

PUBLIC VOLUME

**ATTACHMENT J**

**ATC LETTER TO MISO DATED OCTOBER 4, 2011**



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October 4, 2011

*Via Federal Express*

Mr. Stephen G. Kozey  
Vice President, General Counsel and Secretary  
Midwest Independent Transmission System Operator, Inc.  
720 City Center Drive  
Carmel, IN 46032-7574

**Re: Dubuque-Spring Green-Cardinal MVP and North La Cross-Madison MVP  
(also known as Badger-Coulee)**

Dear Mr. Kozey:

This follows the September 15, 2011 letter from Clair Moeller, the Midwest ISO's VP of Transmission Asset Management, to John Procario, American Transmission Company LLC's (ATC) CEO directing ATC to "proactively address" ownership issues with Xcel Energy (Xcel) and International Transmission Company (ITC) regarding ATC's proposed Badger-Coulee and Dubuque – Spring Green<sup>1</sup> transmission lines, respectively, and our conversation on September 21<sup>st</sup> regarding that letter.

During our discussion on September 21<sup>st</sup>, you indicated that the Midwest ISO was interested in receiving ATC's analysis of the claims made by Xcel and ITC and would respond in writing once the Midwest ISO considered ATC's position. As further discussed below, ATC believes that Mr. Moeller's September 15<sup>th</sup> letter misinterprets the Midwest ISO Transmission Owner's Agreement (TO Agreement) and the Midwest ISO's Tariff and the position set forth is thereby incorrect in asserting that 1) any other party has an ownership claim to the Badger Coulee and Dubuque – Spring Green transmission projects or that 2) ATC must obtain agreement from Xcel and ITC to allow ATC to own more than 50% of those projects.

You also indicated, the Midwest ISO would not submit the Badger Coulee or Dubuque – Spring Green transmission line projects for approval by the Midwest ISO Board at its December meeting unless the ownership issue was resolved, thereby affording ATC less than 90 days to resolve this matter. For the reasons set forth below, neither Xcel nor ITC have any claim to an ownership interest in the Badger Coulee or Dubuque – Spring Green transmission projects. Moreover, there is nothing in the Midwest ISO Tariff, the Transmission Owners' Agreement or elsewhere that requires any ownership claim to be resolved before the Midwest ISO Board can

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<sup>1</sup> The Badger-Coulee line is also known as the North La Cross-Madison MVP.

or should approve transmission projects that are found by the Midwest ISO planning staff to be electrically necessary to meet the Midwest ISO's and the Transmission Owners' respective obligations to provide transmission service, alleviate congestion and to meet public policy requirements.

Thus, ATC requests that the Midwest ISO 1) clarify its September 15 letter; and 2) continue to process the Badger Coulee and Dubuque – Spring Green transmission projects for approval by the Midwest ISO Board at its December 2011 meeting. If there is an ownership claim being asserted by any party, that claim can be resolved separate and apart from the Midwest ISO Attachment FF and Transmission Owners' Agreement Appendix B planning approval process, which the Midwest ISO is obligated to carry out.

Based on the legal authority set forth below, the Midwest ISO is not required to resolve any disagreement concerning ownership of the Badger Coulee and Dubuque – Spring Green transmission projects, nor should it have taken a position on this issue. Finally, ATC requests further information and clarification of the Midwest ISO's interpretation of the relevant provisions of the TO Agreement and Tariff, as noted below.

## **I. Background**

The Badger-Coulee line is a proposed 150 mile, 345 kV transmission line that will interconnect with a proposed Xcel-owned transmission facility. The proposed Xcel facility has not yet been approved by the Public Service Commission of Wisconsin (PSCW) and the exact point of interconnection between Xcel and ATC has not yet been determined. The Badger Coulee line will be wholly within Wisconsin. The Dubuque – Spring Green line is a proposed 104 mile 345 kV transmission line that will likely interconnect with an ITC owned facility and will be constructed primarily in Wisconsin and partially in Iowa. After evaluating both projects in ATC's own FERC-approved local planning process beginning in 2008, ATC submitted its proposals for the Badger Coulee line to the Midwest ISO in September 2009 and for the Dubuque – Spring Green line in September 2010.

Both proposed lines have been reviewed by the Midwest ISO as projects to be included in the first portfolio of multi-value projects (MVP) under the Midwest ISO's MVP cost allocation methodology recently approved by FERC. The Midwest ISO's MVP analysis of the portfolio, of which both the Badger Coulee and Dubuque – Spring Green are a part, is expected to be submitted to the Midwest ISO Board for approval in December 2011.<sup>2</sup> Other than the Midwest ISO's request to accelerate the proposed in-service date for both lines, from the time ATC submitted the Badger Coulee line or the Dubuque – Spring Green line to the Midwest ISO for inclusion in the Midwest ISO Transmission Expansion Plan (MTEP), no change has been

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<sup>2</sup> The Midwest ISO recently requested that ATC consider accelerating the in-service dates for both lines. The Midwest ISO's planning analysis has indicated that the lines would be needed to provide appropriate reliability and reduce congestion in conjunction with other transmission lines proposed in the first portfolio of MVP projects. The request to accelerate ATC's projects was made by Digaunto Chaterjee of the Midwest ISO planning staff to ATC's planning staff on September 6, 2011.

requested to either project and neither project been combined with any other proposed project to form a different proposed transmission line project.

ATC has been the sole proponent of the projects. ATC has spent considerable time and resources planning, developing and engaging in community outreach to support the construction of this line in the near future.<sup>3</sup> To date, ATC has spent nearly \$4 million in developing the project, including conducting community outreach efforts involving communication directly with the public, together with state-required siting evaluation and agency consultation. ATC has budgeted up to \$15 million for further outreach for both the Badger Coulee and Dubuque-Spring Green projects, including \$400,000 in 2012 on the Dubuque – Spring Green line for similar initial project development activities. To ATC's knowledge, no money, effort or planning evaluations have been conducted by any party other than ATC concerning either proposed transmission line.

## **II. Analysis of Section VI, Appendix B, Midwest ISO Transmission Owners' Agreement**

According to the September 15<sup>th</sup> letter, both Xcel and ITC's ownership claims arise from language in the Transmission Owners' Agreement, Appendix B, Section VI,<sup>4</sup> which states:

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

This language is contained in the section of Appendix B that provides the procedures by which the Midwest ISO Planning Staff will develop the MTEP. This language, however, must be considered and interpreted in the context of the rest of Section VI.<sup>5</sup>

The Appendix B provision quoted above was developed so that the Midwest ISO could carry out its regional planning function and ensure that new projects that are needed for reliability are built, in conjunction with the local planning obligations of the respective Transmission Owners.<sup>6</sup> Section VI of Appendix B specifically directs that the Midwest ISO's

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<sup>3</sup> For more details, see [www.atc-projects.com/BadgerCoulee.shtml](http://www.atc-projects.com/BadgerCoulee.shtml).

<sup>4</sup> Mr. Moeller mistakenly references Appendix B, Section IV for this language.

<sup>5</sup> In our September 21<sup>st</sup> discussion, you confirmed that no other dispute resolution or other determination has been made by the Midwest ISO in connection with this language or its applicability.

<sup>6</sup> See, e.g., Transmission Owner's Agreement, Article Three, Section I.C: "The Midwest ISO shall engage in such planning activities as are necessary to fulfill its obligations under this Agreement and the Tariff. Such planning shall conform to applicable reliability requirements of NERC . . . , each Owner's specific reliability requirements and operating guidelines, and all applicable requirements of federal or state laws or regulatory authorities."

Planning Staff “shall seek out opportunities to coordinate or consolidate, where possible, individually defined transmission projects into more comprehensive cost-effective developments subject to the limitations imposed by prior commitments and lead time constraints.”

While the import of this language is clear, its application is limited only to a small set of transmission projects to be included in the Midwest ISO MTEP. If the Midwest ISO, by virtue of its planning analysis, modifies or consolidates projects that were originally proposed by individual transmission owners into a separate and different transmission project to be included in the Midwest ISO MTEP, there is a risk that the original proponents will no longer want to construct the facility, either because of the specific modifications or because of increased costs. Section VI of the Appendix B gives the Midwest ISO the authority to direct construction of such “combined” projects and assign ownership based on how the new facility will be interconnected.<sup>7</sup>

Therefore, the language quoted by Mr. Moeller in the September 15th letter is not a general “grant” of ownership entitlement simply because a transmission line proposed by one Transmission Owner may interconnect with facilities owned (or in the case of Badger Coulee, proposed) by another Transmission Owner. The language quoted above applies only in instances where the Midwest ISO Planning Staff modifies or consolidates one or more proposed projects such that the resulting project is different from the ones originally proposed by one or more Transmission Owners. In that instance, and that instance only, the Midwest ISO may assign the “obligation to build” to both Transmission Owners as contemplated in Section VI of Appendix B. As we discussed, you characterized the provisions of Section VI of Appendix B as an “obligation to build” not a right-of-first refusal. ATC’s interpretation of Section VI is consistent with an “obligation to build” under the limited circumstances contemplated by Section VI.

As noted above, ATC has proposed, has endeavored to seek approval for, and is fully prepared to construct, own and operate the Badger Coulee and Dubuque – Spring Green transmission lines. No changes, like the changes contemplated in Section VI of Appendix B have been made or requested to either transmission line project by any party, including the Midwest ISO planning staff.

Mr. Moeller’s interpretation of the Section VI language is neither consistent with the original intent of Appendix B nor how ownership has been historically attributed to projects built in the Midwest ISO region under the Transmission Owners’ Agreement (or, indeed, anywhere else in the country). There are a number of projects that have been proposed in the MTEP that connect between the “facilities” of more than one Transmission Owner. As you noted in our conversation on September 21, there are no instances in which ownership has been “ordered” by the Midwest ISO using its current interpretation of Section VI of Appendix B as the basis for such ownership allocation.

There are a number of examples in which the Midwest ISO and the other Transmission Owners have not invoked the language of Section VI to claim ownership of projects that

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<sup>7</sup> App. B, Section VI. Similar language is contained in Midwest ISO’s Attachment FF, Section I.B.

interconnect with another transmission owners' facilities. For example, ATC has recently constructed projects, such as the Arrowhead-Weston line that was approved in the MTEP and *that connects to more than one Transmission Owner, including Xcel*. The Arrowhead-Weston line, like the Badger Coulee and Dubuque – Spring Green lines, was proposed by ATC, included in the Midwest ISO MTEP and neither Xcel nor any other party asserted an ownership interest in that line, nor did the Midwest ISO “allocate” any ownership or construction rights prior to its approval by the Midwest ISO Board for inclusion in the MTEP. In addition, ATC has currently proposed the Monroe County – Council Creek 138 kV line that has been approved in the Midwest ISO MTEP planning process that interconnects to Xcel's existing Monroe County substation with a new ATC transmission line. Xcel has not demanded an ownership interest, nor has the Midwest ISO sought to allocate ownership using the language of Section VI.

As a result, the correct reading of Section VI of Appendix B of the Transmission Owners' Agreement is not that the Midwest ISO can determine which Transmission Owner can build any proposed facility included the Midwest ISO MTEP, but that where the Midwest ISO, through appropriate planning, proposes a more efficient or cost effective transmission project than what may have been proposed by the transmission owners *and includes that combined project in the MTEP*, the Midwest ISO can, allocate the “obligation” to build the combined project in the manner set forth in Section VI, unless the Transmission Owners determine differently. The *combined projects* that the Midwest ISO proposes are the only projects to which the allocation of the “obligation to build” applies. Applying that “obligation to build” to a broader category of projects affords the Midwest ISO more authority than as set forth in Appendix B and is contrary to the directives and orders of the FERC.

### **III. The FERC's Review and Modification of Section VI of Appendix B, Order Nos. 890 and 1000, and The Green Power Express Proceedings Support ATC's Interpretation of the Provisions of Section VI.**

The only change that has been made to Section VI of Appendix B since it was first drafted supports ATC's interpretation. On December 20, 2001, in the Order Granting RTO Status to the Midwest ISO, FERC discussed whether the Midwest ISO's transmission planning and expansion provisions (including the Appendix B Planning Framework in the Transmission Owners' Agreement) measured up to the Order 2000 requirements for becoming an RTO.<sup>8</sup> FERC generally interpreted the Transmission Owners' Agreement provision more broadly (*e.g.*, to allow third parties to construct and own only if the TOs agreed), but nevertheless required further changes to remove obstacles to third party construction and ownership, thus narrowing the express interests or rights of the transmission owners:

Second, we find that the Planning Framework appears to limit construction and ownership of new transmission facilities identified by the plan to TOs only. Merchant transmission projects are only possible if the TOs in direct contact with the proposed project are financially incapable of carrying out the construction or would suffer demonstrable financial harm from such construction. As in *PJM*, we

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<sup>8</sup> *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001).

find that the principle of third-party participation is important even though we recognize practical obstacles may prevent third parties from competing effectively with incumbent TOs, at least in the short-run. For example, obtaining rights-of way under eminent domain authority may not be possible for some third parties. Nevertheless, as in *PJM*, we find that our long term competitive goals are better served by RTO expansion plans that allow for third party participation as well as permit merchant projects outside the plan. ***Accordingly, Midwest ISO must revise its Planning Framework to make it possible for third parties to participate in constructing and owning new transmission facilities identified by the plan.***<sup>9</sup>

The Midwest ISO Transmission Owners submitted a compliance filing with changes to the Transmission Owners' Agreement. Specifically, the Transmission Owners proposed the following changes to the Appendix B Planning framework in Section VI:

Third-parties shall be permitted and are encouraged to participate in the financing, construction and ownership of new transmission facilities as specified in the Midwest ISO Plan.<sup>10</sup>

In its 2003 order on compliance, FERC accepted the proposed changes to the Appendix B Planning Framework.<sup>11</sup> The Commission summarized its prior directive to remove the limitation on third party construction and ownership as follows:

We ... found that the planning process appeared to limit construction and ownership of new transmission facilities identified by the plan to TOs only. We found that our goal of competitive markets is better served by RTO expansion plans that allow for third party participation as well as permit merchant projects outside the plan. Accordingly, we directed Midwest ISO to allow for third parties to participate in construction and ownership of new transmission facilities identified by the plan.<sup>12</sup>

The Commission then accepted the Midwest ISO's proposed tariff language noting that the Midwest ISO had "added language to Appendix B to allow and encourage third parties (including merchant transmission) to fully participate in the planning process including participation in the financing, construction and ownership of new transmission facilities."<sup>13</sup>

The interpretation provided in the September 15<sup>th</sup> letter is inconsistent with any party participating in the construction of transmission facilities except the Transmission Owners to

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<sup>9</sup> *Id.* at p. 62,521 (emphasis added).

<sup>10</sup> See TO Agreement submitted in a compliance filing on Jan. 28, 2002 in Docket No. RT01-87-006.

<sup>11</sup> *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,169 (2003).

<sup>12</sup> *Id.* at P 43.

<sup>13</sup> *Id.* at P 45.

whose facilities the propose line would interconnect. Under the interpretation in the September 15<sup>th</sup> letter, so long as a proposed transmission line interconnects between the existing (or proposed) facilities of one or more Midwest ISO Transmission Owners, then the Transmission Owners would have the “right” to construct the proposed facility. No “third party” would have the right to construct and own facilities in the Midwest ISO unless they were an owner of the transmission facilities to which the proposed transmission line would interconnect. The September 15<sup>th</sup> interpretation therefore imparts a “right of first refusal,” not an “obligation to construct” contrary to the characterization that you provided, and is inconsistent with the view of the FERC in approving the language that was inserted in Section VI expressly for the purpose of allowing third parties to construct and own transmission facilities. ATC’s interpretation of Section VI not only appropriately limits the “obligation” to build to those facilities for which that obligation was intended, but also gives meaning to the language that was inserted to fulfill the FERC’s directive. Interpreting Section VI in the manner set forth in the September 15<sup>th</sup> letter renders the language added to meet the FERC’s directive difficult, if not impossible to implement, which was not the intent of the FERC and was not in compliance with the FERC’s order directing that Section VI be revised.

Furthermore, in Order 890, FERC required RTOs to encourage participation and investment by third parties in transmission planning. FERC held that:

the focus of Order No. 890 was to facilitate the ability of all stakeholders to participate in the planning process and to offer solutions to reliability and economic concerns on the grid. More broadly, the Commission has encouraged the construction and ownership of facilities by third party transmission owners.<sup>14</sup>

FERC’s policy allowing third parties to own transmission facilities directly contradicts the Midwest ISO’s position that interconnecting Transmission Owners are entitled to half of projects they may have little or nothing to do with in terms of either planning or development, as is the case with the Badger Coulee and Dubuque – Spring Green lines. In ATC’s view, the interpretation of Section VI in the September 15<sup>th</sup> letter is contrary to FERC’s Order No. 890 directives.

Other examples of the Midwest ISO not interpreting Section VI in the manner set forth in the September 15<sup>th</sup> letter also exist. In *Green Power Express LP*, FERC found that the proposed 765 kV transmission line project would have to be evaluated through a Commission-approved transmission planning process (*i.e.*, the Midwest ISO’s MTEP), just like any other proposed project, but that such evaluation was not a prerequisite to the Commission granting rate incentives for the project.<sup>15</sup> The issue of which Transmission Owner would be “obligated to construct” the line should it be approved in the MTEP planning process, was never raised by

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<sup>14</sup> *Southwest Power Pool, Inc.*, 124 FERC ¶ 61,028 at P 40 (2008).

<sup>15</sup> *Green Power Express LP*, 127 FERC ¶ 61,031 (2009).



either the Midwest ISO or any Transmission Owner. However, the FERC granted rate incentives to ITC that would only be applicable if ITC owned and constructed the line.

Finally, in Order 1000, FERC made it clear that transmission providers cannot have tariff provisions and agreements that allow for a right of first refusal for transmission facilities selected in regional transmission plans.<sup>16</sup> If Section VI of Appendix B is interpreted in the manner set forth in the September 15<sup>th</sup> letter, it is more appropriately construed as a “right of first refusal” rather than an “obligation to construct” because, as interpreted in the September 15<sup>th</sup> letter, Section VI authorizes the Midwest ISO to *automatically* assign ownership to Xcel and ITC irrespective of any obligation or action on their part in connection with the proposed transmission lines. The September 15<sup>th</sup> letter specifically provides that Xcel and ITC are entitled to 50% ownership in the respective projects, notwithstanding that no change, modification or revision has been made to either of them, and notwithstanding that neither has done anything to advance the planning, development, approval or construction of either project. This interpretation is inconsistent with the FERC orders directing changes to the language of Section VI, and with both Order Nos. 890 and 1000. ATC’s interpretation eliminates all of those inconsistencies, and interprets the language of Section VI in the manner it was intended.

#### **IV. Attachment FF Does Not Support the Position Set Forth in the September 15<sup>th</sup> Letter.**

Mr. Moeller further states that “ownership of these projects is an important aspect to the [MISO] Board’s evaluation because ownership, whether solely or jointly, affects the cost estimates provided by each Transmission Owner.” In support of this contention, he quotes from Attachment FF of the tariff:

For each project included in the recommended MTEP, the plan shall designate, [] one or more Transmission Owners or other entities to construct, own and /or finance the recommended project.

Mr. Moeller appears to interpret this section to mean that the Midwest ISO must affirmatively designate a Transmission Owner to construct the project and such designation may include a Transmission Owner or Transmission Owners other than the Transmission Owner that had proposed the project to be included in MTEP. This interpretation is not supported in Attachment FF. First, the language above states that “the plan” shall designate one or more TOs or other entities. In ATC’s view, this merely means that the plan must *specify* the owner or owners that will construct the project. This language does not convey a “right” to the Midwest ISO to determine which Transmission Owner or Owners are to construct a proposed project. This language does not require – or even allow – Midwest ISO to change the ownership of a line from that which was proposed when the project was submitted to the MTEP, unless, as discussed below, MISO changes the project significantly from that which was proposed.

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<sup>16</sup> Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Final Rule, Order No. 1000, 76 Fed. Reg. 49842 (2011).

In addition, it is not clear what relevance ownership of the Badger-Coulee or Dubuque – Spring Green lines has to the ability of the Midwest ISO Board to act on their inclusion in the MTEP. Mr. Moeller makes inconsistent statements regarding the need for resolution of the ownership issue prior to the Board decision. First, Mr. Moeller states: “[w]hile this language will not preclude seeking Board approval of the candidate projects absent resolution of the ownership question, the dispute could create uncertainty with respect to the expected costs and construction of the project.”<sup>17</sup> On the other hand, he also states that “[b]ecause ownership will affect the cost estimates for the projects and potentially introduce uncertainty in the approval process, ownership must be resolved and preferably before MISO finalizes the MVP portfolio for Board consideration.” In our discussion, you indicated that the Badger Coulee line and the Dubuque – Spring Green line will not be offered to the Midwest ISO Board for approval until the ownership has been determined.

ATC has reviewed all elements of the Midwest ISO planning requirements under Attachment FF of the Tariff, as well as the provisions of the applicable Business Practice Manuals and can find nothing that gives the Midwest ISO the authority to refuse to advance to the Board ATC’s two transmission line projects. The position of the Midwest ISO in the September 15<sup>th</sup> letter is unsupported in any manner.

## **V. Dispute Resolution**

The September 15<sup>th</sup> letter directs ATC to engage in dispute resolution under Attachment HH of the Midwest ISO Tariff. The dispute resolution provisions of Section VI of Appendix B of the Transmission Owners’ Agreement, however, would not appear to apply to a possible ownership disagreement. Appendix B states that disputes between Midwest ISO’s Planning Staff and any Transmission Owner “on any element of the Midwest ISO Plan,” may be resolved by the dispute resolution provisions in Attachment HH of the Midwest ISO Tariff, or by FERC or state regulatory authorities.<sup>18</sup> Attachment HH states that it will apply to “all disputes relating to any matter governed by the ISO Agreement.” However, Attachment HH does not apply to “any Dispute involving the obligation to build or enlarge transmission facilities,” which dispute “shall be subject to resolution by the appropriate regulatory authority.”<sup>19</sup> Thus, the dispute resolution provisions do not apply in this instance.

## **VI. Request for Midwest ISO Action**

Based on the foregoing, ATC requests that the Midwest ISO clarify its position as set forth in the September 15<sup>th</sup> letter and rescind the demand for determination of ownership interests in Badger Coulee and Dubuque – Spring Green lines. The September 15<sup>th</sup> letter is based on an erroneous interpretation of Section VI of Appendix B of the Midwest ISO

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<sup>17</sup> There is no uncertainty as to the costs estimated by ATC for the construction of these projects. As with all other projects proposed by ATC for inclusion in the MTEP process, ATC has provided the Midwest ISO with the necessary cost estimates.

<sup>18</sup> Appendix B, Section VI.

<sup>19</sup> Attachment HH, Section IV.A.

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Transmission Owners' Agreement. ATC also requests that the Midwest ISO advise ATC in writing that the Badger Coulee and Dubuque – Spring Green transmission projects will be submitted for approval by the Midwest ISO Board at its December 2011 meeting.

ATC requests the Midwest ISO's written response by October 10, 2011. If this matter is not resolved by that time such that the Midwest ISO reconsiders its demand for dispute resolution and its demand that ATC agree to assigning 50% ownership of the Badger Coulee and Dubuque – Spring Green lines to others, ATC will be required to take such other action as is necessary to protect its interests to advance these two projects important for the grid and to insure that the projects proposed are appropriately included in the Midwest ISO MTEP.

If you have any questions, or care to discuss any aspect of this letter, please feel free to contact me.

Sincerely,



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Dan L. Sanford  
Interim General Counsel  
ATC Management Inc.,  
Corporate manager for  
American Transmission Company LLC

cc: John Procario, President and CEO  
John Flynn, Vice President of Business Development  
John Bear, President and CEO, Midwest ISO  
Clair Moller, Vice President of Transmission Asset Management, Midwest ISO