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FERC Docket No. EL12-28-000

ANSWER OF AMERICAN TRANSMISSION COMPANY, LLC

See p. 8-12.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

ANSWER OF AMERICAN TRANSMISSION COMPANY LLC

Pursuant to Sections 206(f) and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206(f) and 385.213 (2011), American Transmission Company LLC, by its corporate manager, ATC Management Inc., (collectively "ATCLLC"), hereby files its Answer to the Complaint of Xcel Energy Services Inc. and Northern States Power Company (NSP) (collectively "Xcel Energy") filed on February 14, 2012 that claims a 50 percent ownership interest in ATCLLC's Badger Coulee project (also known as the La Crosse-Madison line). Xcel Energy's claim is based on a misinterpretation of the TO Agreement[1] and a misstatement of the relevant facts and circumstances. ATCLLC hereby (1) answers Xcel Energy's allegations, (2) demonstrates that Xcel Energy is wrong in its interpretation of the TO Agreement, and (3) demonstrates that Xcel Energy is otherwise not entitled to relief on an

[1] Midwest ISO, FERC Electric Tariff, Fifth Revised Volume No. 1, Rate Schedule 1, Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation, effective July 31, 2010 ("TO Agreement" and sometimes referred to as "ISO Agreement" in cited documents).

equitable basis. Consequently, ATCLLC requests that the Commission dismiss the Complaint for failure to state a claim under which relief can be granted under Section 206 of the FPA. Alternatively, if Xcel Energy's interpretation of the TO Agreement is upheld, ATCLLC seeks affirmative relief in the form of a finding that ATCLLC should be afforded the same rights to a 50 percent ownership interest in the CapX2020 lines originating in South Dakota and traversing Minnesota that are proposed to connect to ATCLLC's existing transmission facilities.

I. INTRODUCTION AND SUMMARY

Xcel Energy's Complaint is without merit and the Commission should dismiss it. A full, complete and accurate reading of the MISO TO Agreement, *as the Transmission Owner's that formed MISO intended,* requires this result. ATCLLC asks the Commission to interpret *all* of the language of the TO Agreement, not just the words selectively chosen by Xcel Energy (and others). If the Commission does interpret all the language, this Complaint must be dismissed.

Since the advent of regional cost-sharing in the Midwest Independent Transmission System Operator, Inc. (MISO) region, and especially the MVP portfolio designation in 2010, certain incumbent TOs in the MISO region have begun claiming that a portion of a provision in the TO Agreement gives them an exclusive right to 50 percent ownership of any project that connects to their "facilities." The underlying but unspoken motivation is clear: MVP projects, in particular, are desirable to transmission owners because they have the benefit of providing significant investment opportunity for the transmission owner's shareholders while allocating the costs over the entire ratepaying MISO region, thus reducing the rate impact of that investment on the customers of the transmission owner claiming an interest in such project.

This complaint and the recent Pioneer Transmission, LLC complaint[2] are seminal proceedings because the assertions regarding the interpretation of the TO Agreement giving rise to both proceedings highlight the resistance that still exists to more than a decade of Commission policy encouraging the construction of new transmission. If these allegations succeed, the efforts of transmission owners like ATCLLC that have, consistent with that long standing Commission policy, engaged in sustained new transmission development over that decade will be stifled because of the actions of those that have not done so but now want to reap the rewards of the work of others. The allegations of an exclusive "right to build" provision in the TO Agreement represents nothing more than an opportunistic and incomplete interpretation of the TO Agreement that allows interconnecting TOs to claim ownership of projects that they have not actively furthered, and for which they have limited cost and rate responsibility, in an effort to aggrandize their earnings merely because the proposed projects interconnect to their existing facilities. The claim in this proceeding is based solely on that incomplete reading of the TO Agreement. If Xcel Energy's incomplete reading is permitted to stand it will have an adverse effect on encouraging new transmission investment by incumbent and non-incumbent TOs, and is manifestly unfair to those who have undertaken significant burdens and expenses to develop transmission projects.

[2] On February 8, 2012, Pioneer Transmission, LLC, a joint venture transmission development company owned by subsidiaries of American Electric Power Company, Inc. (AEP) and Duke Energy Corporation (Duke Energy) filed a complaint in Docket No. EL12-24-000 against MISO and Northern Indiana Public Service Company (NIPSCo) regarding the rights of parties to invest in and construct the first segment of a 765 kV transmission project which Pioneer intends to build in Indiana. Specifically, the Pioneer complaint seeks relief from (1) the possible application of an alleged "right-to-build" provision in the MISO TO Agreement that NIPSCo contends gives it an exclusive right to own 100 percent of the new facilities and equipment at the New Reynolds substation and 50 percent of the 765 kV line from New Reynolds to Greentown (which, together, is greater than 50 percent of the total Project investment); and (2) MISO's interpretation of TO Agreement provisions that has the effect of precluding third party developers from collecting FERC-approved transmission rates.

Xcel Energy claims that it is entitled to a 50 percent ownership interest in the Badger Coulee line because the line may someday connect with a facility that Xcel Energy has proposed, but has not yet constructed. Xcel Energy bases this claim on an incorrect and incomplete interpretation of the TO Agreement. As shown below, the TO Agreement was never intended to provide a TO with an "exclusive right" to build and own one half of any project that interconnects with its system. Indeed, the logical extension of that right would be that no line could be owned by a single entity unless all other interconnected entities agreed. Not only would this incomplete reading of the TO Agreement be impractical, it would create a disincentive for TOs and third parties to spend any time or resources on developing projects that interconnect with other entities, thus thwarting the very reason for the Commission's policies embodied in Order Nos. 2000,[3] 890[4] and 1000,[5] namely to encourage regional transmission planning and development.

Furthermore, if this interpretation is allowed to stand and control the development of regionally planned transmission projects, it would likely force TOs to enter into business arrangements such as joint ventures for all their projects (unless other TOs agreed otherwise); it would immeasurably complicate the siting process for new transmission lines, rate filings and

[3] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

[4] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification,* Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[5] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49842 (August 11, 2011), FERC Stats, & Regs, ¶ 31,323, (2011).

cost allocation; and it could make financing more difficult because of the participation of more than one entity.

A further fallacy in Xcel Energy's position (but not essential to the Commission's determination here) arises from the fact that the transmission project to which Xcel Energy asserts a claim is a project predominantly located within ATCLLC's own service area. Xcel Energy makes a number of claims about its participation in the transmission planning process that resulted in the identification and the planning approval of the Badger Coulee line, and suggests that these efforts somehow give Xcel Energy rights of ownership. Those factual claims are exaggerated and nothing more than a smokescreen for Xcel Energy's true desires in this case, more investment for little impact to its existing ratepayers, and is intended to obfuscate the real issue in this proceeding, namely the *complete and full interpretation of the language of the TO Agreement.*

Xcel Energy provides no authority for the notion that participation in a transmission planning process bestows rights to ownership of the Badger Coulee line. The TO Agreement, on which Xcel Energy otherwise relies for its claims, provides no authority for this proposition. Moreover, collaborative planning in the manner that the Commission intended via Order Nos. 2000, 890 and 1000 does not equate to ownership entitlement. As set forth in the affidavits of Mr. Dale Landgren and Ms. Flora Flygt, Answer Exhibits 2 and 3, respectively, the planning for the Badger Coulee line arose from ATCLLC's own Commission-approved local planning process, consistent with Section V of Appendix B of the TO Agreement. If Xcel Energy's incomplete reading of the TO Agreement is correct, then Xcel Energy would have the Commission transform the regional transmission planning process into a potentially collusive and

non-competitive exercise that would subvert the real purpose of regional planning: the development of transmission projects that enhance efficiency, reliability and fulfill public policy.

As set forth in detail below, the Commission should: 1) dismiss the Complaint because Xcel Energy does not demonstrate a right under the Federal Power Act[6] to the relief it seeks; 2) dismiss the complaint because Xcel Energy's claim is based on an incomplete and therefore erroneous interpretation of the Transmission Owners' Agreement, and a correct interpretation of the Transmission Owners' Agreement does not support the relief sought; or, in the alternative 3) determine that ATCLLC has the same rights that Xcel Energy seeks and grant ATCLLC 50 percent ownership of all the CAPX2020 projects that Xcel Energy asserts are elements of the same planning analysis.

II. BACKGROUND

1. ATCLLC

ATCLLC is a Wisconsin limited liability company created in accordance with Wisconsin state law as a single-purpose, transmission-only company. ATCLLC owns, controls and operates more than 9,400 miles of transmission lines in the states of Wisconsin, Illinois, Minnesota and Michigan. ATCLLC began providing transmission service on January 1, 2001, under a Commission-approved open access transmission tariff, and on February 1, 2002, transferred operational control of its transmission facilities to the MISO. As a transmission-owning member of the MISO, ATCLLC continues to engage in the day-to-day operational control of the transmission facilities that it owns. Transmission service over ATCLLC's transmission facilities is provided under and governed by the terms of the MISO Tariff. ATCLLC also has its own

[6] 16 U.S.C. § 791, *et seq.*

Commission-approved local planning process set forth in the MISO Tariff at Attachment FF-ATCLLC. Since its inception, ATCLLC has invested more than $2.8 billion in new transmission facilities.

2. The Development of the Badger Coulee Line (Also Known as the La Crosse-Madison Line)

The transmission project to which Xcel Energy makes its claim in this case is the Badger Coulee line, which is also referred to as the La Crosse-Madison line. It is a proposed 150 mile, 345 kV transmission line that will be wholly in Wisconsin and will interconnect with a *proposed* line to be owned (in part) by Xcel Energy, referred to as the Hampton-La Crosse or Twin Cities-La Crosse line.[7] The Badger Coulee line was first submitted by ATCLLC to the MISO Transmission Expansion Plan (MTEP) in 2008. The Badger Coulee project was recently approved in the MISO Board's 2011 Multi-Value Project (MVP) portfolio. As such, the project has been identified as one that is needed to meet MISO's reliability requirements, and that will achieve economic savings for the MISO Region as a whole, and fulfill public policy requirements approved by the Commission for designation as a multi-value project. It has also been determined to meet local electrical needs.[8] As an MVP, the project costs will be allocated across all transmission customers in MISO.

[7] PSCW Docket No. 5-CE-136, Joint Application of Dairyland Power Cooperative, Northern States Power Company - Wisconsin, and Wisconsin Public Power, Inc., for Authority to Construct and Place in Service 345 kV Electric Transmission Lines and Electric Substation Facilities for the CapX Twin Cities - Rochester - La Crosse Project, Located in Buffalo, Trempealeau, and La Crosse Counties, Wisconsin.

[8] Complaint, Attachment C at P 28-29.

The Public Service Commission of Wisconsin (PSCW), the state siting authority, has opened a docket for the Badger Coulee line[9] and ATCLLC has been exclusively involved in the project development, including the initial project design, along with engineering, routing, siting, environmental evaluation and community outreach for the project, as well as statutorily required discussions with the PSCW concerning the proposed construction.[10] The Badger Coulee line will be wholly within Wisconsin, and therefore, authority to construct, own and operate the Badger Coulee line lies with the PSCW.

As is discussed further below, ATCLLC has been the sole proponent of the Badger Coulee project since its inception.[11] Neither Xcel Energy, nor any other party has spent any significant time or resources planning and developing the Badger Coulee line, or engaging in community outreach to support its construction. To date, ATCLLC has spent nearly $4.5 million in developing the Badger Coulee project.[12]

There are approximately 10 years of ATCLLC development history associated with the Badger Coulee line. Xcel Energy provides only a portion of the relevant facts and misconstrues the others. ATCLLC is submitting two affidavits with this Answer that discuss the background and development history of the Badger Coulee line to give the Commission a full record of events: Mr. Dale Landgren, former ATCLLC Vice President and Chief Strategic Officer, and

[9] PSCW Docket No. 137-CE-160, Application of American Transmission Company, as an Electric Public Utility, for Authority to Construct and Operate a New 345 kV Transmission Line from the La Crosse area, in La Crosse County, to the Greater Madison Area in Dane County, Wisconsin. The project is referred to as the Badger Coulee Project. The Docket was opened September 2, 2010.

[10] For more details, see *www.atc-projects.com/BadgerCoulee.shtml.*

[11] Affidavit of Dale Landgren, attached hereto as Answer Exhibit 2 at PP 6-7; Affidavit of Flora Flygt, attached hereto as Answer Exhibit 3, at PP 5-9.

[12] Answer Exhibit 4, Letter from John Procario, ATCLLC, to John Bear, MISO President and CEO, dated Dec. 1, 2011. The $4.5 million includes a relatively smaller amount for development efforts in connection with ATCLLC's Dubuque-Spring Green line.

Ms. Flora Flygt, ATCLLC's Strategic Policy and Planning Advisor. Mr. Landgren and Ms. Flygt were directly involved in the planning and development of the Badger Coulee line. The key points raised in the affidavits regarding the development of the Badger Coulee line include:

- The Badger Coulee project had its origin in the WIRES studies in 1999.[13] Mr. Landgren was the chair of the Wisconsin Reliability Assessment Organization (WRAO), the executive group that gave direction to the technical committee called WIRES.[14] The WRAO was under a directive from the then Governor of Wisconsin, Tommy Thompson, and the PSCW to study transmission options that would improve Wisconsin's interconnection to the region and to improve reliability in Wisconsin.[15] Xcel Energy was but one of many transmission owners that were involved in the study. The WRAO recommended, among others, the Arrowhead-Weston[16] and Badger Coulee lines to be pursued.[17] The Badger Coulee line is the only line identified in the WRAO/WIRES study

[13] These studies should not be confused with the currently existing organization of the same name, WIRES, which is a group composed of entities seeking to advance the planning and construction of transmission facilities of which ATCLLC is a member. See http://www.wiresgroup.com/.

[14] Landgren Affidavit P 6.

[15] Landgren Affidavit P 6.

[16] In stark contrast to Xcel Energy's claim to 50 percent ownership of the Badger Coulee line, to which regional cost sharing has been applied, is Xcel Energy's lack of any such claim for the Arrowhead-Weston line, which was included in the WIRES study and, though approved in the MISO MTEP process, was specifically excluded from any cost sharing of any kind by MISO and was included on the "exclude list" (Attachment FF-1) when the Commission initially approved regional costs sharing in MISO. *Midwest Independent Transmission System Operator Inc.* 114 FERC ¶ 61, 106*)*. The Arrowhead – Weston line is a 231 mile long, 345 kV line that interconnects with "facilities" owned by Allete, Inc. (d/b/a Minnesota Power Company) and Northern States Power Company – Wisconsin, one of the Complainants in this proceeding. The Arrowhead-Weston line was constructed at a cost of approximately $430 Million and was placed in operation in February 2008. No party has asserted an ownership interest in the Arrowhead-Weston line despite the circumstances being essentially identical and the language of Section VI of Appendix B appearing to be equally applicable to the construction and ownership of this line. The only apparent difference is the cost allocation attributable to the Arrowhead-Weston line versus the cost allocation attributable to the Badger Coulee line. See Landgren Affidavit P 6.

[17] Landgren Affidavit P 6: Flygt Affidavit P 5.

in which Xcel Energy now claims an ownership interest, notwithstanding that the Arrowhead-Weston line also interconnects with its facilities. Badger Coulee is the only line identified in that assessment to be designated for regional cost allocation as an MVP.[18]

- As early as 2003, ATCLLC provided detailed information to its network customers regarding the benefits to ATCLLC's network customers of the Badger Coulee line, with the goal of having free movement of power within ATCLLC's footprint.[19]
- A crucial part of the history of the Badger Coulee line was the 2005 Access docket with the PSCW, which Xcel Energy fails to mention.[20] The Wisconsin Access Study Initiative (Access study) was conducted in response to the establishment of the MISO wholesale market in 2002 and the designation of Wisconsin as a "narrow constrained area."[21] After conducting planning analyses and getting public input, ATCLLC decided to proceed with two western Wisconsin lines, one to Iowa (Dubuque-Spring Green to Madison), and one to Minnesota (Badger Coulee). Xcel Energy contributed information and other routine planning inputs to these efforts, in the same way as other regionally proximate utilities did, but did not take any leadership or engage in any other efforts to move these projects forward.[22]
- From the time the CapX2020 group was first formed, Mr. Landgren made repeated requests on behalf of ATCLLC directly to CapX2020 participants that ATCLLC, as a

[18] Landgren Affidavit P 6.

[19] Flygt Affidavit P 6.

[20] Landgren Affidavit P 7.

[21] Landgren Affidavit P 7.

[22] Landgren Affidavit P 7.

transmission owner in Minnesota, should be included as a member in the CapX2020 development efforts.[23] ATCLLC's requests were repeatedly rejected and ATCLLC was denied any direct participation of in CapX2020. ATCLLC provided information to the CapX2020 development efforts about the Badger Coulee line in the same manner as ATCLLC took any CapX2020 transmission expansion plans into account in ATCLLC's own transmission expansion plans. ATCLLC was not allowed to be a member of the CapX2020 Vision Study utilities or to even have a person on the study team.[24] Xcel Energy's claim that the Badger Coulee line is an extension of the CapX2020 projects is belied by ATCLLC's exclusion from the CapX2020 process.[25]

- ATCLLC has always made known its intent to construct and own the Badger Coulee line. All of the early studies conducted to determine the costs and benefits of the line were conducted in terms of benefits and costs to ATCLLC's customers.[26] The Badger Coulee line was in part justified on an economic basis because it provided benefits to ATCLLC's

[23] Landgren Affidavit P 10.

[24] Landgren Affidavit P 11.

[25] Xcel Energy makes no reference to the Access docket (Docket No. 137-EI-100) before the PSCW, with good reason. In that proceeding, Dairyland Power Cooperative, Inc., one of the CapX2020 members and one of the applicants before the PSCW for approval of the Wisconsin portion of the Hampton – LaCrosse line provided the following comments:

> The construction of PI-ROC-LAX is not dependent on ATC building from La Crosse to Columbia. Studies have been done that show PI-ROC-LAX line can be constructed and operated radially for the long term. That said, to get the full benefit of a major EHV line such as PI-ROC-LAX, it is preferable to complete the loop. But since PI-ROC-LAX is needed for local load serving, that portion of the Prairie Island-Columbia option is likely to be constructed by eastern MAPP utilities irrespective of the Access initiative.

Comments of Dairyland Power Cooperative on Commission Staff Draft Report, Docket 137-EI-100 (Dec, 5, 2005) at p. 7. See also the CapX2020 Certificate of Public Convenience and Necessity Application, PSCW Docket No. 5-CE-136 (June 2011), in which the application makes several references to the Badger Coulee line being ATCLLC's project. Answer Exhibit 11.

[26] Flygt Affidavit P 6.

customers, even though it would provide benefits to neighboring states as well.[27] Mr. Landgren had several meetings with Xcel Energy and other CapX2020 executives in 2008-09 in which ATCLLC made clear that it intended to own and construct the Badger Coulee line.[28]

- ATCLLC submitted the Badger Coulee line to the MISO MTEP in 2008 and it was listed as an ATCLLC project.[29] ATCLLC first became aware that CapX2020 and Xcel Energy had any interest in an ownership share in the Badger Coulee line in 2009, but neither CapX2020 nor Xcel Energy advanced this claim until mid-2010 during discussions with Xcel Energy, MISO and other transmission owners regarding the development of MISO's first Candidate MVP portfolio.[30] At some point during the fall of 2011, when MISO was preparing its MVP Portfolio report, the Badger Coulee project "ownership" designation was changed. Instead of just having ATCLLC listed as the owner, Xcel Energy was now also included. ATCLLC never agreed to the inclusion of Xcel Energy as an owner of the Badger Coulee line and promptly informed MISO of its disagreement.[31]

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[27] Flygt Affidavit at P 6.

[28] Landgren Affidavit P 16.

[29] Flygt Affidavit P 15.

[30] Flygt Affidavit at P 15.

[31] See Flygt Affidavit P 15; Answer Exhibit 4 - Letter from John Procario, ATCLLC to John Bear, President and CEO, MISO, dated Dec. 1, 2011:

> ATCLLC disagrees with MISO's characterization of the ownership of the respective projects as "shared." In ATCLLC's view, that characterization is based on an erroneous interpretation of one provision of the Transmission Owners' Agreement. These projects will be owned in their entirety by ATCLLC. While ATCLLC does not believe that ownership of the projects is a concern of the Board (because once approved, irrespective of ownership, transmission owners are obligated to exercise "due diligence" to construct projects approved by the Board), ATCLLC asks that MISO relate to the Board that ATCLLC disagrees with MISO's characterization and that ATCLLC stands ready to carry out its responsibilities and obligations under the MISO Tariff and Transmission Owners'

3. Background of the Appendix B Planning Structure Provisions of the TO Agreement

An understanding of the background of the formation of MISO and the creation of the TO Agreement is crucial to the resolution of this proceeding. At the time the transmission planning provisions of the TO Agreement (Section V and VI of Appendix B) were negotiated, there was a significant lack of new transmission construction in the Midwest and elsewhere.[32] Attached to this Answer is the Affidavit of John C. Procario, ATCLLC's current President and CEO and former Chief Operating Officer at Cinergy. He was Chairman of the MISO Management Council throughout the MISO development period, during which he attended all but one of the Council meetings. He was also the first Chairman of both the MISO Transmission Owners Committee and the MISO Advisory Committee. Mr. Procario actively participated in the discussions and negotiations leading to the formation of MISO, including the development and negotiation of Appendix B to the TO Agreement. As explained by Mr. Procario on the basis of this experience, the Appendix B, Section VI planning provisions of the TO Agreement were included to serve three main purposes: (1) to integrate the transmission planning activities of the individual TOs; (2) to establish the transmission planning framework for MISO, a new "transmission-only" entity at the time; and (3) to address concerns that were raised by TOs and other stakeholders about the newly created MISO transmission planning process.[33]

Agreement and will seek all required approvals necessary to construct the proposed projects once approved by the MISO Board.

See also, Complaint Attachment J - Letter from Dan Sanford, ATCLLC to Stephen Kozey, MISO, dated Oct. 4, 2011 ("the Midwest ISO is not required to resolve any disagreement concerning ownership of the Badger-Coulee and Dubuque-Spring Green projects, nor should it have taken a position on this issue.").

[32] Affidavit of John C. Procario, attached hereto as Answer Exhibit 1 at PP 8 and 11; s*ee also* Landgren Affidavit at P 18.

[33] Procario Affidavit at P 7.

One of the major concerns discussed in the negotiations of Appendix B during the period leading to MISO's formation was what would happen if MISO, as a separate transmission planning entity, planned a new project: one that had not been proposed by any TO in carrying out its own respective transmission planning obligations which are recognized in Section V of Appendix B. Transmission dependent stakeholders in the MISO formation process were concerned that MISO would not be effective in its new transmission planning role if MISO planned for transmission projects to be included in the MISO MTEP Plan that no transmission owner would agree to build.

Thus, the language that Xcel Energy relies on to claim 50 percent ownership was intended by stakeholders as a limit on MISO's authority to direct construction of projects, and not a grant of TO ownership rights. This was necessary because at the time those provisions were drafted, TOs did not want to be directed to build transmission.[34] The Appendix B planning provisions were not intended to give any TO a "right of first refusal" or a "right to build;" those concepts were not the basis for the negotiations leading to the drafting of Appendix B.[35]

The position set forth by Xcel Energy in this proceeding, as well as certain comments filed by TOs and MISO in the Pioneer Complaint proceeding, EL12-24-000, serve to confirm Mr. Procario's position in agreeing that the language of Appendix B, Section VI sets forth an "obligation to build," not a right to build.[36] That position begs the question, however, whether that "obligation to build" applies to only a limited number of transmission projects which

[34] Procario Affidavit PP 8 and 11; Landgren Affidavit at P 18.

[35] Procario Affidavit PP 7-9.

[36] *See, e.g.*, *Motion to Intervene and Comments of the MISO Transmission Owners*, Docket No. EL12-24-000 (filed 2/28/2012); *Answer of Respondent Northern Indiana Public Service Co.*, Docket No. EL12-24-000 (filed 2/28/2012); *Answer of the Midwest Independent Transmission System Operator, Inc.*, Docket No. EL12-24-000 (filed 2/28/2012).

represent "MISO planned" projects that were not proposed by any TO, or whether the "obligation to build" applies to every project included in the MISO MTEP.

As established by Mr. Procario, the so-called "responsibility to construct" language was included in Appendix B Section VI not to grant ownership rights to TOs, but to divide the burden of such a MISO-planned project between TOs, and effectively act as a "shield" to protect one TO from bearing the full effect of MISO's transmission planning of new projects.[37] Requiring two (or possibly more) TOs to share the responsibility to construct a project that MISO's planning staff had developed would avoid the potential adverse impact on some of the smaller TOs and their ability to finance the construction.[38] The language was intended to ensure that transmission projects planned by MISO would be built and was never intended to appropriate ownership of projects that were substantially planned by a single entity.

In short, the essential premise for Xcel Energy's complaint fails, because as ATCLLC demonstrates in this Answer and its supporting affidavits, the "obligation to build" applies only to those limited transmission facilities that MISO's planning process develops and not projects substantially planned by a single entity.

III. ANSWER TO COMPLAINT

A. Appendix B, Section VI Does Not Give an Interconnecting TO an Unlimited Right to Ownership of Transmission Facilities Proposed By Another Entity.

Section VI of Appendix B contains the agreed-upon process by which transmission projects are included in the MTEP and specifies how the "obligation" to construct such planned-for lines is to be treated. Section VI lists the things that the MISO Planning Staff should include

[37] Procario Affidavit PP 8 and 12.

[38] Procario Affidavit P 7.

in its analysis for developing the MTEP Plan and encourages the MISO Planning Staff (as differentiated from the transmission owners' respective planning staffs whose obligations are set forth in Section V of Appendix B) to develop the most "efficient" and "cost-effective" transmission projects to be included in the MISO transmission plan:

> The Midwest ISO Plan will give full consideration to all market participants, including demand-side options, and identify expansions needed to support competition in bulk power markets and in maintaining reliability. This analysis and planning process shall integrate into the development of the Midwest ISO Plan among other things: (i) the transmission needs identified from Facilities Studies carried out in connection with specific transmission service requests; (ii) **the transmission needs identified by the Owners in connection with their planning analyses to provide reliability power supply to their connected load customers and to expand trading opportunities, better integrate the grid and alleviate congestion;** (iii) the transmission planning obligations of an Owner, imposed by federal or state law(s) or regulatory authorities. . . (iv) the inputs provided by the Planning Advisory Committee; and (v) the inputs, if any, provided by the state regulatory authorities having jurisdiction over any of the Owners.
>
> **In the course of this process, the 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**. This multi-party collaborative process is designed to ensure the development of the most efficient and cost-effective Midwest ISO Plan that will meet reliability needs and expand trading opportunities, better integrate the grid, and alleviate congestion, while giving consideration to the inputs from all stakeholders. [Emphasis added.]

Section VI predates Orders No. 890 and 1000, but consistent with them, Section VI recognizes that transmission owners are obligated under Appendix B to continue to engage in planning for their respective areas, but there may be opportunities for MISO's planning staff, once it reviews the plans of each of the transmission owners, to combine the projects identified in those respective planning processes into an overall transmission expansion plan for the MISO region as a whole that results in "more comprehensive" and "cost effective" transmission projects.

That combination of individual transmission owner plans is a fundamental precept on which the MISO regional plan is predicated. To alleviate the concerns noted by Mr. Procario that were raised in the negotiation process leading to the formation of MISO in the first instance, Section VI gives MISO some express authority to direct construction of such new transmission projects that are identified by the MISO planning staff for inclusion in the MTEP that had not otherwise been identified by individual transmission owners:

> The Planning Staff shall present the Midwest ISO Plan, along with a summary of relevant alternatives that were not selected, to the Board for approval on a biennial basis, or more frequently if needed. The proposed Midwest ISO Plan shall include specific projects already approved as a result of the Midwest ISO entering into service agreements with transmission customers where such agreements provide for identification of needed transmission construction, its timetable, cost, and Owner or other parties' construction responsibilities. **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 Owners otherwise agree**, and the responsibility for maintaining such facilities belongs to the Owners of the facilities unless otherwise agreed by such Owners.

It is this language that is at the heart of Xcel Energy's complaint, and it is the incomplete interpretation of this language that leads to Xcel Energy's erroneous conclusion. Xcel Energy and the commenters supporting this position in the *Pioneer* proceeding (Docket No. EL12-24-000) read only the last paragraph and the "Ownership" language to try to establish an "obligation to build" that is disassociated from the language in the prior paragraph that sets the parameters of the MISO planning obligation. Xcel Energy thus "creates" a right to "own" out of an "obligation

to build" simply by being an entity to which *any* proposed transmission project is planned to interconnect.[39]

The two paragraphs should be read together to arrive at the proper meaning. And, when read together, the meaning is evident: the "obligation to build" applies only to projects that the MISO planning staff "creates" in carrying out its express transmission planning obligations. To read the language otherwise is to read out of Appendix B the actual meaning and intent of the "obligation to build."

The limited scope of the "obligation to build" is further evident when the transmission owner obligations under Section V are properly included. There is no need for a contractual "obligation to build" transmission projects that transmission owners themselves proposed to build. Section V of Appendix B already provides that obligation because transmission owners must consider

> **the transmission needs identified by the Owners in connection with their planning analyses to provide reliability power supply to their connected load customers and to expand trading opportunities, better integrate the grid and alleviate congestion;** (iii) the transmission planning obligations of an Owner, imposed by federal or state law(s) or regulatory authorities."

It is hard to fathom that a transmission owner that needed to address its own system requirements, including its respective "connected load customers" or which had a "state" or "federal" transmission planning obligation would need to be further "obligated" to build transmission facilities that it had itself proposed be included in the MISO transmission expansion plan.

[39] To the extent there is an atmosphere of "race to the RTO" for new projects, it is a product of regional cost allocation, *not* the TO Agreement language that has been around for more than a decade. Answer of NIPSCo, Docket No. EL12-24-000, at p. 3.

At the time the relevant language was written in 1996-98, and agreed upon by the Transmission Owners that formed MISO, there was a significant lack of new transmission construction in the Midwest and elsewhere. Stakeholders in the MISO formation process were concerned that MISO would not be effective in transmission planning if its planning staff identified transmission projects to be included in the MISO MTEP Plan that no other party had proposed. The fear was that no one would agree to build them.[40]

The language in Section VI is not a general "grant" of ownership entitlement simply because a transmission line proposed by one TO may interconnect with transmission facilities owned (or in the case of Badger Coulee, proposed) by another TO. The language quoted above applies only in instances where the MISO Planning Staff creates a new project that is substantially different from the ones originally proposed by one or more Transmission Owners (or by no TO at all). In that limited circumstance, Appendix B imposes an "obligation to build," authorizing MISO to direct the interconnecting TOs to build the MISO planned transmission project as contemplated in Section VI of Appendix B. That language was intended to do no more.

[40] According to Mr. Procario, who was present at virtually all of the TO Agreement negotiations, the so-called "responsibility to construct" language was drafted to share the "burden" of MISO's independent planning activities, which acts as a "shield" to protect one TO from bearing the full effect of MISO's planning and consolidation of projects into different projects altogether. Requiring the two (or possibly more) TOs to share the responsibility to construct a project that MISO's planning staff had developed, would avoid the potential adverse impact on some of the smaller TOs and their ability to finance the construction. The language thus was intended to ensure that projects planned by MISO would be built by the TOs and not intended to divide ownership of projects that were substantially planned by a single entity. Procario Affidavit, PP 7-8, and 12.

B. Xcel Energy's Interpretation of the TO Agreement Must Fail Because It Does Not Give Effect to The Commission's 2001 RTO Order Which Required that Third Parties Be Allowed to Construct and Own Facilities.

The Commission has already recognized that Section VI of Appendix B could be misconstrued and endeavored to provide further clarity to insure that transmission would be constructed. On December 20, 2001, in the Order Granting RTO Status to the Midwest ISO, FERC discussed whether MISO's transmission planning and expansion provisions (including the Appendix B Planning Framework in the TO Agreement) measured up to the Order 2000 requirements for becoming an RTO.[41] Initially, the Commission interpreted the TO Agreement as allowing third parties to construct and own only if the TOs agreed, but ultimately required further changes to remove obstacles to third party construction and ownership, thus narrowing the express interests or rights of the incumbent TOs:

> 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 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***.[42]

[41] *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001) (2001 RTO Order).

[42] *Id.* at p. 62,521 (emphasis added).

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

> If the designated Owner is financially incapable of carrying out its construction responsibilities or would suffer demonstrable financial harm from such construction, alternate construction arrangements shall be identified. Depending on the specific circumstances, such alternate arrangements shall include solicitation of other Owners or others to take on financial and/or construction responsibilities. ***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.*** In the event interest among other Owners or other entities is not sufficient to proceed, all Owners, subject to applicable regulatory requirements, shall be responsible for sharing in the financing of the project and/or hiring of a contractor(s) to construct the needed transmission facility; provided, however, the Owners' obligations under this sentence shall be subject to the Owners being satisfied that they will be compensated fully for their investments and will not be subject to additional regulatory requirements, unless the Owners otherwise agree to waive either or both of these requirements.[43]

The new sentence put forth by the TOs in fulfillment of this commitment, however, was added in the paragraph that discusses what happens if a TO is financially incapable of constructing. Arguably, the placement of this sentence is not in compliance with the 2001 RTO Order, but in any event, its location is being taken advantage of to advocate a result that is not consistent with the Commission's order. As a result, Xcel Energy here, and NIPSCo and the TOs in their supporting comments in the *Pioneer* proceeding, advocate an interpretation of the language of Section VI that restricts third-party construction to cases where a TO is financially incapable -- an interpretation that would essentially negate the 2001 RTO Order.

[43] *See* revised TO Agreement submitted in compliance filing on Jan. 28, 2002 in Doc. No. RT01-87-006 (emphasis added).

In accepting MISO's compliance filing that incorporated the change to permit third parties to "participate" in MISO's planning and to entitle them to construct,[44] the Commission emphasized 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.[45]

The Commission accepted the MISO's proposed language noting that MISO 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***."[46]

Xcel Energy's interpretation applying the "obligation to build" of Section VI to all transmission projects is inconsistent with the 2001 RTO Order because it presumes that only interconnecting TOs can own projects, unless the TOs otherwise agree or are financially incapable -- exactly the restriction on transmission construction that the Commission sought to eliminate in the 2001 RTO Order. If, as interpreted by Xcel Energy, ATCLLC is compelled to surrender 50 percent ownership of a transmission project that it proposed merely because it "interconnects" with another TOs facilities, then no "third party" would have the right to construct and own facilities in the MISO region in their own right because by definition they are not an owner of the facilities to which the proposed transmission line would interconnect. Xcel

[44] *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,169 (2003).

[45] *Id.* at P 43.

Energy's interpretation therefore imparts essentially an ultimate ban on the ability of third parties to own facilities they propose, which directly contradicts the Commission's 2001 RTO Order.

The correct reading of Section VI of Appendix B is that the "obligation to build" is limited in its application. Where MISO, through appropriate transmission planning, proposes a more efficient or cost effective transmission project that is significantly different than what may have been proposed by the TOs in fulfilling their respective transmission planning obligations and includes that new transmission project in the MTEP, Section VI of Appendix B allocates the "obligation to build" that transmission project half to each of the interconnecting TOs, unless the TOs determine differently. Those "new" or substantially different transmission projects that MISO's planning staff proposes are the only transmission projects to which the allocation of the "obligation to build" applies. Applying that "obligation to build" to all transmission projects is a misleading and incomplete reading of that language, which affords MISO more authority than is set forth in Appendix B and is contrary to the directives and orders of the Commission.

ATCLLC'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 Commission's directive in the 2001 RTO Order.

The remainder of the TO Agreement further supports ATCLLC's interpretation by imposing the obligation to use good faith for the design, certification and construction of a line that is imposed on an entity by MISO:

> The affected Owner(s) shall make a good faith effort to design, certify, and build the designated facilities to fulfill the approved Midwest ISO Plan. However, in the event that a proposed project is being challenged through the Dispute Resolution process under Attachment HH of the Tariff, the obligation of the Owners to build that specific project (subject to required

[46] *Id.* at P 45.

> approvals) is waived until the project emerges from the Dispute Resolution process as an approved project.

This language would obviously not be needed if a project is proposed by an entity that has the intention, and the means, to complete the project, as is the case here. MISO need not exercise any authority to "order" construction where the construction is itself proposed by the TO that has assessed the need and that need has been confirmed in the MISO regional planning process.

In addition, in Order No. 890 the Commission required RTOs to encourage participation and investment by third parties in transmission planning. The Commission 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.[47]

The Commission's declared policy allowing third parties to own transmission facilities is in direct conflict with Xcel Energy's position that interconnecting TOs are entitled to half of projects even though they may have done little or nothing by way of either planning or development, as is the case with the Badger Coulee line, simply because their facilities interconnect. Xcel Energy's interpretation of Section VI is contrary to the Commission's 2001 RTO Order and Order No. 890 directives.

C. The TO Agreement Does Not Give MISO Authority to Take an Ownership Interest Away From One Entity to Give to Another.

MISO has acknowledged the limits of its authority in its Request for Rehearing of Order 1000. MISO argued to *maintain a right of first refusal* in the TO Agreement so that MISO would not be in a position of deciding who should build. MISO's authority to order ATCLLC to give a

[47] *Southwest Power Pool, Inc.*, 124 FERC ¶ 61,028 at P 40 (2008).

portion of its ownership interests in Badger Coulee to any other entity does not exist – in MISO's own words:[48]

> [S]tate laws give to states the authority to decide who should build such facilities. State law, not federal, governs the preconditions associated with the siting and construction of transmission and the appurtenant rights associated with such construction including, but not limited to, the right of eminent domain. MISO therefore submits that its appropriate role under Order No. 890 is to implement and manage a comprehensive, open, and fair transmission planning process. **It is not for MISO to determine who should build specific transmission projects identified through its transmission planning process. While MISO may approve plans that include needed transmission expansion, MISO has not been vested with any rights by any state legislature or state commission regarding the construction of the facilities that may be deemed necessary as a result of the MTEP process, or any other plan developed by MISO and its stakeholders.**[49]

MISO has never before implemented Section VI of the Appendix B planning structure to require a sponsoring TO to give ownership interests to another TO, although here, apparently at the insistence of Xcel Energy, MISO was compelled to "take a position" that was not consistent with its declared position before the Commission.[50] Indeed, prior to the approval of the MISO's MVP process, there are no identified instances in the history of MISO's implementation of the Appendix B planning framework where MISO or any of the TOs have taken a position that compels one TO to give another TO 50 percent ownership rights in a fully developed, locally

[48] It should be noted that MISO's position in connection with the Badger Coulee line is anything but clear. In the above quoted language, MISO notes that it is "not for MISO to determine who should build" specific transmission projects. However, as noted in both letters received by ATCLLC from MISO signed by Clair Moeller, Vice President of Transmission Planning, MISO "elected" to take a position to endeavor to force ATCLLC to acquiesce to Xcel Energy's demand for 50% ownership of Badger Coulee. Complaint Attachment I and K (Letters from Clair Moeller, MISO to John Procario, ATCLLC, dated Sept. 15, 2011 and Oct. 28, 2011, respectively). The Commission's interpretation of Section VI of Appendix B will also resolve MISO's apparently conflicted position.

[49] *Request for Rehearing or Clarification of the Midwest Independent Transmission System Operator, Inc.,* Docket No. RM10-23, filed on Aug. 22, 2011.

planned project. Interpreting the Section VI "obligation to build" in the manner demanded by Xcel Energy is neither consistent with the original intent of Appendix B nor how ownership has been historically attributed to projects built in the MISO region under the TO Agreement.

As set forth fully above and as set forth in Mr. Procario's affidavit but which bears repeating here, at the time this language was written in 1996-98, and agreed upon by the entities that ultimately formed MISO by this agreement, there was a profound lack of new transmission construction in the Midwest and elsewhere. Stakeholders in the MISO formation process were concerned that MISO would not be effective in transmission planning if MISO planned for transmission projects to be included in the MISO MTEP Plan that no other party had proposed. The fear was that no one would agree to build them. The language in the TO Agreement obligating TOs to build a project that may have been the product of MISO's planning (not their own individual plans) was for the purpose of allaying those fears.

Xcel Energy's interpretation of the "obligation to build" language to apply to *any transmission project approved in the MISO Plan* took on urgency at or about the time that the MISO's MVP cost allocation process became effective. MVP allocates the majority of the cost of the construction of MVP designated projects, such as the Badger Coulee project, to the MISO region as a whole. Language that was crafted to "split" the burden that could arise as a result of MISO carrying out its own transmission planning and which acted as a "shield" to protect TOs from an unanticipated financial burden that might result, by Xcel Energy's interpretation, has been turned into a "sword" for what appears to be opportunistic investors.

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[50] Complaint Attachment I (Letter from Clair Moeller, MISO, to John Procario, ATCLLC, dated Sept. 15, 2011); Complaint Attachment K (Letter from Clair Moeller, MISO, to John Procario, dated Oct. 28, 2011).

D. Xcel Energy's Interpretation of the TO Agreement is Unjust and Unreasonable and Unduly Discriminatory.

To ATCLLC's knowledge, prior to the start of MVP cost allocation, MISO has never before implemented Section VI of the Appendix B planning structure to require a TO to give ownership interests to another TO. As discussed above, ATCLLC is aware of no instances in the history of MISO's implementation of the Appendix B planning framework where MISO has sought to compel one TO to give another TO 50 percent ownership rights in a fully developed, locally planned transmission project. MISO'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 MISO region under the TO Agreement.

A number of projects have been proposed in the MTEP that connect between the facilities of more than one TO and the MISO and the other TOs have not invoked the language of Section VI to claim ownership of those projects. For example, ATCLLC constructed, and placed in service in February 2008, the Arrowhead–Weston line that was approved in the MISO MTEP process. The Arrowhead–Weston line is a 230 mile long, 345 kV transmission line that was constructed at a cost of approximately $430 Million. More importantly, the Arrowhead-Weston Line connects to more than one TO's existing facilities, including those owned by Northern States Power – Wisconsin, one of the Complainants in this proceeding. The Arrowhead-Weston line, like the Badger Coulee and Dubuque–Spring Green lines, was proposed by ATCLLC, included in the Midwest ISO MTEP and neither Xcel Energy nor any other party asserted an ownership interest in that line, nor did MISO "allocate" any ownership or construction rights

prior to its approval by the MISO Board for inclusion in the MTEP.[51] In addition, ATCLLC has currently proposed the Monroe County–Council Creek 138 kV line that has been approved in the MISO MTEP planning process that interconnects to Xcel Energy's existing Monroe County substation with a new ATCLLC transmission line. Xcel Energy has not demanded an ownership interest, nor has the MISO sought to allocate ownership, in the Monroe County–Council Creek line using the language of Section VI.

E. Xcel Energy's Interpretation of the TO Agreement is Contrary to the Commission's Policy to Encourage New Transmission Construction.

In Order No. 1000, the Commission ruled 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.[52] If Section VI of Appendix B is interpreted to provide an exclusive right to build (as Xcel Energy's interpretation would make it), it is more appropriately construed as a "right of first refusal" (ROFR) for TOs to own 50 percent of projects merely because the proposed transmission project interconnects with the TO's existing "facilities." As a ROFR provision, it is inconsistent with the Commission's orders directing changes to the language of Section VI, and with both Order Nos. 890 and 1000.

Allowing Xcel Energy's interpretation of the TO Agreement to stand will have a negative effect on transmission development in the Midwest. To the extent that projects are developed and sponsored by individual TOs through their local planning processes or otherwise, the perverse incentive will be for planning entities to ensure that their projects *will not* interconnect

[51] The Arrowhead–Weston Line was not afforded any cost allocation and was specifically included in the "exclude list" (Attachment FF-1) approved by the Commission when the first cost allocation methodology was approved by the Commission that afforded some measure of regional cost sharing. *See, Midwest Indep. Trans. Sys. Op., Inc.*, 117 FERC ¶ 61,241 at PP 97-98 (2006).

[52] Order 1000 at P 313.

to another TO's system, for fear of losing 50 percent ownership entitlement of that project. TOs or other entities would have no incentive to undertake costly and time consuming project development activities if such a result were possible, which would lead to the balkanized planning processes that both Order Nos. 890 and 1000 were intended to root out. Xcel Energy's interpretation is anathema to sound, regional planning and contrary to the 2001 RTO Order directing "third parties to participate in construction and ownership of new transmission facilities identified by the plan."

F. Significant Harm Will Result if Section VI of Appendix B is Interpreted and Upheld as an Exclusive Right to Build that is not Limited to Just the Badger Coulee Project.

Xcel Energy's interpretation of the TO Agreement will immediately affect ATCLLC's Badger Coulee line and could well affect ATCLLC's proposed Dubuque–Spring Green line.[53] Unlike any other utility, ATCLLC has spent significant time and resources developing both of those projects. [54]

Additionally, this interpretation could directly impact other recently proposed transmission construction projects. In 2011, ATCLLC and Duke Energy entered into a joint venture -- Duke-American Transmission Company, LLC (DATC). DATC was created to plan and develop strategic transmission projects across the U.S. and Canada. On September 12, 2011, DATC announced a proposal for seven new transmission lines in the Midwest, strategically planned to fill in "gaps" in the existing transmission grid that will improve reliability, provide economic benefits to local utilities by decreasing congestion, and boost the interconnection of

[53] See Letter from Clair Moeller, MISO, to John Procario, ATCLLC, dated Sept. 15, 2011.

[54] Answer Exhibit 4 - Letter from John Procario, ATCLLC, to John Bear, President and CEO, MISO, dated Dec. 1, 2011: (stating that "ATCLLC has devoted much time and effort to plan and propose

renewables. The DATC projects will cost an estimated $4.2 billion. The DATC projects have been submitted to MISO to be reviewed in the MISO regional planning process, and DATC will soon seek Commission approval for rate treatments and incentives in order to construct, own and operate those proposed facilities should they be included in an approved MISO MTEP. If Xcel Energy's interpretation is upheld in this proceeding, and thereafter applied to other planned transmission projects in a similar manner, including the DATC-proposed transmission projects, DATC will not likely be entitled to construct and own any of them, which is directly contrary to the Commission's 2001 RTO Order and contrary to Order No. 1000.

The interpretation advanced by Xcel Energy will also affect any number of pending projects in the MTEP and projects that have not yet been proposed, while providing a windfall to TOs who just happen to be connected to the proposed projects but have done nothing to further the construction of the projects.

G. Appendix B, Section VI of the TO Agreement Should Not Be Interpreted to Require Involuntary Joint Ventures

In seeking to obtain 50 percent ownership of the Badger Coulee line, Xcel Energy in effect seeks to impose a 50-50 joint venture or other similar business structure on ATCLLC to construct the Badger Coulee project. In typical joint venture analysis, willing joint venture partners seek to show efficiencies or other benefits that justify their collaboration.[55] For example, the federal antitrust enforcement agencies recognize that "a competitor's collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers,

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these two projects and incurred more than $4.5 million in preliminary development of the projects to this point in time.").

[55] *See, e.g, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (joint venture justifiable by lowering costs, increasing output and creating a new product or service); *see*

or brought to market faster than would be possible absent the collaboration. A collaborative approach may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the cooperation."[56] Since Xcel Energy is seeking to force the creation of a joint venture or other similar business arrangement on ATCLLC it is appropriate to ask whether imposing such a circumstance on ATCLLC would produce any of the legitimate market-enhancing or other public interest benefits that have been recognized as the desirable consequences of legitimate joint ventures.

Far from offering any such analysis, Xcel Energy does not even suggest that any of the benefits that can be advanced to justify a joint activity would result from its participation in the joint ownership of the Badger Coulee line with ATCLLC. Xcel Energy's participation is not needed to ensure that the Badger Coulee line will be planned, financed and built by ATCLLC. The line will serve the same markets, will achieve the same degree of integration into the MISO network and will operate in the same manner as it would without Xcel Energy's participation.[57] The only "benefit" that Xcel Energy identifies is a unilateral benefit to it, an attractive investment opportunity represented by $175 million in capital investment. This benefit does not arise from the creation of the enterprise, but is simply a windfall for Xcel Energy. Indeed, Xcel Energy's claim of injury in its Complaint, which is that it would be deprived of an investment in the

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also National Collegiate Athletic Assn. v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85 (1984), *and American Needle, Inc. v. National Football League*, 130 S. Ct, 2201 (2010).

[56] Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations among Competitors* (April 2000).

[57] Xcel Energy even goes so far as to assert [Complaint at p. 36] that its participation in the ownership of the Badger Coulee line will provide a benefit to their retail customers. Xcel Energy offers this as a bald assertion without any demonstration of how or in what manner that "benefit" would arise. The costs incurred in constructing the Badger Coulee line, because of its designation by MISO as an MVP, will be allocated in the same manner whether Xcel Energy is a part owner or not. As a result,

Badger Coulee line, results in an equal and offsetting adverse effect on ATCLLC. If Xcel Energy's interpretation is upheld, ATCLLC will derive no benefit and will be deprived of 50 percent ownership in the Badger Coulee line.

In short, wholly apart from whether Xcel Energy's Complaint is based on a valid interpretation of Section VI of Appendix B, Xcel Energy does not even try to show that its interpretation of the TOA serves the public interest by promoting market entry, operational efficiencies or other benefits that would not otherwise occur without the joint venture structure that it seeks to require. Xcel Energy does not show that a joint venture is necessary or even consistent with the objectives in Section VI of Appendix B of efficient and cost effective transmission projects.[58] Thus, Xcel Energy has not shown that the remedy it seeks of forcing ATCLLC into a joint venture serves any public purpose.

H. The Commission Should Use Its Authority to Deny Xcel Energy Its Requested Relief.

Xcel Energy asserts that failure to grant it a 50 percent ownership interest in the Badger Coulee line would violate the TOA and thus the MISO tariff, and therefore it is entitled to relief from the Commission that would result in Xcel Energy's shared ownership and construction of the Badger Coulee line.[59] As explained above, Xcel Energy's interpretation of the joint ownership provision of the TOA is incomplete and wrong. Even if Xcel Energy could establish that its interpretation is correct, that would not automatically entitle Xcel Energy to its requested relief.

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unless there is some element of Xcel Energy's rate structure that they have not disclosed, this is a specious argument intended only to further obfuscate Xcel Energy's real underlying intentions.

[58] See discussion in Section (A) above.

[59] Complaint at 36-37.

It is well established that the Commission has broad authority in fashioning remedies. When it comes to providing relief arising from asserted violations of the Federal Power Act or a tariff or other enforceable standard, the courts have long recognized that the Commission's discretion is at its "zenith."[60] Thus, Courts "owe FERC great deference in reviewing its selection of a remedy, for the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions."[61]

In fashioning remedies, the Commission has recognized that laches and other equitable considerations can be taken into account in determining an appropriate outcome.[62] Here, Xcel Energy cannot assert that the operation of the ownership provision of the TOA is automatic and unavoidable, since Xcel Energy has not claimed ownership of other new transmission lines that interconnected with its "facilities" that, aside from cost allocation assignment, are indistinguishable in this respect from Badger Coulee. Moreover, Xcel Energy has not permitted

[60] *See Town of Concord. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) 76 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("Agency discretion is often at its 'zenith' when the challenged action relates to the fashioning of remedies.").

[61] *Louisiana Public Serv. Comm 'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. See also, e.g., Ariz. Corp. Comm in v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (similarly noting that FERC "wields maximum discretion" when choosing a remedy). *See also, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties"), *quoted in East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007).

[62] *See Grynberg v. Rocky Mtn. Natural Gas Co.*, 90 FERC ¶ 61,247 at 61,826 (2000), *reh'g denied*, 93 FERC ¶ 61,180 (2000) (requested relief may be barred "if the person bringing the claim has delayed for such a time that permitting it to prosecute the claim would be inequitable."); *see also ARCO Prods. Co. v. SFPP, L.P.*, 93 FERC ¶ 63,020 at 65,076 (2000); *and City of Lebanon v. Cincinnati Gas & Electric Co.*, 64 FERC ¶ 61,341 at p. 63,445 (1993) (declining to exercise equitable discretion not to grant refunds for a tariff violation on a finding that delay by the party seeking such relief was "excusable.").

ATCLLC co-ownership of the Brookings and Twin Cities-La Crosse lines[63] or any other CapX2020 proposed transmission projects. Thus, Xcel Energy's own conduct under the TOA, as well as the Commission's inherent authority, implies a measure of Commission discretion in granting Xcel Energy any relief in this case, even if the Commission were to agree with Xcel Energy's interpretation of Section VI of Appendix B. The Commission should not grant Xcel Energy any relief because it has done nothing to warrant an ownership share of Badger Coulee, and if it had an entitlement, it should have exercised that entitlement long before now and any assertion of that right now should be barred by the Commission in the exercise of its discretion.

In exercising this discretion, the Commission should take into account that, as explained above and in the affidavits accompanying this Answer, Xcel Energy was not a timely and diligent participant in the planning and related efforts in the development of the Badger Coulee line, and cannot show that without its ownership participation the line will not get built.[64]
Moreover, Xcel Energy does not base its claim for relief on having incurred costs or other detriments in a good faith expectation that it would be made whole by an ownership interest in the Badger Coulee line. Instead, its claim of an adverse impact from the asserted tariff violation is that it "would lose $175 million of investment and the revenues associated with that

[63] *See, e.g.,* Landgren Affidavit at P 6 (Xcel did not claim any ownership rights for the Arrowhead-Weston line), and P 17 ("ATCLLC could just as rightly claim 50 percent ownership of the Brookings and Twin Cities-La Crosse line from South Dakota through Minnesota.").

[64] *See, e.g.,* Landgren Affidavit at P 7 (Xcel "did not take any leadership or engage in any other efforts to analyze the benefits of either of these projects[Dubuque-Spring Green to Madison or Badger-Coulee] or to otherwise move these projects forward."), P 8 ("Xcel Energy merely built into their studies the work that ATCLLC was doing on LaCrosse Madison line (Badger-Coulee))." and P 14 ("Xcel Energy's only valid claim is that it participated in regional planning, which all utilities should do."); *and* Flygt Affidavit at P 7 (Xcel Energy "was not involved in ATCLLC's use of these [PROMOD] modeling techniques to estimate the benefits of the Badger-Coulee line," and "at no time during this study process did anyone raise the issue of who would own any of the lines that might come out of the study."); *see also* Landgren Affidavit at P 16 (Xcel was aware prior to 2010 that ATC intended to be the sole owner of the Badger-Coulee line).

investment."[65] The equities cut strongly against granting relief on the basis of this claim and Xcel Energy's opportunistic conduct, which correlates with Badger Coulee's MVP designation.[66]

Moreover, giving Xcel Energy its wished-for opportunity to invest in a transmission line in which it has not planned or developed would deprive ATCLLC of exactly the same investment opportunity, when ATCLLC is the party that did undertake the burden of developing the Badger Coulee line.[67] In addition to being detrimental to ATCLLC, this remedy would provide a substantial disincentive to transmission development efforts like ATCLLC's in the future. Finally, as shown in the preceding section, Xcel Energy does not show that requiring ATCLLC to participate in a joint venture for the development of the Badger Coulee line would produce any of the efficiency, cost savings, market entry or other benefits typically associated with legitimate joint ventures. Given all these factors, the equities weigh strongly against the 50 percent ownership relief sought by Xcel Energy and notwithstanding a Commission determination that supports Xcel Energy's interpretation of the language of Section VI of Appendix B, the Commission should not grant the relief requested .

IV. REQUEST FOR ALTERNATIVE RELIEF

If the Commission Rules in favor of Xcel Energy's interpretation of Section VI of the TO Agreement, ATCLLC should be afforded the same rights that Xcel Energy seeks and be granted 50 percent ownership of all the CAPX2020 projects that Xcel Energy asserts are elements of the same planning analysis.[68] If Xcel Energy's interpretation of the Transmission Owners'

[65] Complaint at 36.

[66] *See* Flygt Affidavit at PP 15-16.

[67] *See* Flygt Affidavit at PP 5-9.

[68] Xcel Energy Complaint at 5.

Agreement is correct, then ATCLLC should be afforded the same rights to the CAPX2020 projects (starting with those facilities originating at the Brookings substation in South Dakota) that Xcel Energy asserts it is entitled to in ATCLLC's Badger Coulee line.

Attached to ATCLLC's Answer as Exhibit 5 is a map of the proposed CAPX2020 projects consisting of the yet to be constructed 345 kV transmission lines beginning at the Brookings County Substation in South Dakota, and proceeding to the Hampton Substation near Minneapolis, Minnesota (the Brookings line) and then beginning at the Hampton Substation and ending at the proposed Briggs Road Substation located in LaCrosse, Wisconsin (the Hampton–LaCrosse line). Assuming that the Badger Coulee line, the subject of this Complaint, is approved by the PSCW, and interconnects at some point with the Hampton – LaCrosse line (the point of interconnection between the two is to be determined by the PSCW once a certificate of public convenience and necessity (CPCN) application is made for the Badger Coulee line), it is planned to extend to and interconnect with the existing ATCLLC-owned Cardinal Substation, located outside of Madison, Wisconsin.

It is ATCLLC's understanding, based on the as-filed for estimated costs for the Brookings, Hampton–LaCrosse and Badger Coulee lines, when taken together, exceed $1.4 Billion. ATCLLC is therefore being and has been denied the opportunity to invest in the full amount of the planned-for transmission lines that will interconnect with ATCLLC's existing facilities. If, under Section VI of Appendix B, a MISO TO is entitled to 50 percent of all of the transmission lines that interconnect with its existing facilities, ATCLLC therefore requests that the Commission direct that Xcel Energy and the remaining CAPX2020 participants afford ATCLLC 50 percent ownership in all facilities that will interconnect with ATCLLC's Cardinal Substation beginning at the Brookings Substation in South Dakota. Xcel Energy asserts that the

Badger Coulee line is a portion of the CapX2020 projects, and therefore, Xcel Energy's denial of any participation in the CapX2020 activities by ATCLLC has resulted in the same harm and the same injury to ATCLLC that has been alleged to have been incurred by Xcel Energy.

ATCLLC represents that it is a transmission company under Minnesota law, owns existing facilities in the State of Minnesota and is fully prepared to construct, own and thereafter operate all transmission facilities to which any 50 percent obligation to construct is imposed.

V. ADMISSIONS AND DENIALS; AFFIRMATIVE DEFENSES

A. Admissions and Denials

Pursuant to Rule 213(c)(2) of the Commission's Rules of Practice and Procedure, to the extent practicable and to the best of ATCLLC's present knowledge and belief, ATCLLC admits or denies below the material facts and allegations stated in the Complaint. To the extent that any fact or allegation in the Complaint is not specifically admitted in this Answer, it is denied.

- ATCLLC denies that it has not challenged the MTEP11 designations of the Badger Coulee line.
- ATCLLC denies that Xcel Energy has provided leadership in the planning of, or other development activities relating to, the Badger Coulee line.
- ATCLLC denies that its development work on or other efforts or positions relating to the Badger Coulee line are contrary to the TOA or the MISO tariff, or will cause any other entity not to be able to comply with its obligations under the TOA or the MISO tariff.
- ATCLLC denies that it has declined to engage in appropriate dialog or other discussions with Xcel Energy about the Badger Coulee line, or about Xcel

Energy's interest in ownership of part of the line.

- ATCLLC denies that significant planning, preparation, permitting and pre-construction activities undertaken jointly with Xcel Energy need to occur in order to meet the in-service date for the Badger Coulee line.
- ATCLLC denies that its intention to own and construct the Badger Coulee line should be a surprise to Xcel Energy as alleged in the Complaint.
- ATCLLC denies that it has not challenged MISO's position on the ownership of the Badger Coulee line.
- ATCLLC denies that it has not responded to Xcel Energy on its ownership claims.
- ATCLLC denies that it has been engaged in permitting, routing or other activities for the Badger Coulee line that in any way contravenes ATCLLC's obligations to Xcel Energy or any other transmission owning member of MISO, under the TOA, the MISO tariff or otherwise.
- ATCLLC denies that any positions or actions it has taken in the CPCN proceeding, or any other proceeding, before the PSCW are inconsistent with the MISO regional planning process, or are inconsistent with any regional transmission planning or implementation obligations under the MISO tariff, or are contrary to ATCLLC's TOA or MISO tariff commitments, to MISO decisions, or to the Commission's authority over the matters placed at issue by the Complaint.
- ATCLLC denies that it has been unwilling to collaborate in the MISO planning process, or had disregarded integrated transmission plans or planning in the MISO region.
- ATCLLC denies that any of its actions have been unjust or unreasonable, or

unduly preferential or discriminatory, or will cause material harm to Xcel Energy.

- ATCLLC denies that the terms of the TOA, or the MISO tariff, or any other requirement, obligate it and Xcel Energy jointly to construct and own the Badger Coulee line.
- ATCLLC denies that MISO was required to designate Xcel Energy and ATCLLC as joint owners of the Badger Coulee line.
- ATCLLC denies that it does not have a right to sole ownership of the Badger Coulee line.
- ATCLLC denies that the TOA should be construed as containing a "Share Equally Provision," or that the provision cited by Xcel Energy has been known by that designation.
- ATCLLC denies that the language designated by Xcel Energy as the "Share Equally Provision" applies to all projects approved in the MTEP.
- ATCLLC denies that the Commission has found Xcel Energy's interpretation of the TOA to be just and reasonable.
- ATCLLC denies that Xcel Energy's interpretation of the TOA is consistent with the Commission's policy that third parties are to be allowed an opportunity to own and construct transmission projects.
- ATCLLC denies that to maintain its status as an MVP, the La Crosse-Madison line must have its western terminus at a point electrically *identical* to the eastern terminus of the Twin Cities - La Crosse line.
- ATCLLC denies that it has repudiated or disregarded any obligations applicable to

it under the TOA or the MISO tariff, or any other obligations to Xcel Energy or to MISO.

- ATCLLC denies that it has refused to acknowledge a MISO ownership designation in violation of any statutory standard.
- ATCLLC denies that MISO has broad authority to designate who should own a particular MTEP project that is applicable to the Badger Coulee line.
- ATCLLC denies that MISO appropriately designated both Xcel Energy and ATCLLC as owners of the La Crosse - Madison line, and that there is any such determination that deserves any deference.
- ATCLLC denies that any of the studies identified by Xcel Energy confer on Xcel Energy any ownership rights or interest in a line that is included in any such study.
- ATCLLC denies that the TOA provides a baseline understanding or default position that responsibility for transmission facilities will be shared by directly affected transmission owners.
- ATCLLC denies that any willingness on the part of Xcel Energy to fund any part of the Badger Coulee line gives it any rights to ownership in that line.
- ATCLLC denies that its positions or actions contradict historical practice in MISO.
- ATCLLC denies that it does not have a right to claim sole ownership of the Badger Coulee line.
- ATCLLC denies that projects identified in its local planning process are necessarily subject to joint ownership under the TOA.

- ATCLLC denies that Xcel Energy will suffer any cognizable harm as a result of not being afforded joint ownership in the Badger Coulee line, or is otherwise entitled to relief as specified in its Complaint.

B. Affirmative Defenses

- The Complaint fails to state a claim on which relief can be granted.
- Xcel Energy is not entitled to joint ownership of the Badger Coulee line by the TOA or the MISO tariff, or any action of Xcel Energy or MISO.
- Xcel Energy has not shown that the relief requested in the Complaint would be just and reasonable, and not unduly preferential or discriminatory.
- Xcel Energy has not shown that the relief requested in the Complaint would be in the public interest.
- Xcel Energy has not shown injury cognizable under Section 206 of the FPA
- If Xcel Energy's interpretation of the TOA is correct, then ATCLLC is entitled to a 50 percent interest in any transmission facilities interconnecting to the ATCLLC's facilities.

VI. NOTICES AND COMMUNICATIONS

Notice and communications regarding this matter may be addressed to:

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VII. LIST OF EXHIBITS

The following exhibits are included with this Answer:

Exhibit 1 - Affidavit of John C. Procario

Exhibit 2 - Affidavit of Dale Landgren

Exhibit 3 - Affidavit of Flora Flygt

Exhibit 4 - Letter from John Procario, ATCLLC, to John Bear, MISO President and CEO, dated Dec. 1, 2011

Exhibit 5 - Map of proposed CapX2020 projects

Exhibit 6 - "Access Discussion" Network Customer Meeting, presentation by Teresa Mogensen, ATCLLC Director of Transmission Planning and Service, Sept. 18, 2003

Exhibit 7 - PSCW Commission Staff's Final Report on Transmission Access, Docket 137-EI-100, March 23, 2006

Exhibit 8 - 2008 Economic Planning Analysis & Study Results, ATC Planning Stakeholder Meeting, dated March 6, 2009 (updated June 10, 2009)

Exhibit 9 - Email from Xcel Energy to Dale Landgren, dated March 27, 2009

Exhibit 10 -Letter Dated Dec. 14, 2011 from ATCLLC to MISO regarding acceleration of the Badger Coulee Project

Exhibit 11 -CapX2020 Certificate of Public Convenience and Necessity Application, PSCW Docket No. 5-CE-136 (June 2011) (excerpts only)

VIII. CONCLUSION

For the above and foregoing reasons, ATCLLC requests that the Commission:

1. Dismiss Xcel Energy's Complaint for failure to state a claim upon which the Commission can fashion relief under Section 206;

2. Dismiss Xcel Energy's Complaint because, notwithstanding the interpretation of Section VI of Appendix B, it would be inequitable and unjust to afford any ownership interest in Badger Coulee to Xcel Energy under the circumstances;
3. Dismiss Xcel Energy's Complaint because it is without merit and is based on an erroneous and incomplete interpretation of Section VI of Appendix B of the Transmission Owners' Agreement;
4. In the alternative, grant ATCLLC 50 percent ownership interest in all transmission facilities to be constructed by CapX2020 that originated in Brookings, South Dakota and terminate at ATCLLC's Cardinal Substation, near Madison, Wisconsin; and
5. Such other just and equitable relief as the Commission deems appropriate.

Respectfully submitted,

/s/ Linda L. Walsh

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Dated: March 5, 2012

Counsel for American Transmission Company LLC

CERTIFICATE OF SERVICE

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

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

/s/ Linda L. Walsh
Linda L. Walsh