

147 FERC ¶ 61,089
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Xcel Energy Services Inc. and Northern States Power Company, a Wisconsin corporation Docket No. EL12-28-001

v.

American Transmission Company LLC

ORDER DENYING REHEARING

(Issued May 2, 2014)

1. On August 20, 2012, American Transmission Company LLC (American Transmission), by its corporate manager, ATC Management Inc., requested rehearing and a stay of the Commission's July 19, 2012 order granting the complaint filed by Xcel Energy Services Inc. (Xcel), on behalf of itself and its operating company affiliate Northern States Power Company, a Wisconsin Corporation (Northern States) in the above-captioned proceeding.¹ In this order, we deny rehearing of the Xcel Order and deny American Transmission's request for a stay.

I. Background

2. Northern States is a Wisconsin corporation and a vertically-integrated public utility that provides electric generation, transmission, and distribution services. Northern States is a subsidiary of Xcel Energy Inc. and provides electric service to approximately 250,000 retail and wholesale electric customers in western Wisconsin, as well as a portion of the Upper Peninsula of Michigan. Northern States has 2,600 miles of transmission lines and operates 157 substations at transmission voltage in Wisconsin and Michigan. Northern States is a transmission-owning member of Midwest Independent

¹ *Xcel Energy Services, Inc. v. American Transmission Co., LLC*, 140 FERC ¶ 61,058 (2012) (Xcel Order).

Transmission System Operator, Inc. (MISO)² and a signatory to the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (Transmission Owners Agreement). Northern States provides transmission service over its facilities pursuant to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff). Xcel is a subsidiary of and the service company for the Xcel Energy Inc. holding company system, and an affiliate of Northern States.

3. American Transmission is a Wisconsin limited liability company that owns, controls, and operates more than 9,400 miles of transmission lines in the States of Wisconsin, Illinois, Minnesota and Michigan. American Transmission is also a transmission-owning member of MISO and a signatory to the Transmission Owners Agreement. American Transmission also provides transmission service over its facilities pursuant to the Tariff.

4. On February 14, 2012, Xcel, on behalf of itself and Northern States, filed a complaint against American Transmission. Xcel opposed American Transmission's claim that American Transmission had the right to own and the corresponding responsibility to construct the entirety of a proposed 145-mile, 345 kV electric transmission line connecting Northern States' facilities near La Crosse, Wisconsin, with American Transmission's facilities near Madison, Wisconsin (LaCrosse-Madison Line).³ Xcel, which claimed that the Transmission Owners Agreement gave Xcel a right to own and construct 50 percent of the project, argued that the Commission should find that American Transmission has not complied with the express terms and conditions of the Tariff and Transmission Owners Agreement. Xcel also argued that the Commission

² Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

³ MISO approved the LaCrosse-Madison Line as a Multi-Value Project (MVP) in the 2011 MISO Transmission Expansion Plan (MTEP) and designated Northern States and American Transmission as joint owners. MVPs are a category of transmission projects that enable the reliable and economic delivery of energy in support of documented energy policy mandates or laws and/or address multiple economic issues affecting multiple transmission zones and/or address at least one economic issue affecting multiple transmission zones and one reliability issue. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010), *order on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd in part, dismissed in part and remanded in part sub nom. Illinois Commerce Commission v. FERC*, 721 F.3d 764 (7th Cir. 2013), *cert. denied sub nom. Schuette v. FERC*, 2014 WL 684066 (U.S. Feb. 24, 2014) (No. 13-443); *Hoosier Rural Energy Coop. Inc. v. FERC*, 2014 WL 684067 (U.S. Feb. 24, 2014) (No. 13-445).

should direct American Transmission to enter into negotiations with Xcel and Northern States to develop final terms and conditions for the ownership and construction of the LaCrosse-Madison Line, in a manner compliant with the Transmission Owners Agreement and the Tariff.

5. Xcel contended that the language in section VI of Appendix B to the Transmission Owners Agreement gave it investment and ownership rights to a portion of the LaCrosse-Madison Line.⁴ Xcel argued that this language provides that if a project approved through the MISO planning process connects the facilities of two transmission owners, each of the transmission owners has an equal right to own and corresponding responsibility to construct that project. Xcel also argued that that section V of Attachment FF (Transmission Expansion Planning Protocol) of the Tariff gave MISO authority to designate who should own a particular MTEP project. Xcel noted that in the 2011 MTEP, MISO exercised its authority relating to the La Crosse-Madison Line and designated both Xcel and American Transmission as owners of the project.

6. In response, American Transmission argued that section VI of Appendix B to the Transmission Owners Agreement does not give an interconnecting transmission owner an unlimited right to ownership of transmission facilities proposed by another entity. American Transmission asserted that the “obligation to build” language applies only to projects that the MISO planning staff “creates” in carrying out its express transmission planning obligations, not to those projects that the transmission owners themselves proposed to build. American Transmission argued that in that limited circumstance, Appendix B imposes an “obligation to build,” authorizing MISO to direct the interconnecting transmission owners to build the MISO planned transmission project. American Transmission further argued that, as interpreted by Xcel, American Transmission is compelled to surrender 50 percent ownership of a transmission project that it proposed merely because it “interconnects” with another transmission owner’s 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.

⁴ Section VI of Appendix B to the Transmission Owners Agreement states in part:

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

7. In the Xcel Order, the Commission granted the Complaint and found that Appendix B, section VI of the Transmission Owners Agreement is unambiguous as to ownership and the responsibility of owners to build facilities. The Commission found that Appendix B, section VI of the Transmission Owners Agreement supports Xcel's position as to the responsibility of transmission owners to build facilities when such facilities are connected between two or more transmission owners' facilities.⁵ The Commission stated that the Transmission Owners Agreement does require MISO transmission owners to share responsibility for interconnecting facilities and that MISO has exercised its designation authority in accordance with the Transmission Owners Agreement and the Tariff in designating both American Transmission and Xcel as the parties responsible for the LaCrosse-Madison Line.⁶

8. However, the Commission agreed with American Transmission that the language in section VI of Appendix B acts to establish a right of first refusal. The Commission explained that in Order No. 1000,⁷ the Commission stated that it is unjust and unreasonable to grant incumbent transmission providers a federal right of first refusal with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation because doing so may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, result in the inclusion of high-cost solutions to the regional plan. The Commission further explained that while it did require the elimination of a federal right of first refusal in Order No. 1000, it did so on a prospective basis upon Commission acceptance of the compliance filings due on October 11, 2012.⁸

⁵ Xcel Order, 140 FERC ¶ 61,058 at PP 59-60.

⁶ *Id.* P 67.

⁷ *Id.* P 64 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 284 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)).

⁸ *Id.* P 66.

9. On August 20, 2012, American Transmission filed a request for rehearing and a provisional motion for stay of the Xcel Order. On September 4, 2012, Xcel, MISO Transmission Owners,⁹ and ITC Companies¹⁰ filed answers in opposition to American Transmission's rehearing request and motion for stay. On September 19, 2012, American Transmission filed a response to the answers.

II. Request for Rehearing and Motion for Stay and Responsive Pleadings

A. Request for Rehearing

10. American Transmission argues that if a practice has been found to be unjust, unreasonable, or unduly discriminatory, the Commission has no discretion as to when or whether it will remedy the problem.¹¹ American Transmission argues that not only has

⁹ 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 (collectively, ITC Companies); Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

¹⁰ ITC Companies consist of: International Transmission Company; Michigan Electric Transmission Company, LLC; and ITC Midwest LLC.

¹¹ Request for Rehearing at 10-11 (citing section 206 of the Federal Power Act (FPA)). American Transmission notes that section 206 provides:

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification . . . observed . . . by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any . . . practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly

(continued...)

the Commission refused to remedy application of an unlawful right of first refusal, but that in this case, it went so far as to order that the unlawful right of first refusal be enforced. American Transmission asserts the Commission is without authority to enforce an unjust and unreasonable provision of a Commission-jurisdictional agreement.¹²

11. American Transmission further argues that the fact that the Commission has established a generic remedy in a separate rulemaking proceeding does not relieve it of its obligation to remedy undue discrimination in this proceeding. American Transmission states that the Commission may not choose to leave unduly discriminatory practices in place on the ground that it will remedy the undue discrimination in the future after compliance filings in another proceeding are made. According to American Transmission, FPA section 206 makes clear that such practices are “unlawful” and there is nothing in the FPA that suggests that when the Commission acts by rulemaking, the generic proceeding suspends the Commission’s obligation to act in individual proceedings under section 206. American Transmission asserts that the Commission has previously reached the opposite conclusion, for example, in *Southern Company Services*, where the Commission ruled that:

we do not intend [s]mall [g]enerators to be disadvantaged by the fact that our [s]mall [g]enerator interconnection rulemaking is not yet final. If any [s]mall [g]enerator believes that Southern is treating it in an unduly discriminatory manner, it can file a complaint with this Commission under section 206 of the FPA.¹³

12. American Transmission argues that the Commission cannot justify its decision on the ground that transmission providers must be given time to put a replacement process in place for evaluating competing projects. American Transmission argues that in *Primary Power v. PJM*, the Commission acknowledged that no Order No. 1000-compliant selection process had been found to exist, yet PJM could still select among competing

discriminatory or preferential, the Commission *shall determine* the just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force, and shall fix the same by order. . . .*

16 U.S.C § 824e(a) (2012) (emphasis added by American Transmission).

¹² *Id.* at 11-12 (citing *Texas Eastern Transmission Corp.*, 79 FERC ¶ 61,289, at 62,260 (1997)).

¹³ *Id.* at 13 (citing *Southern Co. Services*, 107 FERC ¶ 61,317, at P 17, *order on reh’g*, 109 FERC ¶ 61,014 (2002) (*Southern Company Services*)).

projects and developers.¹⁴ American Transmission further argues that in an earlier proceeding, the Commission found that as long as PJM administered its tariff provision allowing the designation of projects to entities “in a not unduly discriminatory manner” and “no differently than that of any other application proposing to build a project,” its designation would be acceptable.¹⁵ American Transmission states that the Commission did not adopt a requirement that an Order No. 1000-compliant selection process must be in place before PJM could select a project developer.

13. American Transmission states that the instant situation is the same as the one addressed in *Primary Power*, wherein the Commission declined to interpret a set of PJM contract and tariff provisions as granting a right of first refusal. American Transmission states that in *Primary Power*, the Commission effectively found that a provision that required PJM to “designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located” applied only where PJM needed to designate a transmission owner.¹⁶ American Transmission contends that the Commission has not satisfactorily distinguished the two situations, rendering its decision arbitrary.¹⁷

14. Alternatively, American Transmission asks the Commission to reconsider its decision that the Transmission Owners Agreement contained a right of first refusal at all. American Transmission argues that the Appendix B planning provisions were not intended to give any transmission owner a “right of first refusal” or “right to build.”¹⁸ American Transmission argues that the provision establishes a “responsibility” to construct facilities in the MTEP in certain defined circumstances, but does not set forth or imply any exclusive or priority rights to build. American Transmission argues that the provision at issue was included to ensure that MISO’s planning decisions would be

¹⁴ *Id.* at 14 (citing *Primary Power, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,054, at PP 80-85 (2012) (*Primary Power v. PJM*)).

¹⁵ *Id.* (citing *Primary Power, LLC*, 131 FERC ¶ 61,015, at P 65 (2010) (*Primary Power*)).

¹⁶ *Id.* (citing *Primary Power*, 131 FERC ¶ 61,015 at PP 62-73).

¹⁷ *Id.* (citing *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005); *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2003)).

¹⁸ *Id.* at 15.

implemented, but does not apply where a MISO transmission owner has volunteered to build a project.¹⁹

15. American Transmission contends that the Commission and MISO have previously permitted individual transmission owners to own lines that they have developed to interconnect two separate MISO transmission owner systems. American Transmission contends that the Commission still has not addressed why, in the many years since MISO was formed, no transmission owner has attempted to invoke this provision to assert a right to own fifty percent of a project connected to its existing substation prior to the 2011 MTEP.²⁰

B. Motion for Stay

16. American Transmission urges the Commission to grant a stay of the Xcel Order until the Commission acts on its rehearing request. American Transmission argues that all of the requirements to grant a stay are met in this case: (1) American Transmission will face irreparable harm in that it, along with Xcel and MISO, will have to begin making crucial planning, management, financial, preliminary engineering, permitting, and siting decisions to accommodate Xcel's participation, wherein it will be impossible to recreate the financial situation that would have existed if the Commission ultimately reverses course; (2) there will be no injury suffered by Xcel, as if the Commission grants rehearing, Xcel will not have unnecessarily dedicated substantial time or expended substantial resources to the project and if rehearing is denied, negotiations can then commence; and (3) a stay is in the public interest as the public interest requires the Commission to exercise its authority to prevent unduly discriminatory conduct in the markets it regulates and a stay is necessary to permit the Commission to achieve this.²¹

17. Xcel, MISO Transmission Owners and ITC Companies filed answers in response to the request for rehearing and in response to the motion for stay opposing American Transmission's request.²² As for the motion for stay, Xcel responds that American Transmission fails the Commission's standard for staying an order and urges that the

¹⁹ *Id.* at 16.

²⁰ *Id.* at 17.

²¹ *Id.* at 24-25.

²² As discussed below, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), provides that the Commission will not permit answers to requests for rehearing. Accordingly, we will reject the answers to the rehearing request.

request be denied. Xcel argues that (1) American Transmission fails to show that the Commission erred in a manner that would call for the Xcel Order to be stayed; (2) American Transmission has no irreparable harm, in that any harm claimed by American Transmission is wholly speculative and entirely self-inflicted; (3) Xcel will suffer irreparably, as a stay will prevent or delay progress on the project and any actions that risk the loss of MVP rate treatment for the Xcel portion of the project would cause serious and irreparable harm to Xcel and its retail customers; and (4) the public interest demands a stay be denied as customers will benefit from Xcel's participation because Xcel will be able to construct and own a portion of the line that results in a lower cost and preservation of the MVP classification serves the public interest by providing Xcel's retail customers with the benefits of the MVP cost allocation for the portion of the project owned by Xcel.²³

18. MISO Transmission Owners respond that the request for stay should be rejected. MISO Transmission Owners contend that American Transmission's claim that having to negotiate with Xcel will unnecessarily delay initiation of state proceedings is speculative. Further, MISO Transmission Owners contend that the stay could interfere with the planning and development process for the project, which could negatively impact and delay other MVPs as well as other projects approved through MTEP, while MISO customers could experience a delay in receiving the reliability, congestion relief and other benefits from the timely completion of the portfolio of MVPs.

19. ITC Companies respond that: (1) American Transmission fails to meet the burden to support its request for a stay by making the appropriate showing; (2) wind developers and other third party transmission customers will be harmed by the delay in bringing the project's transmission capacity into service and ITC Companies will be harmed if American Transmission does not follow the holding of the Xcel Order as it may affect the Dubuque-Cardinal line, the portion of the MVP to which ITC Companies have ownership rights; (3) American Transmission's claims that "time and resources"²⁴ will have to be expended to evaluate jointly-owned projects, that "considerable time and effort"²⁵ will have to be expended to negotiate commercial arrangements, and that "the parties will be required to continue to spend money"²⁶ are all insufficient arguments to show irreparable harm; and (4) American Transmission has not demonstrated that a stay will protect the public interest.

²³ Xcel Answer at 12-13.

²⁴ ITC Companies Answer at 12 (citing Request for Rehearing at 20).

²⁵ *Id.* at 13 (citing Request for Rehearing at 20).

²⁶ *Id.* (citing Request for Rehearing at 23).

III. Procedural Matters

20. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), prohibits answers to requests for rehearing. We will, therefore, reject the answers filed by Xcel, MISO Transmission Owners and ITC Companies to the extent they apply to the rehearing request.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept American Transmission's answer and will, therefore, reject it.

IV. Discussion

A. Request for Rehearing

22. We deny rehearing. American Transmission has not persuaded us to reverse our determination granting Xcel's complaint and finding that MISO properly exercised its designation authority in accordance with the Transmission Owners Agreement and the Tariff in designating both American Transmission and Xcel as the parties responsible for ownership and construction of the La Crosse-Madison Line.

23. With respect to American Transmission's FPA section 206 arguments, although we agree with American Transmission that section 206 requires the Commission to provide a remedy, section 206(a) permits the Commission to order prospective relief only from the date that it finds an existing rate to be unjust and unreasonable.²⁷ In this instance, the Commission found in Order No. 1000 that it is unjust and unreasonable to grant incumbent transmission providers a federal right of first refusal with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation and required the elimination of federal rights of first refusal on a prospective basis upon Commission acceptance of the compliance filings due on October 11, 2012.²⁸ However, the Commission declined to interpret individual contracts in that generic rulemaking proceeding and instead deferred issues related to specific contracts to compliance proceedings. Subsequently, Xcel filed a complaint against American Transmission, and in the Xcel Order, the Commission agreed with American Transmission that the language in section VI of Appendix B of the MISO Transmission

²⁷ *Town of Norwood Massachusetts v. National Grid USA*, 126 FERC ¶ 61,039, at P 13 (2009).

²⁸ *See* Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 284, 292. *See also id.* P 65.

Owners Agreement acts to establish a right of first refusal. However, as we noted in the Xcel Order, MISO's designation under the Transmission Owners Agreement of the project occurred in MTEP 2011, before the Commission made the determination that the language in section VI of Appendix B acted to create a right of first refusal.²⁹ Thus, we decline to grant rehearing.

24. With respect to American Transmission's claim that if a practice has been found to be unjust, unreasonable, or unduly discriminatory, the Commission has no discretion as to when or whether it will remedy the problem, we disagree. The Commission's decision in the Xcel Order is consistent with its longstanding practices in Order Nos. 888,³⁰ 889,³¹ 890³² to prospectively require the correction of potentially discriminatory behavior or tariff provisions through subsequent compliance filings.³³ Moreover, as the courts and

²⁹ Xcel Order, 140 FERC ¶ 61,058 at P 4.

³⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³¹ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

³² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

³³ See Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 21,558; Order No. 889, FERC Stats. & Regs. ¶ 31,035 at section II.L; Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 135. Further, the Commission made clear in *Cal. Indep. Sys. Operator Corp.*, that right of first refusal rights, to the extent they exist, need not be removed until Order No. 1000 compliance filings are due. See *Cal. Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,075, at P 25 (2012).

the Commission have found, the Commission has broad discretion in fashioning remedies.³⁴

25. American Transmission relies on *Southern Company Services* to argue that the Commission has previously reached the opposite conclusion from the one it reached in this case. We do not agree that *Southern Company Services* applies here. In *Southern Company Services*, the Commission reminded small generators of their right to file a section 206 complaint should they feel that Southern Company Services (Southern) is treating them in an unduly discriminatory manner. Although any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any alleged wrong over which the Commission may have jurisdiction, in *Southern Company Services*, the Commission was specifically referring to the fact that it had not issued the final rule on small generator interconnection³⁵ and the Commission was accepting Southern's proposal to modify its OATT to make clear that Southern's interconnection procedures that previously applied to all generators would apply only to small generators, *prior to the small generator interconnection rulemaking becoming final*. Thus, the *Southern Company Services* order is distinguishable in that, in inviting section 206 complaints, the Commission sought to ensure consistency between Southern's proposed tariff change and the Commission's rulemaking, which had been proposed but was not yet promulgated in a final rule. In the instant case, the Commission, which did not find that MISO's application of the right of first refusal provision prior to the complaint was unlawful, found that a right of first refusal should be eliminated prospectively from the date of acceptance of a compliance filing eliminating provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal. And, it determined that the Order No. 1000 rulemaking already afforded a means to achieve that goal, i.e., MISO's Order No. 1000 compliance filing proposing tariff changes.

³⁴ See *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1216 (D.C. Cir. 2009) (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 95 (2006); *Golden Spread Elec. Coop. v. Sw. Pub. Serv. Co.*, 123 FERC ¶ 61,047, at P 53 (2008).

³⁵ See *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006).

26. Moreover, we find American Transmission's reliance on *Primary Power* and *Primary Power v. PJM* misplaced. In *Primary Power*, the Commission interpreted certain language in the PJM Amended and Restated Operating Agreement (Operating Agreement) to "permit PJM to designate a non-incumbent developer of transmission facilities to construct, own and finance a project if it is included in the RTEP as a recommended transmission enhancement or expansion."³⁶ And in *Primary Power v. PJM*, the Commission refused to make any findings as to whether PJM's existing rules would comply with the requirements adopted in Order No. 1000 and instead found that "PJM acted in accordance with its current Operating Agreement in selecting the alternative projects."³⁷ Because the Commission's interpretation of two different

³⁶ *Primary Power*, 131 FERC ¶ 61,015 at P 64. The Commission was interpreting the provisions of the PJM Operating Agreement stating "[f]or each enhancement or expansion that is included in the recommended plan, the plan shall . . . designate one or more Transmission Owners *or other entities* to construct, own and, unless otherwise provided, finance the recommended transmission enhancement or expansion." *Id.* (citing PJM Operating Agreement, Schedule 6, section 1.5.6(f) (emphasis added)).

³⁷ *Primary Power v. PJM*, 140 FERC ¶ 61,054 at P 69. The Commission was interpreting the provisions of the PJM Operating Agreement stating:

Upon completion of its studies and analysis, including sensitivity studies and scenario analyses the Office of the Interconnection shall prepare a recommended enhancement and expansion plan, which *shall include alternative projects* or solutions as applicable, for review by the Transmission Expansion Advisory Committee. The Transmission Expansion Advisory Committee shall facilitate open meetings and communications as necessary to provide opportunity for the Transmission Expansion Advisory Committee participants to collaborate on the preparation of the recommended enhancement and expansion plan.

Id. (citing PJM Operating Agreement, Schedule 6, Article 1.5, Procedure for Development of the Regional Transmission Expansion Plan, § 1.5.6(b) (OA Schedule 6.1.5, ver. 2.0.0) (emphasis added)).

By comparison, the relevant provision of the MISO Transmission Owners Agreement interpreted in the Xcel Order provides that:

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.

(continued...)

operating agreements (the PJM Operating Agreement and the MISO Transmission Owners Agreement) resulted in two different outcomes does not amount to arbitrary decision-making, but instead simply reflects the differences between the two RTOs and their operating agreements.

27. We continue to disagree with American Transmission's interpretation of section VI of Appendix B and decline to grant American Transmission's request that the Commission reconsider its decision that section IV, Appendix B acts to establish a right of first refusal. As explained in the Xcel Order, the Transmission Owners Agreement is unambiguous as to ownership and the responsibility of owners to build facilities.³⁸ Further, the fact that no transmission owner has attempted to invoke this provision to assert a right to own 50 percent of a project connected to its existing substation prior to the 2011 MTEP does not prove that the language does not create a right of first refusal. It could simply mean that the interconnecting transmission owners did not seek to enforce the right of first refusal, or came to another agreement, pursuant to the Transmission Owners Agreement.³⁹

B. Motion for Stay

28. Under the standards of the Administrative Procedures Act, the Commission may grant a stay "[w]hen ... justice so requires."⁴⁰ In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without the stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether the stay is in the public interest.⁴¹ If the party requesting the stay is unable to demonstrate irreparable harm absent a stay, we need not examine the other factors.⁴²

Xcel Order, 140 FERC ¶ 61,058 at P 58 (citing Transmission Owners Agreement at App. B § VI).

³⁸ See Xcel Order, 140 FERC ¶ 61,058 at P 60.

³⁹ Section VI of Appendix B of Transmission Owners Agreement states "Ownership and the responsibilities to construct facilities which are connected between two (2) or more Owners' facilities belong equally to each Owner, *unless such Owners otherwise agree, . . .*" (emphasis added).

⁴⁰ 5 U.S.C. § 705 (2012).

⁴¹ *MidAmerican Energy Holdings Company*, 118 FERC ¶ 61,003, at P 22 (2007); *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,630-31 (1991), *aff'd sub nom., Michigan Municipal Cooperative*

29. We do not find irreparable harm absent a stay in the circumstances described here. American Transmission argues that it will suffer irreparable harm by having to begin making crucial planning, management, financial, preliminary engineering, permitting, and siting decisions to accommodate Xcel's participation, wherein it would be impossible to recreate the financial situation that would have existed if the Commission ultimately reverses course. As American Transmission notes, the potential for economic loss only exists should the Commission ultimately decide to reverse course. Consistent with our prior holdings, the potential for economic loss does not constitute irreparable harm for purposes of justifying a stay.⁴³ Therefore, we deny the motion for stay.

Group v. FERC, 990 F.2d1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993) (*CMS Midland*); *Boston Edison Company*, 81 FERC ¶ 61,377 (1997).

⁴² *CMS Midland*, 56 FERC at 61,631 (“The key element in our inquiry is irreparable injury to the moving party. If such party is unable to demonstrate that it will suffer irreparable harm if we do not grant the stay, we need not examine the other factors”).

⁴³ *TGP Dev't Co. v. Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,083, at PP 36-39 (2011) (having to choose between posting a second financial security installment and withdrawing from the interconnection queue is a financial decision that does not constitute irreparable harm); *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,013, at P 13 (2009) (finding that delay in processing an LGIP interconnection request is of a “purely economic nature”); *Wis. Gas v. FERC*, 758 F.2d at 674 (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.”) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *Wash. Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925.

The Commission orders:

American Transmission's request for rehearing and motion for stay are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.