

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Xcel Energy Services Inc.)	Docket No. EL12-28-000
)	
and)	
)	
Northern States Power Company, a Wisconsin Corporation)	
)	
Complainants)	
)	
v.)	
)	
American Transmission Company, LLC)	
)	
Respondent)	

**MOTION TO INTERVENE AND COMMENTS
OF THE MISO TRANSMISSION OWNERS**

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214, and the Commission’s February 15, 2012 Notice of Complaint, the MISO Transmission Owners¹ file this motion to intervene and comments in response to the

¹ The MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; Big Rivers Electric Corporation; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITCTransmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; (continued . . .)

February 14, 2012 complaint (“Complaint”) filed in this docket by Xcel Energy Services Inc. (“XES”), on behalf of its operating company affiliate Northern States Power Company (“NSPW” and together with XES, “Xcel Energy”), against American Transmission Company, LLC (“ATC”).² The Complaint involves NSPW’s and ATC’s respective rights and obligations regarding construction and ownership of a proposed 145 mile, 345 kV electric transmission line connecting NSPW’s facilities near La Crosse, Wisconsin, with ATC’s facilities near Madison, Wisconsin (the “La Crosse – Madison Line” or the “Project”).³ In the Complaint, Xcel Energy contends that, by refusing to negotiate with NSPW for the shared ownership and construction of the Project, ATC has not complied with the terms of (i) the Midwest Independent Transmission Operator, Inc.’s (“MISO” or “Midwest ISO”) Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”); and (ii) the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (“Owners Agreement”). Xcel Energy requests that the Commission direct ATC to negotiate with NSPW.

(. . . continued)

Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc. Individual MISO Transmission Owners may file separate comments or pleadings in this proceeding.

² Complaint and Request for Fast Track Processing of Xcel Energy Services Inc. and Northern States Power Company, a Wisconsin Corporation, Docket No. EL12-28-000 (Feb. 14, 2012) (“Complaint”).

³ ATC refers to the Project as the “Badger-Coulee” project. Complaint at 8. The MISO Transmission Owners are using the “La Crosse – Madison Line” or “the Project” designation for consistency with the Complaint. The MISO Transmission Owners are not taking a position on the proper name of the Project; which facilities make up the Project; or who has the responsibility to construct, own, and maintain the Project.

The MISO Transmission Owners as a group take no position with respect to NSPW's or ATC's claims to responsibility for the Project or any other claims made by Xcel Energy in the Complaint, and the MISO Transmission Owners' comments should not be construed as supporting either NSPW or ATC. The MISO Transmission Owners as signatories to the Owners Agreement submit these comments simply to address the relevant provisions of the Owners Agreement and Tariff.

I. BACKGROUND

NSPW is a Wisconsin corporation that provides electric generation, transmission, and distribution services. NSPW is a transmission owner in MISO and a signatory to the Owners Agreement. ATC is a Wisconsin corporation that is a transmission-only corporation. ATC also is a transmission owner in MISO and a signatory to the Owners Agreement. The Project at issue in the Complaint is an approximately 145 mile, 345 kV transmission line from NSPW's proposed Briggs Road Substation to ATC's North Madison Substation.⁴ The Complaint recounts the history of the Project, and specifically, the Complaint highlights NSPW's role in the planning and development of the Project.⁵

Recently, the MISO Board of Directors designated the Project as a Multi Value Project ("MVP") in the MISO Transmission Expansion Plan ("MTEP").⁶ According to Xcel Energy, in MTEP 2011 "MISO designated both Xcel Energy and ATC as joint

⁴ See Complaint at 13.

⁵ See *id.* at 13-18.

⁶ See *id.* at 6, 14; see also Midwest Independent Transmission System Operator, Inc., *MISO Transmission Expansion Plan 2011*, Appendix A, <https://www.misoenergy.org/Library/Repository/Study/MTEP/MTEP11/MTEP11%20Draft%20Report.pdf> ("MTEP 2011"). As an MVP, the costs of the Project will be shared across the entire MISO region.

owners of the Project, with concomitant responsibility to permit, finance, engineer, construct and own the Project.”⁷ Xcel Energy alleges that, despite NSPW’s claims to responsibility for the Project, ATC has violated the Tariff and Owners Agreement through its: (i) unwillingness to share the obligation to own and construct the Project; (ii) unilateral commencement of pre-permitting activities; and (iii) failure to accept NSPW’s obligations in the Project.⁸ The Complaint seeks recognition of NSPW’s responsibilities to participate in the Project.⁹

II. MOTION TO INTERVENE

Under the Commission’s rules, intervention is appropriate where “[t]he movant has . . . an interest which may be directly affected by the outcome of the proceeding.” 18 C.F.R. § 385.214(b)(2)(ii). The MISO Transmission Owners are a group of investor-owned transmission owners, stand alone transmission owners, cooperatives, and municipals that own transmission facilities over which MISO provides transmission service. As stated above, this proceeding involves a dispute between Xcel Energy and ATC regarding provisions of the Owners Agreement and Tariff. As transmission owners within MISO and parties to the Owners Agreement, each of the MISO Transmission Owners may be affected by the outcome of this proceeding. Consequently, each of the MISO Transmission Owners has a direct interest in this case that cannot be adequately represented by any other party. Therefore, the Commission should allow the intervention of each MISO Transmission Owner.

⁷ See Complaint at 7.

⁸ See *id.* at 21-22.

⁹ *Id.* at 2, 7.

The MISO Transmission Owners request that the Commission place the following individuals on the official service list for these proceedings:

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III. COMMENTS

A. The Owners Agreement Provides That Facilities Which Are Connected Between Two Or More Transmission Owners Will Belong Equally To Each Transmission Owner.

Xcel Energy asserts that the Project “will connect the facilities of two MISO member Transmission Owners: namely NSPW and ATC facilities ([at] the Briggs Road and North Madison substations, respectively),”¹⁰ and pursuant to the Owners Agreement, the obligation to own and construct the Project “belongs equally to NSPW and ATC.”¹¹ The MISO Transmission Owners interpret the Owners Agreement to provide that the obligation to construct a transmission project is to be determined in accordance with the express provisions of the Owners Agreement. Specifically, Appendix B, Section VI of the Owners Agreement provides:

Ownership and the responsibility to construct facilities which are connected to a single Owner’s system belong to that Owner, and that Owner is responsible for maintaining such facilities. Ownership and the responsibilities to construct facilities which are connected between two (2) or more Owners’ facilities belong equally to each Owner, unless such

¹⁰ Complaint at 25.

¹¹ *Id.* at 26.

Owners otherwise agree, and the responsibility for maintaining such facilities belongs to the Owners of the facilities unless otherwise agreed by such Owners.¹²

This language is clear and unambiguous, and means that if a transmission project connects between two or more Owners' facilities, the Owners share equally in the responsibility to construct, own, and maintain the facilities, unless otherwise agreed.

Relevant precedent states that when the terms of a contract are clear and unambiguous, the terms of the contract control.¹³ In fact, the Commission recently found that where a provision of the Owners Agreement is unconditional, "the Commission must construe the Transmission Owners Agreement as it is made by the parties themselves, and to give language that is 'clear, simple and unambiguous the force and effect which the language clearly demands.'"¹⁴

¹² Owners Agreement at Appendix B, Section VI.

¹³ The courts and the Commission have found in numerous instances that when the terms of a contract are clear and unambiguous, the terms of the contract control. Extrinsic evidence or evidence outside of the contract is not used to interpret its provisions. *See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010) (when contract language is unambiguous, that language controls and the court "must give effect to the unambiguously expressed intent of the parties." (citation omitted)); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004) (stating that "when the language of a contract is explicit and clear . . . then the court may ascertain the intent from its written terms and not go further"); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000) (stating when a contract's terms are clear, it is to be construed according to its literal terms and extrinsic evidence cannot be used to alter or contradict the contract's express terms). Delaware contract law, which governs the interpretation of the Owners Agreement (Owners Agreement, Article Nine, Section B) applies similar standards. *See Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (stating when an instrument is clear on its face, the court is not to consider parol evidence to interpret its intentions).

¹⁴ *Duquesne Light Co.*, 138 FERC ¶ 61,111, at P 25 (2012), citing *Hajoca Corp. v. Security Trust Co.*, 25 A.2d 378, 383 (Del. 1942).

With respect to Appendix B, Section VI of the Owners Agreement, there are no qualifiers or conditional statements in this section of the Owners Agreement. The MISO Transmission Owners interpret this section to mean precisely what it says; if a project connects to multiple Owners, the responsibilities to build and own the project are to be shared equally by the Owners, unless otherwise agreed.

B. The Tariff Gives MISO The Authority To Designate The Entity Responsible For Ownership And Construction Of A Project.

Xcel Energy asserts that MISO, consistent with its authority and as required by the Tariff, designated Xcel Energy and ATC as joint owners of the Project in MTEP 2011 “with the concomitant responsibility to permit, finance, engineer, construct and own the Project.”¹⁵ Xcel Energy further argues that ATC’s refusal to acknowledge MISO’s designation of Xcel Energy as a joint owner of the Project is “yet another violation of a statutory standard underlying” the Complaint.¹⁶

The MISO Transmission Owners interpret the plain language of the Tariff to give MISO the authority to designate an entity responsible for projects that the MISO Board of Directors approves through the MTEP. Section V of Attachment FF of the Tariff (a section titled “Designation of Entities to Construct, Own and/or Finance MTEP Projects”) states:

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

¹⁵ Complaint at 7.

¹⁶ *Id.* at 27.

Transmission Owners or other entities to construct, own and/or finance the recommended project.¹⁷

Based on the plain, unambiguous language of the Tariff provision, MISO shall designate the entity responsible for projects in the MTEP.¹⁸ The MISO Transmission Owners are not opining on the entity or entities MISO designated as responsible for the Project in this proceeding; the MISO Transmission Owners merely are stating that the Tariff provides that MISO shall designate in the MTEP the responsible entity to build projects.¹⁹

IV. CONCLUSION

For the foregoing reasons, the MISO Transmission Owners request that the Commission grant their motion to intervene in this proceeding and consider their comments.

Respectfully submitted,

/s/ Tyler R. Brown

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March 5, 2012

¹⁷ Tariff at Attachment FF, Section V.

¹⁸ While MISO may designate an entity as responsible for projects in the MTEP, nothing in the Tariff prohibits the designated entity from assigning its responsibility to another entity, subject to appropriate regulatory approvals.

¹⁹ The MISO Transmission Owners also are not opining on the efficacy of MISO's current practice of designating the responsible entity for MTEP projects in Appendix A. See Complaint at 7 n.15 ("Column C in Appendix A of MTEP11 is labeled as 'Geographic Location by TO Member System' and is where MISO identifies its designated owner of a particular MTEP project.").

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 5th day of March, 2012.

/s/ Tyler R. Brown
Tyler R. Brown

**Attorney for the
MISO Transmission Owners**