in the name of the Owners (individually or collectively), including preparing documentation to be submitted by the Construction Manager to any Governmental Body in connection therewith.
- 9.6 **Owner Governmental Approvals.**
- 9.6.1 **Owner Compliance Obligations.** Each Owner shall comply with any condition applicable solely to it under the terms of any Governmental Approval that becomes a Final Order and the costs and expenses associated with compliance with such condition(s) will be the sole liability and obligation of such Owner.
- 9.6.2 **Right to Cure.** If any Owner described in Section 9.6.1 fails to comply with the conditions described in Section 9.6.1, the Construction Manager may, but will not be obligated to, seek authority from the Management Committee to cure such breach or default by such Owner, including making any required payment or performing any required act. For purposes of the reimbursement of the Construction Manager, and without limiting the right of the Management Committee to seek reimbursement from the offending Owner, any amount so paid or incurred by the Construction Manager will be treated as if it constituted CM Costs incurred in furtherance of the Services. The making of such payment or the doing of such act by the Construction Manager will not operate to cure such default or to estop the applicable Owners from the pursuit of any remedy to which the applicable Owners may be entitled pursuant to the Project Component Agreements.

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- 9.7 **Owner's Insurance Requirements.** The Owners and the Construction Manager shall comply with the respective insurance obligations imposed on them in Appendix E.
- 9.8 **Scheduling.** Subject to the requests of the Construction Manager and the requirements of Applicable Energy Regulations, a Discretely Owned Substation Owner shall coordinate any outage of such Discretely Owned Substation Asset necessary to enable the connection of the Project Component to the electrical terminal points on the Transmission Grid in accordance with the Construction Work Schedule, including permitting installation of all breakers, relays, switches, synchronization Equipment, communications Equipment and other protective and control devices and metering Equipment for full hook-up and parallel operation at the specified voltage level and in accordance with Applicable Energy Regulations. Each Discretely Owned Substation Owner shall further be responsible for coordinating outages at its Discretely Owned Substation Assets as necessary to permit Commissioning and Energization.
- 9.9 **Right to Stop Construction Work.** The Management Committee may, with or without cause, order the Construction Manager to cause any Contractor to suspend, delay or interrupt the performance of Construction Work in whole or in part for such period of time as the Management Committee may determine, subject to the provisions of the applicable Construction Agreements.
- 9.10 **Construction Manager Deficiency Claim.** If an Owner raises an objection regarding the Construction Manager's material lack of performance of its obligations under this Agreement, it shall notify the Construction Manager and the other Owner in writing, and provide a detailed account and explanation of the claimed deficiency in performance. Within ten (10) days after such notification (or such other period of time agreed to by the Parties), the Construction Manager and the Owners will meet to discuss the objections made by the objecting Owner and determine jointly whether such performance deficiencies can be agreed upon. If the performance deficiencies can be agreed upon, the Construction Manager shall establish a written remediation plan to correct the deficient performance and promptly deliver the plan to the Owners for approval. If the Construction Manager and the Owners cannot agree upon the adequacy of performance of the Construction Manager, either the Construction Manager or the Owner that is not the Construction Manager shall have the right to request that the matter be the subject of dispute resolution as set forth in Schedule 1 of this Agreement. If the matter is taken to dispute resolution, the finding of the decision maker shall be binding upon the parties.
- 9.11 **Coordination of Requests.** Subject to Section 7.12.3, each Owner, at its expense, has the right to audit or inspect Records, whether kept by the Construction Manager or others, and each Owner understands that such audit or inspection involves planning and resources by the custodian of such Records. Accordingly, each Owner agrees that it will endeavor to coordinate its requests for inspection or audit with the other Owners.
- 9.12 **Cooperation of Discretely Owned Substation Owners.** Subject to the requirements of Applicable Energy Regulations, each Discretely Owned Substation Owner shall reasonably cooperate with the Construction Manager to facilitate the upgrade or interconnection of its Discretely Owned Substation Assets as is required to accommodate the Project Component.
- 9.13 **Access Rights.** Each Owner hereby grants to the Construction Manager rights of access, ingress and egress to and from its Discretely Owned Substation Assets, at no cost, as reasonably necessary or convenient for the purpose of performance of the Construction Management Services. Such access, ingress and egress shall be subject to such Owner's applicable rules and regulations applicable to entities engaged in construction, construction management, or related activities and the specific Construction Agreements relating thereto.

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- 9.14 **Owner Responsibility for Substation Work.** The respective Owners are responsible for procuring, constructing, installing and placing in service each of the Discreetly Owned Substation Assets. Each Owner agrees to undertake such responsibilities on a schedule reasonably consistent with the Construction Work Schedule. If an Owner responsible for procuring, constructing, installing and placing in service a Discreetly Owned Substation Asset is in material default with respect to such obligation, the non-defaulting Owner shall have such remedies as set forth in the Project Ownership Agreement.

ARTICLE 10
REPRESENTATIONS AND WARRANTIES

- 10.1 **Representations and Warranties of the Construction Manager.** The Construction Manager, on and as of the Effective Date, makes the following representations and warranties, which representations and warranties survive the execution and delivery of this Agreement:
- 10.1.1 **Organization and Good Standing.** The Construction Manager is a corporation organized, existing and in good standing under the laws of the state of its formation or incorporation, as the case may be, and is authorized to conduct business in each state in which authorization may be required to perform its obligations under this Agreement.
- 10.1.2 **Power and Authority.** The Construction Manager has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 10.1.3 **Authorization.** The Construction Manager has taken all action required by Applicable Law and its governing documents in order to approve, execute and deliver this Agreement.
- 10.1.4 **No Violation.** The execution and delivery of this Agreement by the Construction Manager, the performance by the Construction Manager of its obligations hereunder and the consummation by the Construction Manager of the transactions contemplated herein do not and will not: (i) contravene any Applicable Law in effect as of the Effective Date or any Order in effect as of the Effective Date of any Governmental Body or arbitrator having jurisdiction over the Construction Manager or its Property or (ii) result in a breach or violation of any of the terms and provisions of, or constitute a default under, any indenture, mortgage, deed of trust or other agreement in effect as of the Effective Date and to which the Construction Manager is a party or by which it or its Property is bound.
- 10.1.5 **Approvals and Consents.** No approval, consent or authorization of any Governmental Body or other Person is required for the execution and delivery by the Construction Manager of this Agreement or the performance by the Construction Manager of its obligations hereunder, except such approvals, consents or authorizations that have been given or obtained by the Construction Manager and are in full force and effect.
- 10.1.6 **Binding Effect.** This Agreement has been executed and delivered by the Construction Manager. Assuming that each Owner has all the requisite power and authority and has taken all necessary action to execute and deliver this Agreement, this Agreement is the legal, valid and binding obligation of the Construction Manager enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditor's rights (e.g., bankruptcy, insolvency, moratorium) or by the exercise of judicial discretion in accordance with general principles of equity.

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- 10.2 **Representations and Warranties of Owners.** Each Owner, severally and not jointly, on and as of the Effective Date makes the following representations and warranties, which representations and warranties survive the execution and delivery of this Agreement:
- 10.2.1 **Organization and Good Standing.** Such Owner is a corporation organized, existing and in good standing under the laws of the state of its formation or incorporation, as the case may be, and is authorized to conduct business in each state in which authorization may be required to perform its obligations under this Agreement.
- 10.2.2 **Power and Authority.** Such Owner has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 10.2.3 **Authorization.** Such Owner has taken all action required by Applicable Law and its governing documents in order to approve, execute and deliver this Agreement.
- 10.2.4 **No Violation.** The execution and delivery of this Agreement by such Owner, the performance by such Owner of its obligations hereunder and the consummation by such Owner of the transactions contemplated herein do not and will not (i) contravene any Applicable Law in effect as of the Effective Date or any Order in effect as of the Effective Date of any Governmental Body or arbitrator having jurisdiction over such Owner or its Property or (ii) result in a breach or violation of any of the terms and provisions of, or constitute a default under, any indenture, mortgage, deed of trust or other agreement in effect as of the Effective Date and to which such Owner is a party or by which it or its Property is bound.
- 10.2.5 **Approvals and Consents.** No approval, consent or authorization of any Governmental Body or other Person is required for the execution and delivery by such Owner of this Agreement, or the performance by such Owner of its obligations hereunder, except: (i) such approvals, consents or authorizations that have been given or obtained by such Owner and are in full force and effect or (ii) as set forth in Schedule 10.2.5 of this Agreement.
- 10.2.6 **Binding Effect.** This Agreement has been executed and delivered by such Owner. Assuming that the other Owner and the Construction Manager have all the requisite power and authority and have taken all necessary action to execute and deliver this Agreement, this Agreement is the legal, valid and binding obligation of such Owner enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditor's rights (e.g., bankruptcy, insolvency, moratorium) or by the exercise of judicial discretion in accordance with general principles of equity.

ARTICLE 11
COMPLETION AND ACCEPTANCE OF WORK

- 11.1 **Commissioning and Energization.** The Construction Manager shall supervise, manage and/or oversee the performance of all tasks necessary for Commissioning and Energization of the Project Component, including the performance of all inspection, testing, operations and other tasks inherent in Commissioning and Energization in accordance with Good Utility Practice and the Equipment manufacturer's procedures. The Construction Manager shall oversee the turning over of the Project Component to the applicable Maintenance Provider and Control Center Authority.

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- 11.1.1 **No Performance Guarantees.** Each Owner acknowledges that the Construction Manager is neither providing any performance guarantees nor guaranteeing successful Commissioning or Energization of the Project Component. The Construction Manager's sole obligation with respect to Commissioning and Energization of the Project Component is to supervise, manage and oversee the applicable tests inherent in the processes of Commissioning and Energization with the objective being to verify that the same are conducted in accordance with the applicable procedures for testing and Commissioning and Energization set forth in the Construction Agreements and such other procedures as may have been developed by the Construction Manager in accordance with Good Utility Practice in the performance of the Construction Management Services and to otherwise comply with the provisions of this Section 11.1.
- 11.1.2 **Notices of Proposed Energization and Energization.** When the Construction Manager believes that the Project Component is ready for Energization, it shall deliver to the Management Committee a notice of proposed Energization (the "**Notice of Proposed Energization**"). Energization of the Project Component shall not commence until the Management Committee approves the Notice of Proposed Energization, which shall not be unreasonably withheld. Following approval to commence Energization by the Management Committee, when the Construction Manager believes that the Project Component has successfully completed Energization, it shall deliver to the Management Committee a notice that energization of the Project Component has been completed (the "**Notice of Energization Completion**").
- 11.1.3 **Notice of Deficiency.** Following receipt of a Notice of Proposed Energization, the Management Committee or any Owner shall notify the Construction Manager at the earliest possible date of any inadequacy, inaccuracy or otherwise unacceptable information or result set forth in the notice. If the Management Committee or any Owner reasonably determines, after consultation with the Construction Manager, that the Notice of Proposed Energization is inadequate or that Energization has not been successfully completed, the Management Committee or Owner, as applicable, shall notify the Construction Manager of such determination, specifying in reasonable detail the basis therefor. The Construction Manager shall promptly take such action, as is permitted under the applicable Construction Agreements, directing the Contractors to make such corrections or to perform additional Construction Work to address the concerns noted by the Management Committee. Upon such Contractors' completion thereof and the Construction Manager's confirmation, the Construction Manager shall promptly issue to the Management Committee an updated Notice of Proposed Energization Commencement for approval. Such procedure for submittal of Notices of Proposed Energization will be repeated as necessary until the Management Committee approves the notice.
- 11.1.4 **Coordination Meeting.** Not less than thirty (30) days prior to the projected start of Energization, the Construction Manager shall meet with the applicable Maintenance Provider and Control Center Authority for the purpose of coordinating continuing access to the Project Component to allow unfinished Construction Work to be completed without undue interference with the responsibilities of the Maintenance Provider or the Control Center Authority under the OMA. The Construction Manager shall coordinate the performance of warranty work by Contractors or Subcontractors when such work is to be performed after the Project Component has been placed in service but prior to the expiration of the Term. The Construction Manager understands that operation of the Project Component, after having been placed in service, is subject to Applicable Energy Regulations. The Construction Manager and each applicable Maintenance Provider,

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Control Center Authority and Discretely Owned Substation Owner, subject to Applicable Energy Regulations, shall cooperate to ensure that once the Project Component is placed in service, the progress of the Construction Work and the Substation Work can proceed without undue interference from the performance of the obligations of the Maintenance Provider or the Control Center Authority under the OMA and that operation and maintenance of the Project Component will not be impaired by such Construction Work and the Substation Work, except as agreed by the Construction Manager, the applicable Maintenance Provider, the applicable Control Center Authority and the applicable Discretely Owned Substation Owner. Prior to the placement of the Project Component in service, the Construction Manager shall provide to the applicable Maintenance Provider, Control Center Authority or Discretely Owned Substation Owner any portion of the Project Component Design Book that the Maintenance Provider, Control Center Authority or Discretely Owned Substation Owner may need to maintain or repair the Project Component, including currently marked drawings showing the location of the Project Component placed in service.

- 11.2 **Substantial Completion.** The Construction Manager shall notify the Management Committee in writing when the Construction Manager believes that Substantial Completion has been accomplished or when such notice is otherwise required to be given under the applicable Construction Agreements (**‘Notice of Substantial Completion’**). The Notice of Substantial Completion must include the information required by Section 11.3, together with a written statement by the Construction Manager as to whether the Construction Manager agrees that Substantial Completion has been achieved and, if not, reasonable detail regarding the basis of the Construction Manager’s determination that Substantial Completion has not been achieved, including any time constraints imposed by the applicable Construction Agreements with respect to any action required regarding the same. The Management Committee shall review and promptly vote to accept or reject each Notice of Substantial Completion and deliver to the Construction Manager a notice indicating that, in the determination of the Management Committee, after consultation with the Construction Manager: (i) Substantial Completion has occurred or (ii) Substantial Completion has not been achieved, in which latter event, such notice will set forth in reasonable detail the basis of the Management Committee’s determination. In the event that the Management Committee notifies the Construction Manager that, in its determination, Substantial Completion has not been achieved, the Construction Manager shall promptly take such action as may be taken under the applicable Construction Agreements, directing the Contractors to make such corrections or perform additional Construction Work as will likely effect achievement of Substantial Completion. The Construction Manager shall diligently continue working with the Contractors in accordance with the Construction Agreements to supervise, administer and oversee the performance of Construction Work until Final Completion is achieved.
- 11.3 **Creation of Punch List.** Each notice delivered by the Construction Manager pursuant to Section 11.2 must include a list of all minor items of the Construction Work that have been identified by or disclosed to the Construction Manager that remain to be completed but do not affect operation of the Project Component in accordance with Good Utility Practice (which elements must not include items that may affect the safety, performance or reliability of the Project Component) and the proposed schedule for the completion of such remaining Construction Work. The Construction Manager shall confer with the applicable Contractors and attempt to reach agreement upon the detailed list of items of the Construction Work and the schedule for completion of such Construction Work, and the Construction Manager is authorized to reach agreement with a Contractor on behalf of the Owners with respect to same (once agreed to by the Construction Manager and the Contractor, each such document herein a **“Punch List”**). The Construction

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Manager shall supervise, manage and oversee the completion of all Construction Work on each Punch List in accordance with the proposed schedule set forth therein.

- 11.4 **Final Completion.** Following the achievement of Substantial Completion, the Construction Manager shall notify the Management Committee in writing when the Construction Manager believes that Final Completion has been accomplished or when such notice is otherwise required to be given under the applicable Construction Agreements ("**Notice of Final Completion**"). The Notice of Final Completion will include a written statement by the Construction Manager as to whether the Construction Manager agrees that Final Completion has been achieved and, if not, reasonable detail regarding the basis of the Construction Manager's determination that Final Completion has not been achieved, including any time constraints imposed by the applicable Construction Agreements with respect to any action required regarding the same. The Management Committee shall review and promptly vote to accept or reject each Notice of Final Completion and deliver to the Construction Manager a notice indicating that, in the determination of the Management Committee, after consultation with the Construction Manager: (i) Final Completion has occurred or (ii) Final Completion has not been achieved, in which latter event, such notice must set forth in reasonable detail the basis of the Management Committee's determination. In the event that the Management Committee notifies the Construction Manager that, in its determination, Final Completion has not been achieved, the Construction Manager shall promptly take such action as may be taken under the applicable Construction Agreements, directing the Contractors to make such corrections or perform additional Construction Work as will likely affect achievement of Final Completion. The Construction Manager shall diligently continue working with the Contractors in accordance with the Construction Agreements to supervise, administer and oversee the performance of Construction Work until Final Completion is achieved.
- 11.5 **Inspection Opportunities.** The Construction Manager shall give the Management Committee timely notice for all important inspections required to meet Substantial Completion and Final Completion, and allow each Owner to be present.

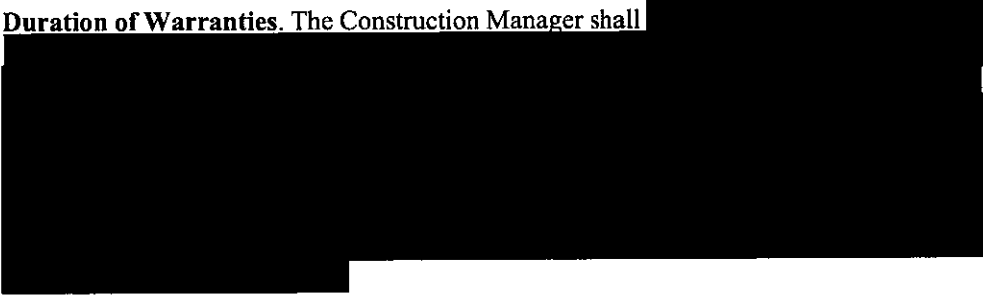
ARTICLE 12
CONSTRUCTION WORK WARRANTIES

- 12.1 **Warranty Requirements for Contractors.** The Construction Manager shall make commercially reasonable efforts to obtain the warranties set forth below in the applicable Construction Agreements with respect to the performance of Construction Work:
- (i) the applicable portion of the Construction Work provided or constructed conforms to the requirements of the applicable Construction Agreement;
 - (ii) the applicable portion of the Construction Work will be free from defects in design (to the extent applicable), workmanship and materials; and
 - (iii) all Contractor Procured Materials will be new and unused, unless otherwise specified in the applicable Construction Agreement, and be free from defects in design and workmanship.
- 12.1.1 **Limitation.** If the Construction Manager, despite its commercially reasonable efforts, is unable to procure the warranties and other terms set forth in clauses (i) through (iii) above from Contractors (or their Subcontractors) and instead obtains different warranties or terms, such results will not constitute a breach or default in the performance of the Construction Management Services; provided, however, any such different warranty terms

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shall be reported to the Management Committee and, if contained in a Major Contract or Major Change Order, must be approved by the Management Committee in accordance with Section 3.4.2.

- 12.1.2 **Scope of Warranties – Subcontractors.** The Construction Manager shall make commercially reasonable efforts to procure from each Contractor pursuant to the respective Construction Agreement, an undertaking on the part of each such Contractor to procure from all Subcontractors customary warranties similar to those set forth in clauses (i) through (iii) above with respect to any Materials, Equipment or services provided by each such Subcontractor and further to require that each of such Subcontractor warranties be enforceable by, or be assignable to, the Owners (acting collectively through a designee selected by the Management Committee) on notice by the Owners.

- 12.1.3 **Duration of Warranties.** The Construction Manager shall
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- 12.1.4 **Enforcement of Warranties.** Except as otherwise directed by the Management Committee, the Construction Manager shall enforce all warranties obtained from Persons under Construction Agreements during the Term. Immediately upon the achievement of Final Completion, the applicable Maintenance Provider shall assume primary responsibility for the enforcement of such warranties and the Construction Manager shall cooperate with the applicable Maintenance Provider to effect a seamless transition of these responsibilities.

- 12.2 **No Warranty By the Construction Manager.** THE CONSTRUCTION MANAGER MAKES NO WARRANTY OR GUARANTY TO ANY OWNER OR ANY OTHER PERSON, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE PROJECT COMPONENT, THE SERVICES OR CONSTRUCTION WORK AND THE CONSTRUCTION MANAGER EXPRESSLY DISCLAIMS, AND EACH OWNER EXPRESSLY WAIVES, ANY AND ALL WARRANTIES IMPLIED BY LAW, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS.

- 12.3 **Manufacturer Information.** The Construction Manager shall collect, organize and promptly offer to each Owner and each applicable Maintenance Provider copies of all manufacturers' notices (including any and all health and safety advisories and notices and material safety data sheets) related to any Equipment, Materials and Consumables supplied by Contractors or any Subcontractor that are received by the Construction Manager. The Construction Manager shall also provide copies of the Project Component Design Book to the Maintenance Provider, including documentation regarding Equipment and Materials comprising the Project Component, design manuals, operation and maintenance manuals and start-up documentation received from any Contractor or any Subcontractor (including manufacturers).

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ARTICLE 13
INDEMNIFICATION

13.1 Third Party Indemnification.

13.1.1 Indemnification by Owners. To the maximum extent permitted by Applicable Law, each Owner shall (i) severally, to the extent of its individual Ownership Percentage, defend, indemnify and hold harmless the Construction Manager, its Affiliates (except for any Affiliate that is a Contractor or Subcontractor) and their respective directors, officers, shareholders, members, partners, employees, and agents from and against Third Party Claims and Third Party Environmental Claims arising from the Project Component, except to the extent such claims arise from an act or omission of the Construction Manager for which the Owners are indemnified under Section 13.1.2 or for which there is contributory negligence under Section 13.1.3, and (ii) defend, indemnify and hold harmless the Construction Manager, its Affiliates (except for any Affiliate that is a Contractor or Subcontractor) and their respective directors, officers, shareholders, members, partners, employees, and agents from and against any Third Party Claims and Third Party Environmental Claims arising from such Owner's Substation Work.

13.1.2 Indemnification by the Construction Manager. To the maximum extent permitted by Applicable Law, the Construction Manager shall defend, indemnify and hold harmless each Owner and its Affiliates (except for any Affiliate that is a Contractor or Subcontractor) and their respective directors, officers, shareholders, members, partners, employees and agents from and against:

- (i) Third Party Claims arising from the Construction Manager's negligent act or omission, gross negligence, intentional misconduct or willful misconduct in connection with the performance of or failure to perform the Services under this Agreement; **provided**, that the liability of the Construction Manager to defend, indemnify and hold harmless for a Third Party Claim arising from the Construction Manager's negligent act or omission (but not gross negligence, intentional misconduct or willful misconduct) will not exceed the amount of proceeds recovered from Insurance with respect to such Third Party Claim; and
- (ii) Third Party Environmental Claims, except claims described in clause (ii) of the definition of Third Party Environmental Claim other than to the extent exacerbated by the gross negligence, intentional misconduct or willful misconduct of the Construction Manager. The Construction Manager's liability to defend, indemnify and hold harmless for a Third Party Environmental Claim arising from its negligent act or omission (but not gross negligence, intentional misconduct or willful misconduct) will not exceed the amount of proceeds recovered from Insurance with respect to such Third Party Environmental Claim.

13.1.3 Contributory Negligence. In the event the Construction Manager incurs any liability with respect to any Third Party Claims or Third Party Environmental Claims for which the Construction Manager is not required to indemnify the Owners pursuant to Section 13.1.2, the total liability and costs incurred by the Construction Manager shall be included as CM Costs and shared by the Owners according to their Ownership Percentages. With respect to Third Party Claims alleging negligence by an Indemnifying Person, such Indemnifying Person will not be responsible for that portion of any award as to which it is determined (whether in the Proceeding brought by the Third Party or in any subsequent Proceeding

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commenced by a Party to determine the allocation of liability) that another Party was negligent to the extent of the specific percentage of negligence allocated to such other Party; **provided, however**, the foregoing will not relieve the Indemnifying Person of its obligation to (i) defend the Indemnified Persons in any such Third Party Claim in accordance with Section 13.1.1, and (ii) indemnify and hold the Indemnified Persons harmless from and against all negligence liability (other than that portion specifically allocated to another Party) in accordance with Section 13.1.1, subject to a right of reimbursement from the Indemnified Person for a proportionate share of defense costs including attorneys' fees if applicable.

13.1.4 **Capacity of Persons.** The provisions in this Article 13 apply to a Party solely in its specified capacity and not to such Party acting in any other capacity.

13.1.5 **Conduct of Claims.** Any Person or its officers, directors, employees or agents entitled to indemnification under this Agreement for any Third Party Claim or Third Party Environmental Claim ("Indemnified Person(s)") shall, promptly after the receipt of notice of any legal action or claim against such Indemnified Person in respect of which indemnification may be sought pursuant to this Section 13.1, notify the Person from whom it seeks indemnity ("Indemnifying Person(s)") of such Third Party Claim or Third Party Environmental Claim. The Indemnifying Person(s) is not obligated to indemnify the Indemnified Person(s) with respect to any such claim if the Indemnified Person(s): (i) fails to notify the Indemnifying Person(s) thereof in accordance with the provisions of this Section 13.1.5 in sufficient time to permit the Indemnifying Person(s) timely to defend against such matter and to make a timely response thereto, including any responsive motion or answer to a complaint, petition, notice or other legal, equitable or administrative process relating to the action or claim and (ii) such failure causes material prejudice to the defense of, or otherwise damages, the Indemnifying Person(s). If a Third Party Claim or a Third Party Environmental Claim is made or brought against the Indemnified Person(s), the Indemnifying Person(s) may, or if so requested by the Indemnified Person(s) shall, assume the defense thereof with counsel of its selection reasonably acceptable to the Indemnified Person(s). In such circumstances, the Indemnified Person(s) shall: (i) at no cost or expense to the Indemnified Person(s), cooperate with the Indemnifying Person(s) and provide the Indemnifying Person(s) with such information and assistance as the Indemnifying Person(s) reasonably requests in connection with such claim and (ii) at its own expense, have the right to participate and be represented by counsel of its own choice in such claim. If the Indemnifying Person(s) assumes the defense of such claim (a) the Indemnifying Person(s) will not be liable for any settlement thereof that is made without its consent and (b) the Indemnifying Person(s) shall control any settlement of such Third Party Claim or Third Party Environmental Claim; **provided, however**, that the Indemnifying Person(s) shall not conclude any settlement that requires any action or forbearance from action or payment (unless paid in full by the Indemnifying Person(s)) or admission by the Indemnified Person(s) or any of its Affiliates without the prior approval of the Indemnified Person(s). The obligations of an Indemnifying Person(s) will not extend to any loss, damage or expense of whatever kind and nature (including all related costs and expenses) to the extent the same results from the taking, after the receipt of notice of such claim against the Indemnified Person(s), by the Indemnified Person(s) of any action (unless required by Applicable Law or applicable legal process) that materially prejudices the successful defense of the claim, without the prior written consent of the Indemnifying Person(s) (such consent not to be required in a case where the Indemnifying Person(s) has not assumed the defense of the Third Party Claim or Third Party Environmental Claim). The Indemnified Person(s) agrees to afford the Indemnifying Person(s) or its counsel the

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opportunity to be present at, and to participate in, conferences with all Persons, including Governmental Bodies, asserting any such claim against the Indemnified Person(s) covered by the indemnity contained in Section 13.1.1 or 13.1.2, as applicable, or conferences with representatives of or counsel for such Person(s).

- 13.2 **Insurer Obligations.** The provisions of this Article 13 and Article 16 are not to be construed so as to relieve any insurer of its obligation to pay any insurance claim in accordance with insurance policies obtained in respect of the Services or the Construction Work.
- 13.3 **Indemnification Costs.** Damages incurred in connection with Third Party Claims and Third Party Environmental Claims constitute CM Costs except to the extent the Construction Manager is obligated to indemnify the Owners therefor pursuant to this Article 13.
- 13.4 **Right to Participate.** The Indemnified Person agrees to afford the Indemnifying Person or its counsel the opportunity to be present at, and to participate in (by attendance and observation only), conferences with all Persons (or their counsel), including Governmental Bodies, bringing or asserting any Third Party Claim against the Indemnified Person.

ARTICLE 14
CONFIDENTIALITY PROVISIONS

- 14.1 **Confidential Information.** Each Owner and the Construction Manager have a proprietary interest in information that will be furnished or exchanged under this Agreement. Each Owner and the Construction Manager shall keep in confidence and shall not: (i) disclose any such information that, in good faith, is proprietary and that, if written, (including electronic information) is specifically marked as "confidential" or, if oral, is identified by the declarant as "confidential," which declaration is followed by written notice confirming such declaration ("**Confidential Information**"), without the prior written permission of the disclosing party or (ii) use Confidential Information for a purpose unrelated to the Project Component, except as provided herein. Each Owner and the Construction Manager agrees (A) to the disclosure by the other parties to this Agreement of Confidential Information to their respective consultants, representatives and to such other Persons as may be necessary for each Owner and the Construction Manager to perform its respective obligations under this Agreement, any other Project Component Agreement, any Construction Agreement or any Real Property Agreement or, in the case of an Owner, to finance or sell or otherwise transfer an Ownership Percentage and (B) with respect to Confidential Information relating to the Project Component, but not Confidential Information of the other Owner, the use by each Owner for other transmission projects in which the Owner has an interest. Each Owner and the Construction Manager agree, with respect to Confidential Information, to hold the same confidential for three (3) years from the earlier to occur of termination of this Agreement or Final Completion of the Project Component, with the exception of CEII which will be disclosed only in accordance with Applicable Law. The provisions of this Article 14 will not apply to information which the receiving Party can substantiate is:
- (a) information that, at the time of disclosure by the disclosing Party, is publicly available or information that later becomes publicly available through no act or omission of the receiving Party or its representative in violation of the terms hereof;
 - (b) information that the receiving Party can demonstrate was in its possession prior to disclosure by the disclosing Party (subject to clause (c) hereof);

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- (c) information received by the receiving Party from a Third Party that, to the best of the receiving Party's knowledge, was not under an obligation to maintain such information on a confidential basis;
- (d) information that the receiving Party either independently developed or had independently developed for it and was not obtained, in whole or in part, from the disclosing Party; or
- (e) information that the disclosing Party authorizes the receiving Party to disclose.

- 14.2 **Required Disclosure.** If an Owner or the Construction Manager (or any Affiliate of such Person): (i) is required by Applicable Law or an arbitrator to disclose Confidential Information or (ii) intends to disclose any Confidential Information in connection with any Proceeding before any Governmental Body with jurisdiction over an Owner's rates, operations or other aspects of its business, it shall provide reasonable prior notice of such impending disclosure to the other Parties (without regard to the capacities of such Parties) to this Agreement, as appropriate, and shall cooperate with the original disclosing Party in its efforts (if any) to obtain an appropriate protective Order or other similar remedy. If, in the absence of a protective Order or other similar remedy, the receiving Party nonetheless (a) in the opinion of its counsel, is required by Applicable Law or (b) determines that it is necessary, in order to get the action or relief it seeks before a Governmental Body, to disclose such Confidential Information, then, except for Confidential Information relating solely to the disclosing Party, it may so disclose such Confidential Information without liability hereunder; **provided, however**, the receiving Party shall furnish only that portion of material which is legally necessary to be disclosed and, upon the original disclosing Party's request, cooperate, to the extent permitted by Applicable Law at the disclosing Party's expense, to obtain assurances that confidential treatment, if possible, will be accorded to such information. Confidential Information subject to this Article 14 may be used in any arbitration or other Proceeding relating to this Agreement.
- 14.3 **Public Disclosure Laws.** Each Owner and the Construction Manager intend that nothing in this Agreement will: (i) cause Confidential Information that would otherwise have been exempt from public access or inspection to become subject to public access or inspection under any Applicable Law regarding public access to information or (ii) make unavailable or waive any exception to or protection under Applicable Law that would otherwise enable any Owner or the Construction Manager to preserve the confidentiality of Confidential Information.
- 14.4 **Public Disclosure.** If an Owner or the Construction Manager intends to make, directly or indirectly, any material public comment, statement or communication (such as a press release) with respect to, or otherwise to disclose or to permit the disclosure of a material non-public aspect of the Project Component or any of the material terms, conditions or other material aspects of this Agreement, it shall use commercially reasonable efforts to first provide to the other Owners and/or the Construction Manager the content of the proposed disclosure and the time and place that the disclosure will be made and provide a reasonable opportunity to comment on the proposed disclosure; **provided**, that no such public comment, statement or communication may contain Confidential Information, except as required by Applicable Law.
- 14.5 **Inadequate Remedy at Law.** Monetary Damages alone would be inadequate to compensate a Party for another Party's breach of its obligations under this Article 14. Each Party accordingly agrees that the original disclosing Party will be entitled to specific performance and other equitable relief by way of an Order granting an injunction or otherwise if the receiving Party breaches or threatens to breach its obligations under this Article 14, which specific performance or other

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equitable relief will be granted without bond or proof of Damages and in addition to any other remedies that the original disclosing Party may have under Applicable Law and the receiving Party shall not plead in defense that there would be an adequate remedy at law.

14.6 Additional Regulatory Requirements.

14.6.1 **Compliance with FERC Standards of Conduct.** The Construction Manager shall not, directly or indirectly, reveal any non-public transmission function information (as defined in 18 C.F.R. §§ 358.3(j), as such rules may be interpreted, amended, or replaced by FERC from time to time, and hereinafter referred to as “**Transmission Information**”) in a manner that violates 18 C.F.R. §§ 358.6 and 358.7, as such rules may be interpreted, amended, or replaced by FERC from time to time. To the extent applicable, a disclosure (inadvertent or otherwise) of Transmission Information by the Construction Manager must be appropriately addressed by the Construction Manager pursuant to 18 C.F.R. § 358.7 or any successor provision.

14.6.2 **Critical Energy Infrastructure Information.** The Construction Manager certifies for itself and its representatives, who may be granted access to “critical energy infrastructure information” (“**CEII**”) as defined in 18 C.F.R. § 388.113(c)(1) or any successor provision, that: (i) it and each of its representatives are aware of the requirements of 18 C.F.R. Part 388 with regard to CEII and (ii) it has no reason to believe that it or its representatives would be restricted from access to CEII. To the extent applicable, a disclosure (inadvertent or otherwise) of CEII by the Construction Manager must be appropriately addressed by the Construction Manager pursuant to 18 C.F.R. § 358.7 or any successor provision.

ARTICLE 15
TERM AND TERMINATION OF AGREEMENT

15.1 Term of Agreement.

15.1.1 **Effective Date.** This Agreement will become effective and be in full force and effect as of the Effective Date.

15.1.2 **Term.** Unless earlier terminated pursuant to the terms of Section 15.2 below, this Agreement will remain in full force and effect until Final Completion (the “**Term**”).

15.2 Termination.

15.2.1 **Rights of Termination.** Prior to the expiration of the Term, this Agreement may be terminated only as follows:

15.2.1.1 **Termination of this Agreement.**

15.2.1.1.1 **By Agreement.** This Agreement may be terminated at any time for any reason or no reason upon the vote of the Management Committee to terminate this Agreement with the written concurrence of the Construction Manager.

15.2.1.1.2 **Zero Ownership Percentage.** If the Ownership Percentage of the Owner that is the Construction Manager becomes zero, the remaining Owner may terminate this Agreement on sixty (60) days’ prior notice

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(but the Construction Manager shall not have the right to terminate this Agreement). Upon the delivery and receipt of such notice, the Construction Manager and the Owners agree to actively and cooperatively work together to transition the performance of the Services to the Person designated by the Management Committee. The Construction Manager further agrees that if the transition requires additional Services to be performed beyond such sixty (60) day period, it shall continue to perform such Services for a reasonable period of time. The costs incurred to effect any such transition Services constitute CM Costs. For clarity, if the Ownership Percentage of the Owner that is the Construction Manager becomes zero, the Construction Manager may perform the Services hereunder exclusively through Subcontractors in accordance with Section 7.2.

- 15.2.1.1.3 For Failure to Cure Curable Construction Period Payment Default. If the Owner acting as the Construction Manager commits a Curable Construction Period Payment Default but fails to cure under the Project Ownership Agreement, the other Owner may terminate this Agreement.

15.2.1.2 Termination For Convenience.

- 15.2.1.2.1 The Management Committee will have, at any time during the Term, the right to terminate this Agreement without Cause, upon not less than ninety (90) days' notice to the Construction Manager if: (i) the Management Committee votes to terminate the Project Component or, as provided in Section 9.9, suspend the Construction Work for more than one hundred eighty (180) days; (ii) the Management Committee votes to adopt a Wind-up Plan (as defined in the Project Ownership Agreement); or (iii) the Project Ownership Agreement terminates.

- 15.2.1.3 Termination of Agreement by Owners for Cause. Subject to the Construction Manager's opportunity to cure (if applicable) as provided in Section 15.2.1.4, the other Owner may terminate this Agreement for one or more of the following reasons ("Cause") upon not less than three (3) Business Days' prior written notice to the Construction Manager, if the Construction Manager has:

- (i) committed an act of dishonesty or fraud involving the Construction Work or in connection with performance of the Services under this Agreement;
- (ii) failed to follow any material policy or directive of the Management Committee of which the Construction Manager had knowledge or of which the Construction Manager should have had knowledge;
- (iii) intentionally abandoned or suspended performance of the Services for at least fourteen (14) consecutive days (other than as contemplated by the Construction Work Schedule) resulting in a suspension in the prosecution of Construction Work for any reason other than by directive of the Management Committee, Force Majeure or as otherwise permitted by this Agreement;

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- (iv) assigned its rights or obligations as the Construction Manager under this Agreement or any part thereof to any Person without the prior written consent of the Management Committee or the interest of the Construction Manager in this Agreement passes to any Person otherwise than as herein permitted (provided that the use of CM Subcontractors as permitted under this Agreement shall not constitute a transfer);
- (v) failed or refused to perform any obligation under the Agreement, which failure or refusal results in a material adverse effect on the Construction Work, other aspects of the Project Component or any of the Owners;
- (vi) failed or refused to comply with any Applicable Law, which failure or refusal results in a material adverse effect on the Construction Work or other aspects of the Project Component or any of the Owners;
- (vii) breached a Major Contract as a result of gross negligence, intentional misconduct or willful misconduct, the consequences of which results in the termination of such Major Contract, material liability, or the acceleration of the Owners' obligations thereunder;
- (viii) experienced an Insolvency Event; or
- (ix) committed a breach of fiduciary duty when acting as an agent hereunder.

15.2.1.4 Construction Manager Opportunity to Cure. Notwithstanding anything in this Agreement to the contrary, the events described in clauses (ii) through (v) and (ix) of Section 15.2.1.3 above will not constitute Cause unless and until the Construction Manager has failed to cure such default within thirty (30) days after delivery of notice from the applicable Owner who is not the Construction Manager asserting one or more such events have occurred or, in the case of a curable default that cannot be cured within thirty (30) days, has failed to initiate, within such thirty (30) days, actions reasonably likely to cure such default and to diligently pursue such cure to completion within ninety (90) days after notice to the Construction Manager concerning such default.

15.2.1.5 Termination of this Agreement by the Construction Manager for Good Reason. The Construction Manager may terminate this Agreement for Good Reason upon not less than thirty (30) days' prior written notice to the Management Committee. "Good Reason" means:

- (i) failure of the Owner that is not the Construction Manager to make the payments required hereunder and the failure of the Owner that is not the Construction Manager to cure such default within fifteen (15) days of the date of a notice by the Construction Manager to such Owner demanding cure;
- (ii) except as provided in clause (iii) below, suspension of all or nearly all Services and Construction Work by the Management Committee for ninety (90) consecutive days through no act or fault of the Construction Manager;

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(iii) suspension of all or nearly all Construction Work by Order or Emergency for one hundred eighty (180) days through no act or fault of the Construction Manager or its CM Subcontractors; or

(iv) failure or refusal of the Owner that is not the Construction Manager or the Management Committee, as applicable, to perform any other obligation under this Agreement which failure or refusal results in a material adverse effect on the Construction Work, the Services or the Construction Manager; **provided, however,** such failure or refusal will not constitute Good Reason unless and until such Owner or the Management Committee, as applicable, has failed to cure such default within thirty (30) days after delivery of a notice from the Construction Manager, or, in the case of a curable default which cannot be cured within thirty (30) days, has failed to initiate, within such thirty (30) days, actions reasonably likely to cure such default and to diligently pursue such cure to completion within ninety (90) days after such notice concerning such default.

15.2.2 Construction Manager Suspension Right. In addition to the termination rights set forth in Section 15.2.1, if: (i) the Owner that is not the Construction Manager fails to: (a) pay amounts due by the Owners hereunder as and when due; (b) maintain the insurance required to be maintained by the Owners hereunder; or (c) perform any of its other obligations hereunder, in each case such that continued performance of the Services by the Construction Manager hereunder becomes commercially unreasonable, would violate Applicable Law or would subject the Construction Manager to unreasonable liability; or (ii) the Construction Manager receives any directive as a result of a dispute resolution process to continue Construction Work when such work is not authorized hereunder or will exceed the Maximum CM Cost Amount; (iii) the Management Committee materially expands the Scope of Work and/or the Services required in support thereof (without offsetting reductions) without an adjustment of the Project Component Budget and the Maximum CM Cost Amount, as required under this Agreement and corresponding verification of the availability from each Owner individually of its share of any necessary increase in funding requirements; or (iv) the Construction Manager is subject to unreasonable interference by the Management Committee by the issuance of directives and guidelines to the Construction Manager, which frustrate the ability of the Construction Manager to properly perform its duties and obligations hereunder, the Construction Manager will have the right to suspend the performance of the Services hereunder until such failure has been remedied. The Construction Manager shall provide notice to the Management Committee of its election to suspend the Services, setting forth the reason(s) for such suspension and will not be liable or responsible to the Owners for any delays caused by suspending the Services in accordance with this Section 15.2.2.

15.2.3 Effect of Termination.

15.2.3.1 Duties Upon Termination. If this Agreement is terminated under Section 15.2.1, the Construction Manager, subject to the contrary provisions of an Order, shall:

(i) promptly and cooperatively assist in the transition process to the Person designated by the Management Committee to undertake the performance of the Construction Manager's duties hereunder, including the transfer, as the Management Committee may direct, of all uncommitted funds held by the Construction Manager under this Agreement, security instruments provided by

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Contractors and informational documents possessed or under the control of the Construction Manager, including Records, contracts, reports, studies, business plans, budgets and other financial accounting records, Project Component goods and Equipment, Materials, Consumables or Construction Aids and all other confidential, proprietary or other Records with respect to the Services and Construction Work supervised, performed or to be supervised or performed by the Construction Manager, as directed by the Management Committee or such Person; and

- (ii) promptly complete its other wind-up duties and responsibilities hereunder, including the timely compilation and transmittal of reports and timely submittal of billings to the Management Committee.

15.2.3.2Property Rights. Upon expiration of the Term or the earlier termination of this Agreement, the Construction Manager shall provide to each Owner a copy of all studies, reports, contracts, drawings, specifications and other similar data and other similar information constituting Construction Work that is in the possession or under the control of the Construction Manager. All such information and instruments constitute the Property of the Owners.

15.2.3.3Wind-Up and Cooperation Following Termination as a Result of a Termination Decision. Upon termination of this Agreement pursuant to a Project Component termination decision, the Owners shall promptly and cooperatively assist the Construction Manager, at the request of the Construction Manager, with the process of winding up the Services and Construction Work, including notification of appropriate Governmental Bodies and Contractors, termination of outstanding Construction Agreements and other engagements and payment of all remaining outstanding obligations and liabilities associated with the Services and Construction Work or otherwise arising under this Agreement or the activities arising hereunder. The Owners and the Construction Manager shall use commercially reasonable efforts to cooperate and complete the wind-up process as expeditiously as possible.

15.2.3.4Third Party Costs and Expenses of Wind-Up. The Management Committee shall advise the Construction Manager of the action to be taken, if any, with respect to Construction Agreements and Real Property Agreements in connection with any termination of this Agreement. Costs and expenses incurred in connection therewith will be deemed CM Costs that are subject to the Application for Deposit process and the funding and payment requirements under Article 6.

15.2.3.5Termination Payment. In the event of a termination of this Agreement pursuant to Sections 15.2.1.1, 15.2.1.2 or 15.2.1.5 (unless the termination is solely the result of a default by the Owner that is the Construction Manager), the Construction Manager will be entitled, in addition to all other amounts due hereunder (including under Section 6.1) as of the date of termination and regardless of the reason for termination, to a termination payment from each Owner severally, up to its Ownership Percentage, of all costs and expenses reasonably incurred by the Construction Manager as a direct result of such termination for: (i) all relocation and severance costs incurred with respect to the Construction Manager's employees that the Construction Manager is contractually or legally obligated to pay such employees or that are incurred with the prior written consent of the

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Owners in accordance with established personnel policies of the Construction Manager and (ii) the costs reasonably incurred by the Construction Manager to demobilize its operations with respect to the Services.

ARTICLE 16
LIMITATIONS OF LIABILITY

- 16.1 **Limitation on Consequential Damages.** No Party will be liable to any other Party under this Agreement for any special, incidental, consequential, indirect, exemplary, treble, or punitive Damages (including loss of revenue, loss of profits, diminution in value, cost of capital, loss of goodwill or increased operating costs), or any other penalty; **provided, however**, the foregoing exclusion will not apply to liability to indemnify for Damages arising from any Third Party Claim or Third Party Environmental Claim pursuant to Section 13.1.
- 16.2 **Construction Manager Limits of Liability.**
- 16.2.1 **Limitation of Damages to Owners.** The Construction Manager's total aggregate liability to the Owners for any and all Damages of any kind arising out of or relating to this Agreement is limited to the amount that the Construction Manager and its Affiliates are compensated by payment for its Construction Manager Internal Costs for its Services rendered under and pursuant to this Agreement, except Damages arising from: (i) the Construction Manager's fraud; (ii) the Construction Manager's intentional misconduct or willful misconduct; (iii) breach of Construction Manager's fiduciary duty (a) by exercising apparent authority in the absence of actual authority under this Agreement or (b) in connection with fraudulent invoicing, depositing, withdrawing or applying funds under this Agreement; and (iv) the Construction Manager's defense, indemnification and hold harmless obligations under Section 13.1.2. Proceeds of Insurance will not reduce the liability of the Construction Manager under this Section 16.2.1. Notwithstanding the foregoing, any liability of the Construction Manager covered by Insurance will be paid first from the proceeds thereof and then, solely to the extent insurance proceeds cannot be recovered, from the Construction Manager. The liability limitation under this Section 16.2.1 shall not apply to the extent proceeds of Insurance can be recovered for Owners' Damages.
- 16.2.2 **Exception for Gross Negligence, Intentional Misconduct or Fraud.** If (i) a judgment is rendered in favor of a Third Party in connection with a Shared Liability Claim (as defined in the POA), (ii) such judgment arises from an Owner providing the requested assistance described in Section 16.2.1 of the POA, and (iii) such judgment is based solely on a finding in the judgment that such Owner engaged in gross negligence, intentional misconduct or fraud, then the Owner that provided the requested assistance will pay one hundred percent (100%) of all amounts awarded in such judgment.
- 16.2.3 **Liability Exclusions.** NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, THE CONSTRUCTION MANAGER SHALL HAVE NO LIABILITY TO THE OWNERS FOR DAMAGES SUFFERED OR INCURRED BY THE OWNERS TO THE EXTENT RESULTING FROM:
- (i) the Construction Manager's reliance upon, or compliance with, any agreement, waiver, consent, approval, instruction, direction or communication given to the Construction Manager by the Management Committee, the E&O Committee or all of the Owners, in writing, except to the extent caused by the negligent act or omission

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(but only to the extent of Insurance coverage therefor), gross negligence, intentional misconduct or willful misconduct of the Construction Manager;

- (ii) the failure of any Party, in such Owner's capacity as an Owner under the applicable Project Component Agreement, to comply with the provisions of any Project Component Agreement;
- (iii) the absence, lapse or voidance of any required approval of a Governmental Body or any warranty, other than any such absence, lapse or voidance resulting from the gross negligence, intentional misconduct or willful misconduct of the Construction Manager; or
- (iv) a design or construction defect in the Project Component or any component incorporated therein other than a design or construction defect resulting from the negligent act or omission (but only to the extent of Insurance coverage therefor), gross negligence, intentional misconduct or willful misconduct of the Construction Manager.

16.2.4 **Limited Recourse.** The obligations of a Party to this Agreement are obligations of that Party only and, except as expressly provided in this Agreement, no recourse will be available against any director, officer, shareholder, member, partner, employee or agent of that Party or of its Affiliates in connection therewith.

ARTICLE 17
MISCELLANEOUS PROVISIONS

- 17.1 **Survival.** Schedule 1, Sections 2.3.2 (Agency Authority Limited), 5.2 (Construction Manager Not Responsible for Cost Overruns), 6.2.2 (Applications for Deposit), 6.5 (Final Payment), 6.6 (Delinquent Payments), 6.10 (Amounts to be Deposited), 6.11 (Owner Obligations Several), 6.12 (Interest Attribution), 7.12 (Responsibility for Project Documents and Records), 7.14 (Post-Term Services), 8.3 (Final Completion Report), 9.1 (Owners Act through Management Committee), 9.11 (Coordination of Requests), 11.1.1 (No Performance Guarantees), and 11.5 (Inspection Opportunities); Articles 10 (Representations and Warranties) (but only for purposes of asserting a claim for breach of any of the representations and warranties contained therein that arose on or prior to the date of termination of this Agreement), 12 (Construction Work Warranties), 13 (Indemnification), 14 (Confidentiality Provisions), 15 (Term and Termination of Agreement), 16 (Limitations of Liability), and 17 (Miscellaneous Provisions); Appendices C (Reimbursement of Cost for Services) and E (Insurance); and all other sections providing for indemnification or limitation or protection against liability of any Party will survive the termination, cancellation or expiration of this Agreement.
- 17.2 **Forward Contracts; Single Agreement.** The Owners and the Construction Manager acknowledge and agree that this Agreement and the other Project Component Agreements are "forward contracts" and that the Owners are "forward contract merchants," as those terms are defined in the United States Bankruptcy Code. The Owners and the Construction Manager further acknowledge and agree that this Agreement and the other Project Component Agreements form a single, integrated agreement and this Agreement and the other Project Component Agreements are entered into in reliance on the fact that this Agreement and the other Project Component Agreements collectively form a single agreement among the Owners.

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- 17.3 **Force Majeure.** No Party (in any capacity) will be liable or considered to be in Default hereunder to the extent that its performance of an obligation hereunder is delayed or prevented by an event of Force Majeure. Such Party shall use its commercially reasonable efforts to overcome the limitations imposed by the occurrence of such event of Force Majeure and to mitigate the consequences of its inability to perform on the other Parties. Any event of Force Majeure shall be promptly reported in accordance with the provisions of Section 5.1.3.
- 17.4 **Notices.** Except for informal communications of a routine nature, which may be given in such a manner as the Parties deem appropriate (except as otherwise determined by the Management Committee or as provided herein, including Schedule 1), all notices contemplated under this Agreement shall be sent to the addresses of the entities and Persons as set forth in Schedule 1, as such schedule may be amended from time to time as provided therein.

[SIGNATURE PAGE FOLLOWS]

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Execution

IN WITNESS WHEREOF, the Owners have caused this Agreement to be executed as of the date above recited.

OWNER:

OTTER TAIL POWER COMPANY

BY: 
NAME: Todd Wahlund
ITS: President

CONSTRUCTION MANAGER:

OTTER TAIL POWER COMPANY

BY: 
NAME: Todd Wahlund
ITS: President

[Signature Page to the Construction Management Agreement]

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IN WITNESS WHEREOF, the Owners have caused this Agreement to be executed as of the date above recited.

OWNER:

**WESTERN MINNESOTA MUNICIPAL
POWER AGENCY**

BY: 
NAME: Terry Wolf
ITS: Second Assistant Secretary

SCHEDULE 1

GENERALLY APPLICABLE PROVISIONS

ARTICLE 1
DEFINITIONS

The capitalized terms used in this **Schedule 1** or in notices given under any Project Agreement have the meanings specified in this Schedule 1. All other capitalized terms used but not defined in this **Schedule 1** have the meanings specified in the Project Ownership Agreement, and if not specified therein, then in the Construction Management Agreement, and if not specified therein, then in the Operation and Maintenance Agreement.

ARTICLE 2
DISPUTE RESOLUTION

- 2.1 Scope of Dispute Resolution Provisions.** Except for Percentage Calculation Disputes contemplated by the **Project Ownership Agreement**, or any dispute, claim or controversy arising under **Section 6.4** (to the extent relating to COSA Operating Expenses) or **Articles 14** or **15** of the **Project Ownership Agreement**, the provisions of this **Article 2** will govern any dispute, claim or controversy arising out of, or relating to, a Project Agreement or relating to a decision of the Management Committee (a “**Dispute**”) between or among (i) the Owners under any Project Agreement; (ii) an Owner acting singly, or the Owners acting collectively through the Management Committee, and the Construction Manager under a Construction Management Agreement; or (iii) an Owner acting singly, or the Owners acting collectively through the Management Committee, and the Maintenance Provider or Control Center Authority under an Operation and Maintenance Agreement; **provided, however**, that an Owner in any capacity (including as an Owner, a Construction Manager, a Maintenance Provider or a Control Center Authority) may, at any time seek appropriate equitable relief, including injunctive relief and specific performance, without first complying with the provisions of this **Article 2**.
- 2.2 Required Steps Before Initiating Other Remedies.** No Owner in any capacity (including as an Owner, a Construction Manager, a Maintenance Provider or a Control Center Authority) may seek any remedy in connection with a Dispute subject to **Article 2** without first complying with the provisions of this **Section 2.2**. Each Owner shall appoint a Senior Executive of such Owner authorized to settle any applicable dispute hereunder.
- 2.2.1 Notice of Dispute.** Any Owner in any capacity wishing to assert a claim or pursue any other remedy in connection with a Dispute (the “**Initiating Party**”) will provide written notice (a “**Dispute Notice**”), which must: (i) be dispatched at the same time and in the same manner to all other Parties; (ii) describe in reasonable detail the nature of the Dispute; (iii) identify all Parties that are required for the resolution of the Dispute (the “**Responding Parties**”); (iv) specify the resolution sought by the Initiating Party; (v) provide the name, title and contact information of the Senior Executive appointed by the Initiating Party; and (vi) indicate the

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proposed place, date and time (within the limits set forth in **Section 2.2.3**) for Senior Executives of the Initiating Party and Responding Parties (together, the **'Disputing Parties'**) to conduct an initial meeting to discuss and attempt to resolve the Dispute.

2.2.2 Appointment of Senior Executives. Within three (3) Business Days after receipt of a Dispute Notice, each Responding Party will appoint and provide written notice to the other Disputing Parties of a Senior Executive assigned to participate in efforts to settle the Dispute.

2.2.3 Initial Meeting of Senior Executives. Within five (5) Business Days after receipt of a Dispute Notice, the Senior Executives will meet in the place specified in the Dispute Notice (such location to be either in Big Stone City, South Dakota or a virtual meeting, with either Owner having the discretion to demand a virtual meeting), at the date and time specified in the Dispute Notice, unless all Disputing Parties agree to modify one or more of the place, date and time for the initial meeting. The purpose of the initial meeting will be for the Senior Executives to attempt in good faith to reach a mutually acceptable resolution of the Dispute.

2.2.4 Additional Meeting of Senior Executives. If the Disputing Parties are unable to resolve the Dispute at the initial meeting of Senior Executives held in accordance with **Section 2.2.3**, the Senior Executives will hold at least one (1) additional meeting, which all Senior Executives must attend in person during the ten (10) Business Days following the initial meeting, to continue to attempt in good faith to reach a mutually acceptable resolution of the Dispute unless the Disputing Parties agree otherwise. The Senior Executives may by mutual agreement use a mediator to facilitate an acceptable resolution at the additional meeting and to schedule subsequent additional meetings. If the Disputing Parties have not resolved the Dispute by the end of the additional meeting held in accordance with this **Section 2.2.4** (or any subsequent additional meetings scheduled by mutual agreement) then if all Disputing Parties agree to attempt to resolve the Dispute through mediation, the Disputing Parties will proceed to mediation in accordance with **Section 2.3**. If there is no agreement to resolve the Dispute through mediation, all Disputing Parties will retain all rights and remedies available at law or in equity.

2.2.5 Deemed Satisfaction of Obligations Under Section 2.2. If a Party has made good faith efforts to comply with the requirements set forth in **Sections 2.2.1** through **2.2.4** (the **"Complying Party"**), but has been unable to do so because of another Party's failure or refusal to comply for a period of not less than fifteen (15) Business Days following delivery of a Dispute Notice, the obligations set forth in **Section 2.2** will be deemed satisfied for purposes of the Complying Party's right to pursue other remedies.

2.2.6 Tolling of Statute of Limitations. If an Initiating Party provides the Dispute Notice prior to the expiration of the statute of limitations applicable to the Dispute that is the subject of the Dispute Notice and otherwise complies with the

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requirements set forth in Sections 2.2.1 through 2.2.4, then the statute of limitations for such Dispute will be tolled by the number of days that have lapsed between the date of the Dispute Notice and (i) the last additional meeting of Senior Executives held in accordance with Section 2.2.4 if the Senior Executives hold one or more additional meetings, (ii) the tenth (10th) Business Day following the initial meeting of Senior Executives held in accordance with Section 2.2.3 if the Senior Executives do not hold an additional meeting or (iii) the fifteenth Business Day following the Dispute Notice if the Senior Executives do not hold the initial meeting of Senior Executives in accordance with Section 2.2.3 on or prior to such date.

2.3 Non-Binding Mediation. Before resorting to litigation for any disputes arising out of any Project Agreement, the Parties may first attempt to resolve the dispute through mediation. If the Parties agree to mediation, the Parties agree to cooperate to the end that any mediation proceeding agreed to by the Parties shall be conducted as expeditiously as possible and a mediator shall be selected by mutual agreement between the Parties and shall, to the extent practicable, be a Person familiar with the public electric utility industry generally. The Parties agree to select the mediator within twenty (20) days of an agreement to mediate. The mediation materials shall be submitted to the mediator within thirty (30) days after selection of the mediator, and the mediation occur within thirty (30) days after the submittal.

2.4 Availability of Other Remedies. Nothing herein, including exercise of any right to mediate hereunder, shall limit the right of any Party hereto to obtain provisional or ancillary remedies such as injunctive relief, attachment or appointment of a receiver from a court having competent jurisdiction, before, during or after the pendency of any mediation or negotiation pursuant to this Article 2.

2.5 Confidentiality of Proceedings. If and to the extent permitted by Applicable Law, all documents prepared or obtained during discovery or produced during a hearing or meeting (other than documents which are already part of the public domain) and all testimony or recordings of testimony, including depositions, affidavits, and expert reports exchanged by the Parties or produced during a hearing or meeting, shall be confidential.

2.6 Continued Duties. The Parties shall carry on their duties under the Agreement during any Proceedings, unless otherwise ordered by a court.

ARTICLE 3
WAIVER OF GOVERNMENTAL IMMUNITY

To the extent permitted under applicable law, WMMPA hereby explicitly and irrevocably waives any immunity it may have as municipal corporation and/or political subdivision of a particular state, or otherwise created by or governed under the laws of the States of Minnesota or South Dakota, including but not limited to the municipal immunities and liability limits provided in the Minnesota Municipal Tort Claims Act and any other applicable state or federal law. Further, WMMPA hereby waives any and all claims and defenses available under any special statutory protections applicable to a municipal corporation.

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**ARTICLE 4
NOTICES**

- 4.1 Notices Generally.** All notices, requests or other communications required under a Project Agreement shall be in writing and shall be sufficient in all respects: (i) if delivered in person or by courier, upon receipt by the intended recipient or an employee that routinely accepts packages or letters from couriers or other Persons for delivery at the address identified (as confirmed by, if delivered by courier, the records of such courier), (ii) if sent by email, when the sender receives confirmation of receipt by the receiving Person, (iii) if mailed, upon the date of delivery as shown by the return receipt therefor, or (iv) if delivered by a nationally recognized overnight mail delivery service, upon the date of delivery. Notices must be sent to the addresses of the Persons set forth on Exhibit 1 attached to this Schedule 1.
- 4.2 Designation of Different Addresses and Persons.** A party may, at any time, by written notice to each other party, designate different or additional Persons or different addresses for giving of notices, demands or requests to it under a Project Agreement.

**ARTICLE 5
MISCELLANEOUS PROVISIONS**

- 5.1 Headings.** The headings of the articles, sections and subsections of each Project Agreement are intended for the convenience of the Parties only and will in no way be held to explain, modify, construe, limit, amplify or aid in the interpretation of the provisions hereof. The terms “hereof,” “herein,” “hereunder,” “hereto,” “hereby” and similar expressions refer to, as applicable, each Project Agreement as a whole and not to any particular article, section, subsection or other portion thereof and include the appendices, schedules and exhibits thereto and any document, instrument or agreement executed and/or delivered pursuant thereto unless expressly so limited, and the terms “this Section” or “this Article” refer to the section or article in which such words occur.
- 5.2 Scope of Agreement.** Unless the context otherwise requires, all references in a Project Agreement or in any appendix, schedule, exhibit or instrument thereto, to the assets, Property interests, operations, business, financial statements, employees, books and records, accounts receivable, accounts payable, contracts or other attributes thereunder will mean such items or attributes as they are used in, apply to, or relate to such Project Agreement.
- 5.3 Interpretation.** The Parties have participated jointly in the negotiation and drafting of each Project Agreement. If an ambiguity or question of intent or interpretation arises, each Project Agreement is to be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of such Project Agreement. The terms and phrases used in each Project Agreement, unless the context otherwise requires, are to be interpreted as follows: (i) the words “including,” “include” or “includes” mean including

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without limitation; (ii) reference to any agreement (including a Project Agreement), appendix, schedule, exhibit, instrument or coverage policy means as such is amended, modified or supplemented, including by waiver or consent; (iii) reference to any Applicable Law or Applicable Energy Regulation means such Applicable Law or Applicable Energy Regulation as amended, modified, codified or reenacted, in whole or part, and in effect from time to time; (iv) reference to any Owner includes such Owner's successors and assigns, to the extent that such successors and assigns are permitted by the applicable Project Agreement; (v) pronouns in masculine, feminine and neuter genders are to be construed to state and include any other gender; (vi) the words "will" and "shall" have the same meaning; and (vii) unless the context otherwise requires, all defined terms in this **Schedule 1** or in any Project Agreement include the singular and the plural.

- 5.4 Relationship of Owners; New Owners.** The covenants, obligations and liabilities of the Parties to each Project Agreement are several, and not joint or collective, and nothing contained in any Project Agreement will ever be construed to create an association, joint venture, trust, partnership or other legal relationship, or to impose a trust or partnership covenant, obligation or liability on or with regard to any of the Parties to a Project Agreement. The Owners agree that every Person that desires to acquire an interest in the Project will do so in accordance with the terms of the Project Ownership Agreement and will become a signatory to all of the Project Agreements by executing the applicable Transfer Agreement. Each Owner, the Construction Manager, each Maintenance Provider and each Control Center Authority will be individually responsible for its own covenants, obligations and liabilities in each Project Agreement to which it is a Party. No Owner will be under the control of, or will be deemed to control, the other Owner or the Owners as a group. No Owner acting in any capacity is the agent of, or has a right or power to bind, the other Owner without its express written consent, except to the extent agency authority has been granted to an Owner by the other Owner pursuant to the terms of a Project Agreement.
- 5.5 No Rights or Benefits to Third Parties.** Except as otherwise specifically provided in a Project Agreement, the Parties do not intend to create rights in, or to grant remedies to, any Third Party as a beneficiary of any Project Agreement or to create any duty to, or standard of care on behalf of, any Third Party by any covenant, obligation or undertaking established in any Project Agreement. There are no incidental Third Party beneficiaries to any Project Agreement and, by way of clarification and not of limitation, no Governmental Body, customer or member of an Owner or customer of an Owner's member is an intended or incidental Third Party beneficiary thereof.
- 5.6 Binding Obligations.** Each Project Agreement is binding upon and inures to the benefit of the permitted successors and assigns, if any, of the Parties.
- 5.7 Severability.** If any term, covenant or condition of a Project Agreement or the application of such term, covenant or condition is held invalid or unenforceable as to any Person or circumstance by any Governmental Body, all other terms, covenants or conditions of such Project Agreement and their application will not be affected thereby, but will remain in force and effect unless such a Governmental Body holds that the

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provisions are not separable from all other provisions of such Project Agreement. The Parties to a Project Agreement specifically consent to the "blue-penciling" of such Project Agreement by any Governmental Body to construe as valid and enforceable the terms and conditions of such Project Agreement, consistent with the intent of the Parties thereto. Such Governmental Body will have the authority to reform and interpret the terms and conditions of a Project Agreement to find a valid and enforceable construction of such Project Agreement that is consistent with the intent of the Parties thereto and hold all invalid and unenforceable provisions, if any, as separable from all other remaining provisions.

- 5.8 Amendment and Waiver.** No purported amendment of a Project Agreement will be effective unless in a writing specifically referring to such Project Agreement, which is executed and delivered by all of the parties to such Project Agreement. The terms, conditions, warranties, representations and covenants contained in a Project Agreement, including the documents, instruments and agreements executed and delivered by any of the Parties thereto pursuant to such Project Agreement, may be waived only by a written instrument executed by the Party against whom such waiver is sought to be enforced. Any such waiver will only be effective in the specific instance and for the specific purpose for which it was given and will not be deemed a waiver of any other provision thereof or of the same breach or default upon any recurrence thereof. No failure on the part of any Party to a Project Agreement, as applicable in the circumstances, to exercise, and no delay in exercising, any right thereunder will operate as a waiver thereof nor will any single or partial exercise of any right thereunder preclude any other or further exercise thereof or the exercise of any other right.
- 5.9 Execution in Counterparts and Delivery of Electronic Signatures.** Each Project Agreement may be executed in any number of counterparts. All such counterparts will be deemed to be originals and will together constitute but one and the same instrument. Each Project Agreement will become effective upon its execution by the applicable Parties thereto. The executed counterparts of a Project Agreement and any ancillary documents thereto, such as amendments, may be delivered by electronic means, such as email and/or DocuSign, and the receiving Party may rely on the receipt of such executed counterpart as if the original had been received.
- 5.10 Governing Law; Venue; Waiver of Jury Trial.** Each Project Agreement will be governed by and construed in accordance with the laws of the State of Minnesota (exclusive of conflicts of law provisions of any jurisdiction and the principles of comity), except for those Applicable Laws relating to Project Real Property which govern within the state of location of such Property. Except as otherwise set forth in a Project Agreement, the Parties to each Project Agreement agree and consent that any Proceeding seeking to enforce any provision of such Project Agreement will be instituted and adjudicated solely and exclusively in the state courts sitting in Douglas County, Minnesota or the federal courts sitting in Fergus Falls, Minnesota. Each Party to a Project Agreement agrees that each such court will have personal jurisdiction over it with respect to such Proceeding, and waives any objections it may have, and expressly consents, to such personal jurisdiction. EACH PARTY TO A PROJECT AGREEMENT WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT

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MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH ANY PROJECT AGREEMENT.

- 5.11 Assignment.** No Party to a Project Agreement may Transfer its interest in such Project Agreement, except an Owner may assign its interest as an Owner (but not in any other capacity) in a Project Agreement as part of and to the extent is Ownership Percentage in the Project is transferred as provided in the Project Ownership Agreement.
- 5.12 Payment in Business Days.** Notwithstanding anything to the contrary in any Project Agreement, if any payment required to be made under a Project Agreement falls due on a day that is not a Business Day, such payment will be due on the next succeeding Business Day.
- 5.13 Further Assurances.** Each Party to a Project Agreement will use its commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under Applicable Law to consummate and make effective the transactions contemplated by each Project Agreement to which it is a Party in a manner consistent with Applicable Law.
- 5.14 Cooperation.** Each Owner will make good faith efforts to cooperate with the other Owner to comply with the terms and conditions of the Project Agreements and other agreements between the Owners relating to the Project, and all critical permits, contracts and agreements entered into in connection with the Project, and other obligations and commitments arising in connection with the Project.
- 5.15 Currency.** All payments under all Project Agreements will be made in such currency as is legal tender for the payment of debts in the United States.
- 5.16 Entire Agreement.** Each Project Agreement, together with all other Project Agreements, constitutes the entire agreement between or among, as applicable, the respective Parties thereto, with respect to the subject matter thereof, and supersedes all prior oral or written agreements, understandings, representations and warranties, and courses of conduct and dealings between or among, as applicable, the Parties thereto, on the subject matter thereof. Each Owner acknowledges and agrees that it would not have entered into any individual Project Agreement in its capacity as an Owner without the execution and delivery of all of the other Project Agreements to which it is a Party in its capacity as an Owner.

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EXHIBIT 1

NOTICES

TO OWNERS OR DISCRETELY OWNED SUBSTATION ASSET OWNERS:

IF TO OTTER TAIL POWER COMPANY:

OTTER TAIL POWER COMPANY
215 S. CASCADE ST.
P.O. BOX 496
FERGUS FALLS, MN 56538-0496
ATTENTION: VICE PRESIDENT OF TRANSMISSION
TELEPHONE: 218-739-8594

WITH A MANDATORY COPY TO:

OTTER TAIL POWER COMPANY
215 S. CASCADE ST.
P.O. BOX 496
FERGUS FALLS, MN 56538-0496
ATTENTION: GENERAL COUNSEL
TELEPHONE: 218-739-8350

IF TO WESTERN MINNESOTA MUNICIPAL POWER AGENCY:

WESTERN MINNESOTA MUNICIPAL POWER AGENCY
c/o MISSOURI RIVER ENERGY SERVICES
3724 WEST AVERA DRIVE
P.O. BOX 88920
SIOUX FALLS, SD 57109-8920
ATTENTION: CHIEF OPERATING OFFICER
TELEPHONE: 605-338-4042

WITH MANDATORY COPIES TO:
WESTERN MINNESOTA MUNICIPAL POWER AGENCY
c/o MISSOURI RIVER ENERGY SERVICES
3724 WEST AVERA DRIVE
P.O. BOX 88920
SIOUX FALLS, SD 57109-8920
ATTENTION: MRES GENERAL COUNSEL
TELEPHONE: 605-338-4042

WESTERN MINNESOTA MUNICIPAL POWER AGENCY
129 2ND STREET NW
ORTONVILLE, MN 56278
ATTENTION: WMMPA GENERAL COUNSEL
TELEPHONE: 320-839-2549

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TO THE CONSTRUCTION MANAGER:

OTTER TAIL POWER COMPANY
215 S. CASCADE ST.
P.O. BOX 496
FERGUS FALLS, MN 56538-0496
ATTENTION: VICE PRESIDENT OF TRANSMISSION
TELEPHONE: 218-739-8594

WITH A MANDATORY COPY TO:

OTTER TAIL POWER COMPANY
215 S. CASCADE ST.
P.O. BOX 496
FERGUS FALLS, MN 56538-0496
ATTENTION: GENERAL COUNSEL
TELEPHONE: 218-739-8350

TO THE AUTHORIZED OWNER REPRESENTATIVES:

IF TO OTTER TAIL POWER COMPANY:

REPRESENTATIVE: JOANN THOMPSON
EMAIL: JTHOMPSON@OTPCO.COM

ALTERNATE: KIRK PHINNEY
EMAIL: KPHINNEY@OTPCO.COM

ADDRESS:
OTTER TAIL POWER COMPANY
215 S. CASCADE ST.
P.O. BOX 496
FERGUS FALLS, MN 56538-0496

IF TO WESTERN MINNESOTA MUNICIPAL POWER AGENCY:

REPRESENTATIVE: TERRY WOLF
EMAIL: TERRY.WOLF@MRENERGY.COM

ALTERNATE: RICHARD DAHL
EMAIL: RICHARD.DAHL@MRENERGY.COM

ADDRESS:
MISSOURI RIVER ENERGY SERVICES
3724 WEST AVERA DRIVE
P.O. BOX 88920
SIOUX FALLS, SD 57109-8920

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**SCHEDULE 3.1
TO
CONSTRUCTION MANAGEMENT AGREEMENT
PRE-CONSTRUCTION CONTRACTS**

1. Fredrikson & Byron engagement letter for permitting and land rights project counsel services, effective May 10, 2023, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and Fredrikson & Byron, P.A.
2. Dorsey & Whitney LLP engagement letter for the Big Stone South to Alexandria transmission line project, effective July 31, 2023 between Otter Tail Power Company and Dorsey & Whitney LLP.¹
3. Major Professional Services Agreement for administration support services, effective April 28, 2023, between Otter Tail Power Company and Power Engineers, Inc.²
4. Major Professional Services Agreement for administration support services, effective April 28, 2023, between Otter Tail Power Company and HDR Engineering, Inc.
5. Professional Services Agreement for professional land rights services, effective December 18, 2023, between Otter Tail Power Company and Border Resources, LLC.
6. Professional Construction Management Services Agreement for construction management services, effective April 25, 2024, between Otter Tail Power Company and Beste Consulting, Inc.
7. Flandreau Santee Sioux Tribe, engagement letter for tribal survey, effective February 22, 2024, between Otter Tail Power Company and Flandreau Santee Sioux Tribe – Tribal Historic Preservation Office.
8. Sisseton-Wahpeton Oyate, Consultant Agreement for traditional cultural properties surveys, effective February 22, 2024, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, a sovereign and federally recognized Indian Tribe, d/b/a the Tribal Historic Preservation Office.
9. Major Professional Services Agreement for line design engineering services, effective June 28, 2024, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and Power Engineers, Inc.²
10. Services Agreement for audio and video equipment and services, effective January 7, 2025, between Otter Tail Power Company and Red Noise 6 LLC.
11. Major Professional Service Agreement for professional right of way services, effective March 2, 2025, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and HDR Engineering, Inc.

¹ Dorsey & Whitney Engagement Letter applies to the Project Component with respect to Dorsey's work outside of its representation of OTP for negotiation of the Project Agreements; e.g. procurement and regulatory work are attributable to the CMA.

² WSP USA, Inc. acquired POWER Engineers, Inc. on October 1, 2024. POWER merged into WSP on December 31, 2025.

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12. Professional Services Agreement for professional consulting services, effective December 3, 2025, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and CBRE, Inc.
13. Professional Services Agreement for professional consulting services, effective December 3, 2025, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and Patchin Messner Appraisal, Inc.
14. Major Professional Services Agreement for land survey services, effective July 7, 2025, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and KLJ Engineering LLC.
15. Services Agreement for audio and video equipment and services, effective August 21, 2025, between Otter Tail Power Company and Red Noise 6 LLC.
16. Professional Service Agreement for professional relocation consultancy and advisory services, effective November 14, 2025, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and WSB LLC.
17. Faegre Drinker Biddle & Reath LLP engagement letter for the Big Stone South to Alexandria transmission line project, effective June 16, 2026, between Otter Tail Power Company, Western Minnesota Municipal Power Agency, and Faegre Drinker Biddle & Reath LLP.
18. Roster of Easements. Pursuant to the Project Development Agreement, OTP, as Project Manager thereunder, obtained easements to allow the Project Component to pass through certain third-party real estate. The Parcel ID, Section, Township, Range, and Legal Description for each such easement is listed below.

Parcel ID	Sections	Township	Range	Legal Description	State
03.47.24.1202	24	121	47	NW1/4NE1/4	SD
03.47.13.4100	13	121	47	SW1/4SE1/4	SD
03.47.13.4400	13	121	47	SE1/4SE1/4	SD
03.46.18.3400	18	121	46	SE1/4SW1/4	SD
03.46.19.2201	19	121	46	W1/2NW1/4	SD
03.46.19.2102	19	121	46	N1/2NW1/4	SD
03.46.18.3401	19	121	46	N1/2NW1/4	SD
03.46.19.2400	19	121	46	S1/2NW1/4	SD
03.46.19.1300	19	121	46	SE1/4NW1/4	SD

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03.46.19.3101	19	121	46	N1/2SW1/4	SD
03.46.19.3100	19	121	46	N1/2S1/2	SD
03.46.19.4100	19	121	46	N1/2S1/2	SD
03.46.19.3401	19	121	46	S1/2S1/2	SD
03.46.20.3200	20	121	46	NW1/4SW1/4	SD
03.46.20.3302	20	121	46	SW1/4SW1/4	SD
03.46.20.3402	20	121	46	SE1/4SW1/4	SD
03.46.20.4300	20	121	46	S1/2SE1/4	SD
03.46.21.5004	21	121	46	SW1/4SW1/4	SD
02-0055-000	11	124	41	N1/2SE1/4	MN

SCHEDULE 10.2.5

REQUIRED APPROVALS AND CONSENTS

- I. Acceptance for filing with FERC under Section 205 of Federal Power Act.

**APPENDIX A
TO
CONSTRUCTION MANAGEMENT AGREEMENT**

PROJECT COMPONENT PLAN

BIG STONE SOUTH TO ALEXANDRIA 345 KV TRANSMISSION LINE

Scope of Work

- 1) The Project Component is an approximately 96 mile 345 kV transmission line from the vang on the first structure outside the fence of Otter Tail Power's Big Stone South Substation located near Big Stone, South Dakota to the vang on the first structure located inside Western Minnesota Municipal Power Agency's Alexandria Substation located near Alexandria, Minnesota. The Project Component consists of a single circuit bundled T2-636 kcmil ACSR conductor on double circuit capable monopole steel structures containing two sets of davit arms on concrete foundations with one optical ground wire (OPGW) and one overhead ground wire (OHGW); Project Real Property and all Property interests that arise in connection with the Project Real Property; and all other Property related to or associated with the Project Real Property in which the Owners have joint right, title or interest, including the Governmental Approvals, the Project Agreements, the Procured Materials, the Construction Agreements and the Real Property Agreements. The Project Component does not, however, include Discretely Owned Substation Assets or Non-Project Modifications.
- 2) Construction Management. The Construction Manager ("CM") will manage the Project Component pursuant to the Agreement.
 - a) The CM expects to contract out support of the Project Component with CM Subcontractors that will include:
 - i) Field inspectors/coordinators
 - ii) Safety
 - iii) Sourcing support
 - iv) Quality Assurance and Quality Control (QAQC) support
 - v) Field Administrator
 - vi) Owners Engineer
 - vii) Right of Way Support
 - viii) Other as needed
- 3) Real Property Services – The CM expects to assign a land specialist to manage the Project Component, Real Property Management Services, and survey support. Condemnation will be managed by the CM directly and Fredrikson & Byron P.A. is expected to manage legal action.
- 4) Design Engineering - WSP USA Inc. will perform the detailed engineering per the BSSA Design Criteria contained in Appendix C of this Agreement.

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- 5) Environmental
 - a) HDR Engineering, Inc. (“**HDR**”) is the environmental consultant for the Project Component.
 - b) Construction
 - i) During construction of the Project Component, HDR will assist in ensuring environmental permits are followed, and mitigation plans are executed.
 - ii) HDR will provide an environmental inspector to confirm that the Project Component is constructed in accordance with permit requirements, implement mitigation strategies, and perform inspection activities.
- 6) Construction
 - a) Line construction
 - i) Line construction will be performed by a construction CM Contractor. It is anticipated that a single construction CM Contractor will perform all line related work.
 - b) Foundation work is expected to be a separate CM Contractor. This work would be to install all of the foundations for the Project Component.
 - c) Access
 - i) Civil construction will be largely related to work performed to install and remove access roads and perform right of way mitigation as may be specified by permits or other agreements.
 - ii) Matting for site access will be acquired through a combination of rental and purchase, or be provided in the scope of work of an access contractor.
 - d) Vegetation management
 - i) Tree clearing will be for the entire 96 mile route for the Project Component. This work will be contracted locally.

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Construction Work Schedule

Task Name	Estimated Start Date	Estimated Finish Date
Big Stone South to Alexandria 345 kV Transmission Line	April 15, 2026	December 31, 2030
Critical Permitting	August 1, 2023	June 25, 2027
Local Permitting	August 1, 2023	June 12, 2026
Right of Way	March 1, 2024	August 31, 2027
Condemnation	August 15, 2026	November 5, 2030
Environmental Surveys	April 15, 2023	October 1, 2026
Detailed Engineering	May 1, 2026	August 1, 2029
Procurement	October 29, 2026	June 27, 2029
Construction	July 21, 2027	August 15, 2030
Commissioning	September 1, 2030	November 30, 2030
Substantial Completion		August 15, 2030
Final Completion		December 31, 2030

APPENDIX B
TO
CONSTRUCTION MANAGEMENT AGREEMENT
PROJECT COMPONENT BUDGETS

Big Stone South – Alexandria Transmission Line

	Big Stone South – Alexandria 345 kV Transmission Line
Project Component Budget	\$418,500,000
Max CM Component Cost Amount	\$502,500,000

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Appendix C and Appendix D Removed from Public Version

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APPENDIX E
TO CONSTRUCTION MANAGEMENT AGREEMENT

INSURANCE PLAN

Capitalized terms that are not defined in this Appendix or the Agreement to which it is attached have their respective meanings defined in the applicable policies of insurance. This **Appendix E** establishes the initial Insurance Plan (this “**Plan**”) under the Agreement. The full and complete description of insurance required of Contractors and Subcontractors will be as specified in this Plan and any Subcontracts entered into between the CM and such Contractors and Subcontractors.

I. CONSTRUCTION PHASE INSURANCE

A. Owner Controlled Insurance Program Definitions.

The following definitions shall apply to the owner controlled insurance program (the “**OCIP**”) defined hereunder.

1. “**Enrolled Parties**” means (a) the CM, (b) each Owner (irrespective of the capacities in which it participates in the Big Stone South to Alexandria 345 kV Transmission Line Project Component), (c) eligible Contractors and Subcontractors who perform on-site construction operations on the OCIP Site, and (d) such other persons or entities as the CM may designate as Enrolled Parties who perform on-site work at the OCIP Site.
2. “**OCIP Manual**” means the Project insurance manual, which manual is developed by the OCIP Broker and OCIP Administrator as approved in writing from time to time by the Management Committee.
3. “**OCIP Site**” means the Big Stone South to Alexandria 345 kV Transmission Line Project Component with all Project Real Property and other sites incidental and/or adjacent to any lay-down or offsite storage facilities as defined in the OCIP insurance policies which shall be further stipulated in the OCIP Manual.

B. OCIP Implementation.

1. Prior to the beginning of Construction Work, the Construction Manager (referred to herein as the “**CM**”) shall implement the OCIP at a time to be determined by the CM in consultation with the Management Committee. The OCIP will be placed by the Project’s designated insurance broker (the “**OCIP Broker**”) who will designate a Project insurance administrator (the “**OCIP Administrator**”).
2. The CM shall engage the OCIP Broker to obtain competitive quotations for insurance coverages in accordance with this Insurance Plan to be made part of the OCIP, and to place selected coverages. The CM shall use the OCIP Administrator to: (a) provide a process for and undertake enrollment of eligible Contractors and Subcontractors in insurance policies pursuant to this Insurance Plan and any applicable Subcontract, (b) assure compliance with this Insurance Plan (including both OCIP enrolled and non-enrolled insurance requirements as set forth herein), (c) review and confirm Contractor and Subcontractor insurance

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costs that should be excluded from Project billings relative to coverages provided under the OCIP, and (d) perform any other tasks summarized in the OCIP Manual.

3. The CM shall cause the OCIP Administrator to ensure that the Owners are designated First Named Insureds under each policy placed pursuant to the OCIP, and the CM and Enrolled Parties be included as Named Insureds. The Management Committee may allow the CM to make exceptions of certain classes of Contractors, Subcontractors or vendors eligible to become Enrolled Parties, and the OCIP Manual will be updated to reflect such. The CM will require that all Enrolled Parties comply with the requirements set forth in the OCIP Manual, a copy of which will be provided to each Enrolled Party by the OCIP Administrator. The OCIP Manual will detail enrollment requirements, including the submittal of forms and documentation necessary for enrollment into the OCIP. Enrollment will be evidenced by an enrollment confirmation notice and certificates of insurance issued by the OCIP Administrator to the Enrolled Party.

C. OCIP Project Specific Insurance.

Unless otherwise provided herein, the CM shall procure and all Enrolled Parties through their participation in the OCIP shall maintain the following insurance coverages set forth in this **Section I. (C) (1), (2) & (3)** (collectively, the “**OCIP Insurance Coverage**”), the cost of which (including premiums, deductibles and self-insured retentions) will constitute a CM Cost:

1. **Commercial General Liability (“CGL”) insurance** (on form ISO CG 00 01 or its equivalent) including contractual liability coverage and other coverages usual and customary to the standard CGL form, with primary limits of [REDACTED] Products & Completed Operations Aggregate. An extended Completed Operations coverage period will apply for 10 years after the In-Service Date or for the applicable Statute of Repose in the jurisdiction where the project is located (usually 10 years).

The General Aggregate Limit will reinstate at least once during the multi-year policy period, or annually if commercially available and at a reasonable cost agreed to by the Management Committee. The Completed Operations Aggregate Limit will not reinstate during the extended Completed Operations period unless a reinstatement option becomes commercially available and at a reasonable cost agreed to by Management Committee.

CGL Self-insured Retention or Deductible [REDACTED] per occurrence.

2. **Umbrella or Excess Liability insurance** of not less than [REDACTED] per occurrence and in the aggregate. Coverage shall follow the form of the primary CGL or if not following form, shall be at least as broad as coverage provided by the primary CGL.
3. **Contractor’s Pollution Liability (“CPL”) insurance** in the amount of [REDACTED] per occurrence and in the aggregate will be procured by the CM providing coverage to Enrolled Parties on the OCIP Site.

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THE OCIP SHALL ONLY PROVIDE GENERAL LIABILITY AND EXCESS LIABILITY COVERAGE TO ENROLLED PARTIES. ADDITIONALLY, THE CM WILL MAINTAIN THE ABOVE INDICATED CONTRACTORS' POLLUTION LIABILITY POLICY ON BEHALF OF THE ENROLLED PARTIES FOR POLLUTION LIABILITY EVENTS DIRECTLY ASSOCIATED WITH A PROJECT COMPONENT.

The OCIP shall NOT provide coverage for workers' compensation insurance, employer's liability insurance, automobile liability insurance, contractor's equipment insurance, performance bonds and/or other lines of insurance that Enrolled Parties or non-enrolled parties may be required to carry under this Insurance Plan or otherwise determined appropriate to adequately protect such parties from exposures to risk.

D. Other Insurance Required of CM, Owners and/or Contractors (the "Non-OCIP Insurance Requirements"):

Each of the CM, each Owner, and each Contractor performing Services pursuant to Subcontract shall obtain and maintain the following coverages.

1. **Non-Owned Aircraft Liability Insurance:** The CM will not procure non-owned aviation insurance for any Project Component; any such insurance shall be procured and maintained according to the terms of the applicable Subcontract.
2. **Professional Liability Insurance:** The CM will not procure professional liability insurance nor any errors & omissions for first party indemnity or professional liability claims by third parties for any Project Component and any such insurance shall be procured and maintained according to the terms of the applicable Subcontract.
3. **Lay-Down Yard Property Insurance:** Property insurance during Construction Work with respect to Owners' Equipment and Materials stored or utilized at the lay-down yards defined by the CM in writing after the date hereof (the "**Lay-Down Yards**") shall be procured by the CM; The Owners will be Named Insureds and Loss Payees to the extent of their interest(s) in any covered loss under any CM procured property insurance with respect to the Lay-Down Yards. Should a loss to covered property be due to the negligence of a Contractor or Subcontractor, any policy deductibles will be chargeable to the negligent Contractor or Subcontractor in an amount not less than [REDACTED].
4. **COSA Property Insurance:** Property insurance during Construction Work with respect to Owners' Materials and Equipment stored, utilized, or used for Construction Work at any COSA shall be procured by the CM; The Owners will be Named Insureds and Loss Payees to the extent of their interest(s) in any covered loss under any CM procured property insurance with respect to the COSAs. Should a loss to covered property be due to the negligence of a Contractor or Subcontractor, any policy deductibles will be chargeable to the negligent Contractor or Subcontractor in an amount not less than [REDACTED].
5. **Owners' Owned Substations:** Property insurance for Construction Work with respect to Owners' Equipment and Materials stored, utilized, or used for Construction Work at any Owners individually owned substation will not be procured by the CM. Owners are responsible to insure.

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6. **Self-Insured Property Insurance:** Construction Work with respect to Owners' Equipment and Materials stored, utilized, or used for Construction Work outside any Lay-Down Yard or COSA shall be self-insured. Should a loss to self-insured property be due to the negligence of a Contractor or Subcontractor, such loss will be chargeable to the negligent Contractor or Subcontractor in an amount not less than [REDACTED].

The CM shall cause the Contractors and Subcontractors responsible to insure Equipment and Materials designated for any Project Component that they may acquire and for which they have an insurable interest and risk of loss.

7. **Special Cargo Insurance:** If the CM determines that ocean marine transit should be utilized for the transportation of a Project Component Equipment or Materials for which risk of loss will pass to the buyer before transit occurs, Ocean Marine Cargo insurance on a "warehouse to warehouse" basis may be procured, insuring the Materials to be used in and/or incorporated into the Project Component against loss or damage arising from customary "all risk" marine perils (including war, strikes, riots, and civil commotion, if readily available) while in transit. The Marine Cargo policy shall be subject to a physical damage deductible not to exceed [REDACTED]. The CM and each Owner, irrespective of the capacity in which such party participates in the Project Component, will be Named Insureds and Loss Payees, to the extent of their interest(s) in any covered loss. It is up to the discretion of the CM whether such insurance shall be procured by a Contractor or Subcontractor, in each case prior to the time the risk being insured arises. If the insurance is provided by a Contractor or Subcontractor, premiums, deductibles and self-insured retentions will be a CM Cost by inclusion of such cost in the cost of goods or services being provided.

E. Individually Procured (Non-OCIP) Insurance

Subject to the Non-OCIP Insurance Requirements set forth in Section D above, the CM and each Owner, irrespective of the capacities in which it participates in Project Component, and each Contractor and Subcontractor (individually and collectively the "Project Construction Parties"), upon the A&R Effective Date, shall individually procure and maintain the additional insurance coverages as provided below:

1. **Workers' Compensation and Employers Liability Insurance:** Each of the Project Construction Parties shall procure and maintain its own Workers' Compensation policy, which policy will cover no less than the statutory liability under the workers' compensation laws of the states in which such party's work or services are performed.

The Employers Liability limits on these policies will be no less than

\$ [REDACTED] each accident,
\$ [REDACTED] disease - policy limit, and
\$ [REDACTED] disease each - employee;

except as respects Subcontractors in which case limits on this policy will be as determined by the CM but will be no less than

\$ [REDACTED] each accident,

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\$ [REDACTED] disease - policy limit, and
\$ [REDACTED] disease - each employee.

The above limits may be met by any combination of primary and/or excess liability insurance limits.

Coverage shall include United States Longshore and Harbor Workers ("USL&H") and Maritime coverage endorsements if such exposures exist.

2. **Business Automobile Liability Insurance:** Each of the Project Construction Parties shall procure and maintain their own business automobile policy, which shall contain a Combined Single Limit ("CSL") of at least [REDACTED] per occurrence (except as respect to Subcontractors, in which case limits on such policy will be as determined by the CM but will not be less than [REDACTED] per occurrence), and include coverage for:

- (a) Bodily injury and property damage; and
- (b) Any and all vehicles owned, used or hired.

The above limits may be met by any combination of primary and/or excess liability insurance limits.

3. **Commercial General Liability ("CGL") Insurance:** Each of the Project Construction Parties shall procure and maintain its own general liability and/or excess liability insurance to comply with this **Section I. (B) (3)**. For Contractors and all Subcontractors, such insurance shall be on form ISO CG 00 01 or its equivalent. Coverage will apply to all work or services performed.

For Enrolled Parties, the CM shall have the OCIP Administer request CGL insurance cover risks not covered by the OCIP.

Limits of liability shall be [REDACTED] per occurrence and in the aggregate (except for Subcontractors in which case limits on this policy will be as determined by the CM but will not be less than [REDACTED] per occurrence). Contractors and Subcontractors shall include the CM and each Owner, irrespective of the capacities in which it participates in a Project Component, as Additional Insureds (unless otherwise included as a Named Insured) on the most current version of ISO CG 20 10 and CG 20 37 or their equivalents. Contractors and Subcontractors insurance shall be considered primary, without right of contribution, from any other insurance, which is carried by CM and each Owner.

The CM, at its discretion, may allow the above limits to be met by any combination of primary and/or excess liability insurance limits.

Each of OCIP Insurance Coverage policies shall include a) Waivers of Subrogation in favor of the CM; each Owner, and all Contractors and Subcontractors enrolled in the OCIP, b) except for the CGL OCIP Insurance policy include the CM and each Owner as Additional Insured, and c) as Additional Insureds will be primary and non-contributory as respects any similar insurance that may be available to the CM and Owners.

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4. **Professional Liability Insurance:** The CM shall have procured and maintained by any Contractor or Subcontractor performing professional services for any Project Component that with total limits of [REDACTED] each claim/[REDACTED] annual aggregate; however, the CM has the discretion to require less insurance for smaller contracts. This coverage must remain in force and effect for a minimum of five years after completion of the professional services being performed or contract termination.
5. **Contractors Equipment Insurance:** All Contractors (including a Contractor that is also an Owner) shall be required to release the CM and each Owner, irrespective of the capacities in which it participates in a Project Component, (or otherwise accept the full risk of loss or damage therefor), from all claims for loss or damage to or loss of use of such Contractor's tools, machinery, equipment, motor vehicles or any other property whether owned, rented, or leased by the Contractor in or about the OCIP Site and shall purchase such insurance in respect thereto as the Contractor deems appropriate. Contractors shall require similar releases in favor of the CM and each Owner, irrespective of the capacities in which it participates in a Project Component, from Subcontractors.
6. **Railroad Protective Liability Insurance:** At the discretion of the CM, applicable Contractors will purchase and maintain Railroad Protective Liability ("RRPL") insurance in connection with work across, under or adjacent to railroad tracks or railroad right-of-way. The policy shall name the specific railroad requiring such coverage as Named Insured and for such limits of liability as shall be as required by the railroad. This requirement can be satisfied by participating in the railroad's group program or waiver if so offered.
7. **Watercraft Liability Insurance:** At the discretion of the CM, watercraft insurance may be required of any kind be any Contractor, or by anyone else on a Contractor's behalf or otherwise as part of the Construction Work. In the event watercraft insurance is requested, the Contractor shall maintain, or cause the operator of the watercraft to maintain, watercraft public liability insurance covering bodily injury, property damage and passenger liability for any watercraft owned, used, operated or hired in connection with the Construction Work. The policy(ies) shall provide limits of not less than [REDACTED] combined single limit for bodily injury and property damage per occurrence (& aggregate) and list the CM and each Owner, irrespective of the capacities in which it participates in the Project Component, as additional insureds. Contractors and Subcontractors insurance shall be considered primary, without right of contribution, from any other insurance which is carried by CM and each Owner. In addition, insurer(s) shall waive their right of subrogation against CM and each Owner.
8. **Aircraft Liability Insurance:** At the discretion of the CM, aircraft insurance may be required of a Contractor, or by anyone else on a Contractor's behalf or otherwise as part of the Construction Work. In the event aircraft insurance is requested, the Contractor shall maintain, or cause the operator of the aircraft to maintain, aircraft public liability insurance covering bodily injury, property damage and passenger liability for any aircraft owned, used, operated or hired in

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connection with the Construction Work. The policy(ies) shall provide limits of not less than [REDACTED] combined single limit for bodily injury and property damage per occurrence (& aggregate) and list the CM and each Owner, irrespective of the capacities in which it participates in a Project Component, as additional insureds. Contractors and Subcontractors insurance shall be considered primary, without right of contribution, from any other insurance which is carried by CM and each Owner. In addition, insurer(s) shall waive their right of subrogation against CM and each Owner.

F. Additional Provisions:

1. All insurance policies required by this Insurance Plan shall be placed with insurance companies with a current A.M. Best Insurance Guide Rating of A- and Class VII, or better. Each policy shall ensure that it will not be cancelled, unless at least 60 days' prior written notice from such affected insurers (10 days for non-payment of premium) has been received by the CM and each Owner, irrespective of the capacities in which it participates in the Project.
2. Each Owner (including but not limited to an Owner acting as the CM) may utilize their existing insurance programs, including existing levels of self-insurance, retentions and deductibles, to comply with insurance required of Owners in this **Section I**.
3. The CM may allow Contractors and Subcontractors to maintain reasonable levels of retentions and deductibles as respects insurance coverage required of them in this **Section I**, only upon mutual agreement of, and specific written approval by, the Owners.
4. **Certificates of Insurance:** The CM and each Owner, irrespective of the capacities in which it participates in a Project Component shall, on or before the date on which insurance required hereunder is to become effective, furnish to the CM and other Owners certificates of insurance evidencing its compliance with applicable requirements hereunder.

Insurance certificates evidencing compliance of Contractors and Subcontractors, whether Enrolled Parties or otherwise, with the requirements of this Section F, shall be provided to the OCIP Administrator on or before the date on which insurance required hereunder is to become effective. The OCIP Administrator, on behalf of the CM and Owners shall maintain copies of certificates of insurance provided to it as required herein. The OCIP Administrator shall maintain a database of all certificates submitted by Contractors and Subcontractors and make such certificates available for inspection and copying upon request by any Owner or by the Management Committee.

In addition, the OCIP Administrator shall, promptly following the enrollment of an Enrolled Party under the OCIP, deliver to the Enrolled Party certificates of insurance and other evidence, as appropriate, documenting the Enrolled Party's enrollment in the OCIP.

For insurance required of Project Construction Parties that may expire and

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subject to renewal during the term of the Project, renewal certificates of insurance shall be provided to the CM and each Owner, or to the OCIP Administrator, as provided above to remain in compliance with Project insurance requirement.

5. Costs: Premiums, deductibles and self-insured retentions incurred by each Owner, in all capacities in which such Owner participates in the Project, to provide the insurance required by the OCIP Insurance Coverage do not constitute CM Costs, except to the extent that the Owner serving in the capacity as CM includes the costs of those standard insurance policies in its A&G costs reflected in **Appendix D** (Reimbursement Methodology For Maintenance Services) of the Operation and Maintenance Agreement. Premiums, deductibles and self-insured retentions incurred by each Contractor or Subcontractor, each specifically in such capacity, to provide the insurance required by this Plan, will be borne as provided in the applicable Construction Agreement as a part of the provision of goods or services.
6. Unaffiliated Third-Party Contractors: For Contracts between the CM and Third-Party Contractors (and their Subcontractors), the requirements with respect to Contractors and Subcontractors in this Insurance Plan will constitute part of the template documents to be negotiated with such Contractors and Subcontractors by the CM. The CM shall also require Owners that become Contractors to utilize such insurance requirements in the negotiation of Subcontracts with their Subcontractors.

II. OPERATIONAL PHASE INSURANCE

A. Operation Phase Policies

On or before the In-Service Date, the insurance coverages set forth below will be procured and maintained as indicated:

1. **Workers' Compensation and Employers Liability insurance**: Responsible Entities, Owners, Contractors and Subcontractors shall procure and maintain their own Workers' Compensation policy to comply with this **Section II. (A) (1)**. Workers' compensation will cover no less than the statutory liability under the workers' compensation laws of the states in which the work or services are performed.

The Employers Liability limits on these policies will be not less than

\$ [REDACTED] each accident,
\$ [REDACTED] disease - policy limit, and
\$ [REDACTED] disease each employee;

except as respects Subcontractors retained by Responsible Entities, including Maintenance Providers, in which case limits on this policy will be as determined by the CM but will be not less than

\$ [REDACTED] each accident,

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\$ [REDACTED] disease - policy limit, and
\$ [REDACTED] disease each employee.

The above limits may be met by any combination of primary and/or umbrella or excess liability insurance limits.

Coverage shall include United States Longshore and Harbor Workers ("USL&H") and Maritime coverage endorsements if each such exposure exists.

Each of the above policies will include a waiver of subrogation in favor of each Owner.

2. **Commercial General Liability ("CGL") insurance:** Each of the Responsible Entities, Owners, Contractors and Subcontractors shall procure and maintain its own policy to comply with this **Section II. (A) (2)** which CGL policy shall include (or not exclude) contractual liability coverage, independent contractors coverage and all other usual and customary CGL coverages.

CGL primary limits for Responsible Entities, Contractors and Subcontractors shall be at least \$ [REDACTED] per occurrence and [REDACTED] general and products & completed operations aggregates; provided that through the use of any combination of primary and umbrella or excess liability insurance, a total of [REDACTED] each occurrence and in the aggregate shall be maintained.

Subcontractors retained by Responsible Entities, including Maintenance Providers, shall be allowed to maintain CGL coverage at a minimum of [REDACTED] per occurrence and in the aggregate through any combination of primary and umbrella or excess insurance.

3. **Business Automobile Liability insurance:** Each of the Responsible Entities, Owners, contractors and subcontractors will procure and maintain its own policy to comply with this **Section IIA(3)**. This insurance shall contain a Combined Single Limit ("CSL") of at least [REDACTED] per occurrence, shall be procured and maintained by the Responsible Entities, contractors and subcontractors and include coverage for, but not be limited to, the following:

- (a) Bodily injury and property damage; and
- (b) Any and all vehicles owned, used or hired

4. **Watercraft Liability insurance:** If watercraft of any kind will be used by a Responsible Entity or by anyone else on a Responsible Entity's behalf, the Responsible Entity will require that the operator of the watercraft maintain watercraft liability insurance covering bodily injury, property damage and passenger liability for any watercraft used, operated or hired in connection with the operating services. The policy(ies) shall provide limits of [REDACTED] per occurrence & in the aggregate and list the Responsible Entities and each Owner, irrespective of the capacities in which it participates in a Project Component, as Additional Insureds.

5. **Aircraft Liability insurance:** If aircraft of any kind is used by a Responsible

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Entity or by anyone else on a Responsible Entity's behalf, the Responsible Entity will require that the operator of the aircraft to maintain, aircraft public liability insurance covering bodily injury, property damage and passenger liability for any aircraft owned, used, operated or hired in connection with the Construction Work. The policy(ies) shall provide limits of not less than [REDACTED] combined single limit for bodily injury and property damage per occurrence and list the Responsible Entity and each Owner, irrespective of the capacities in which it participates in a Project Component, as Additional Insureds.

6. **Railroad Liability insurance:** If a Responsible Entity works across, under or adjacent to railroad tracks or railroad rights-of-way, the Responsible Entity will maintain Railroad Protective Liability ("RRPL") insurance in connection with the Construction Work. The policy shall name the specific railroad requiring such coverage as Named Insured and for such limits of liability as shall be as required by the railroad. This requirement can be satisfied by participating in the railroad's group program or waiver if so offered. Additional Provisions.

Each of the above policies shall include Waivers of Subrogation in favor of Owners, and except for the Workers' Compensation and Employers Liability policy in **Section II. (A) (1)** above, each of these policies shall include each Owner as an Additional Insured and shall be primary and non-contributory as respects any other insurance maintained by each Owner.

The above limits may be met by any combination of primary and/or excess liability insurance limits.

III. Plan Policy Requirements

A. Additional Provisions

1. All insurance policies required by this Plan shall be placed with insurance companies with a current A.M. Best Insurance Guide Rating of A- and Class VII, or better. Each policy shall provide that it shall not be cancelled unless at least 60 days' prior written notice from such affected Insurers (10 days for non-payment of premium) has been received by the Owners.
2. Each Owner may utilize their existing liability insurance programs, including existing levels of self-insurance, retentions and deductibles, to comply with insurance required of Owners with respect to the Operational Insurance Phase policies required in **Section II**.
3. Responsible Entities, Contractors and Subcontractors may be allowed to maintain reasonable levels of self-insurance, retentions and deductibles as respects insurance coverage required of them in this Plan. Certificates of Insurance; Proof of Loss: On or before the date on which insurance required under this Plan is to become effective, valid certificates of insurance shall be provided to each Owner certificates of insurance demonstrating their respective compliance with insurance required herein. Each Responsible Entity and Owner shall maintain copies of certificates of insurance required to be furnished to it hereunder and shall make such certificates available for inspection and copying upon request by

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any Responsible Entity, Owner or by the Management Committee and as otherwise required to facilitate implementation of the requirements hereunder.

The party maintaining each insurance policy required herein shall take all actions reasonably required, and/or shall not do anything to inhibit, ensuring coverage is provided under such policies to any Additional Insured or Loss Payee.

4. Costs: The costs (including premiums, deductibles and self-insured retentions) of insurance required to be provided by the Maintenance Provider will constitute a Maintenance Cost (premiums to be reimbursed through A&G charges as provided in Appendix D (Reimbursement Methodology For Maintenance Services) of the Operation and Maintenance Agreement). The costs of insurance required and borne by the Control Center Authority or the Owner not serving as Maintenance Provider will not constitute a Maintenance Cost, except as provided in Section 4.2 of the Operation and Maintenance Agreement, which will be considered Control Center Costs. The costs of insurance required and incurred by each Contractor and Subcontractor will be borne as provided in the applicable agreement with such Contractor or Subcontractor as part of the provision of goods and services under such agreement. If the insurance in Section II. A (4) (Watercraft Liability insurance) of this Plan is required, the cost thereof will be a Maintenance Cost and charged directly to the Project.

IV. AVAILABILITY OF INSURANCE

The types, terms, limits and retentions/deductibles of construction phase or operational phase insurance coverages prescribed herein are those that are commercially available, reasonably attainable and the cost of which are reflective of the insurance industry's ability and willingness to provide at the time that these requirements were drafted.

RECEIVED

OCT 05 2026

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Attachment D

Proposed Form of Protective Agreement

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PROTECTIVE AGREEMENT

This Protective Agreement (this "Agreement") is entered into this ____ day of _____, by and between Otter Tail Power Company ("Applicant") and _____ ("Intervenor"), and shall govern the use of all Protected Materials produced by Applicant to Intervenor, or vice versa, in connection with the proceeding before the Federal Energy Regulatory Commission (the "Commission") in Docket No.[insert] (the "Proceeding"). Applicant and Intervenor are sometimes referred to herein individually as a "Party" or jointly as the "Parties."

1. Applicant filed Protected Materials in the Proceeding and Intervenor is a Participant in the Proceeding, as the term Participant is defined in 18 C.F.R. § 385.102(b), or has filed a motion to intervene or a notice of intervention in the Proceeding. The Parties enter into this Agreement to govern the disclosure and confidentiality of Protected Material provided in connection with the Proceeding. Notwithstanding any order terminating the Proceeding, this Protective Agreement shall remain in effect unless and until specifically modified or terminated by the Commission or a court of competent jurisdiction. In the event this Protective Agreement terminates, the obligations of Reviewing Representatives to maintain the confidentiality of Privileged Material and/or CEII as provided hereunder shall remain in effect for 18 months following the date of termination.

2. This Agreement applies to the following two categories of Protected Materials: (A) a Party may designate as protected those materials which customarily are treated by that Party as commercially sensitive or proprietary, which are not otherwise available to the public, and which, if disclosed, would subject that Party or its customers to risk of competitive disadvantage or other business injury ("Privileged Material"); and (B) a Party shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(a) and (c) ("Critical Energy Infrastructure Information" or "CEII").¹

3. Privileged Material shall include:

¹ This Agreement does not alter the requirements of 18 C.F.R. § 388.112 and 18 C.F.R. § 388.113.

- A. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as Privileged Material by such Participant;
 - B. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Privileged Material by such Participant;
 - C. Any information contained in or obtained from such designated material;
 - D. Any other material which is made subject to this Protective Agreement by the Presiding Administrative Law Judge ("Presiding Judge") or the Chief Administrative Law Judge ("Chief Judge") in the absence of the Presiding Judge or where no presiding judge is designated, the Federal Energy Regulatory Commission ("Commission"), any court, or other body having appropriate authority, or by agreement of the Participants (subject to approval by the relevant authority);
 - E. Notes of Privileged Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Privileged Material); or
 - F. Copies of Privileged Material.
4. Privileged Material does not include:
- A. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;
 - B. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Agreement; or
5. For purposes of this Agreement, the following additional definitions apply:
- A. "Non-Disclosure Certificate" shall mean the certificate attached to this Protective Agreement, by which Participants granted access to Privileged Material and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Agreement, and that such Participants have read the Protective Agreement and agree to be bound by it. All executed Non-Disclosure Certificates must be provided to the Participants.

- B. "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:
- i. An attorney who has made an appearance in this Proceeding for a Participant;
 - ii. An attorney, paralegal, or other employee associated for purposes of this case with an attorney who has made an appearance in this Proceeding on behalf of a Participant;
 - iii. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this Proceeding;
 - iv. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or
 - v. An employee or other representative of Participants appearing in this Proceeding with significant responsibility for this Proceeding.

6. Protected Materials shall be made available under the terms of this Protective Agreement only to Participants and only to their Reviewing Representatives as provided in this Protective Agreement. The contents of Privileged Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Agreement and shall be used only in connection with this specific Proceeding.

7. All Protected Materials must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to this Protective Agreement.

8. Protected Materials must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to this Protective Agreement. Privileged Material and/or CEII shall not be used except as necessary for the conduct of this Proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this Proceeding and who needs to know the information in order to carry out that person's responsibilities in this Proceeding. Reviewing Representatives may make copies of Privileged Material and/or CEII, but such copies automatically become Privileged Material and/or CEII. Reviewing Representatives may make notes of Privileged Material, which shall be treated as Notes of Privileged Material if they reflect the contents of Privileged Material.

9. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 9, such Reviewing Representative may not use information contained in any Privileged Material and/or CEII obtained in this Proceeding for a commercial purpose (e.g., to give a Participant or competitor of any Participant a commercial advantage):

- A. Energy marketing;
- B. Direct supervision of any employee or employees whose duties include energy marketing; or
- C. The provision of consulting services to any person whose duties include energy marketing.

10. If a Participant wishes to designate a person not described in Paragraph 5.B above as a Reviewing Representative, the Participant must seek agreement from the Participant providing the Privileged Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative with respect to those materials. If no agreement is reached, the Party seeking the designation may submit the dispute regarding the designation to the Commission for resolution. Pending such resolution, the person for whom the designation is sought shall not have access to Protected Material.

11. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Material pursuant to this Protective Agreement until three business days after that Reviewing Representative first has executed and served a Non-Disclosure Certificate.² However, if an attorney qualified as a Reviewing Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial, and clerical personnel under the attorney's instruction, supervision, or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Agreement and must take all reasonable precautions to ensure that Privileged Material and/or CEII are not disclosed to unauthorized persons. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the Proceeding.

² During this three business day period, a Party may file an objection with the Presiding Judge or Commission contesting that such individual qualifies as a Reviewing Representative, and the individual shall not receive access to the Protected Material until resolution of the dispute.

12. Any Reviewing Representative may disclose Protected Material to any other Reviewing Representative as long as both Reviewing Representatives have executed a Non-Disclosure Certificate. In the event any Reviewing Representative to whom Privileged Material and/or CEII are disclosed ceases to participate in this Proceeding or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative, access to such materials by that person shall be terminated. Even if no longer engaged in this Proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Agreement and the Non-Disclosure Certificate for as long as the Protective Agreement is in effect.

13. All Protected Material in this Proceeding filed with the Commission, submitted to the Presiding Judge, or submitted to any Commission personnel, must comply with 18 C.F.R. § 388.112 (for Privileged Material) and/or 18 C.F.R. § 388.113 (for CEII) and the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*, including by creating and filing both public and non-public versions of documents, with suitable redactions and markings so as to maintain the confidentiality of Protected Material.

14. If any Participant desires to include, utilize, or refer to Privileged Material or information derived from Privileged Material in testimony or other exhibits during the hearing in this Proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Participant first must notify both counsel for the disclosing Participant and the Commission, and identify all such Privileged Material. Thereafter, use of such Privileged Material will be governed by procedures determined by the Commission.

15. Nothing in this Protective Agreement shall be construed as precluding any Participant from objecting to the production or use of Privileged Material and/or CEII on any appropriate ground.

16. Nothing in this Agreement shall preclude any Party from requesting the Commission or any other body having appropriate authority to find that this Agreement should not apply to all or any materials previously designated as Protected Materials pursuant to this Agreement. The Commission may alter or amend this Agreement as circumstances warrant at any time during the course of the Proceeding.

17. The Parties may amend this Agreement only by mutual consent and in writing; provided, however, that a Party has the right to seek changes to this Agreement as appropriate from the Commission.

18. Subject to Paragraph 21, the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Protective Agreement pertaining to Privileged Material according to the following procedures. Prior to presenting any such dispute to the Presiding Judge, the Chief Judge, or the Commission, the Participants to the dispute shall employ good-faith best efforts to resolve it.

- A. Any Participant that contests the designation of material as Privileged Material shall notify the Participant that provided the Privileged Material by specifying in writing the material for which the designation is contested.
- B. In any challenge to the designation of material as Privileged Material, the burden of proof shall be on the Participant seeking protection. If the Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 18 shall apply.
- C. The procedures described above shall not apply to material designated by a Participant as CEII. Material so designated shall remain subject to the provisions of this Protective Agreement, unless a Participant requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

19. The designator will have five (5) days in which to respond to any pleading requesting disclosure of Privileged Material. Should the Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public, the Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Agreement shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with the Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to be privileged. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714 and 385.715. No Participant waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding Privileged Material or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Privileged Material and/or CEII in the files of the Commission.

20. Privileged Material and/or CEII shall remain available to Participants until the later of (1) the date an order terminating this Proceeding no longer is subject to judicial review or (2) the date any other Commission Proceeding relating to the Privileged Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Participant that produced the Privileged Material and/or CEII may request (in writing) that all other Participants return or destroy the Privileged Material and/or CEII. This request must be satisfied within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts, and exhibits in this Proceeding containing Privileged Material, or Notes of Privileged Material, may be retained if they are maintained in accordance with Paragraph 7 of this Protective Agreement. If requested, each Participant also must submit to the Participant making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Privileged Material and/or CEII. To the extent Privileged Material and/or CEII are not returned or destroyed, they shall remain subject to this Protective Agreement.

21. Regardless of any order terminating this Proceeding, this Protective Agreement shall remain in effect until specifically modified or terminated by the Presiding Judge, the Chief Judge, or the Commission. All CEII designations shall be subject to the “[d]uration of the CEII designation” provisions of 18 C.F.R. § 388.113(e).

22. Any violation of this Protective Agreement and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

The undersigned represents and warrants that he or she has authority to execute this Protective Agreement on behalf of the entity identified below. By its execution of this Protective Agreement, such entity agrees to be bound by its terms.

By: _____

Name: _____

Title: _____

Representing Otter Tail Power Company

By: _____

Name: _____

Title: _____

Representing Intervenor [**insert name**]

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Privileged Material and/or Critical Energy/Electric Infrastructure Information (CEII) is provided to me pursuant to the terms and restrictions of the Protective Agreement dated _____, 20__, by and between Otter Tail Power Company and [Intervenor] concerning materials in Federal Energy Regulatory Commission Docket No. _____ (the "Protective Agreement"), that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it.

I understand that the contents of Privileged Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____