

152 FERC ¶ 61,073  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Midcontinent Independent System  
Operator, Inc.

Docket No. ER15-1792-000

ORDER DISMISSING FILING

(Issued July 27, 2015)

1. On May 28, 2015, the Midcontinent Independent System Operator, Inc. (MISO), on behalf of American Transmission Company LLC, by its corporate manager ATC Management Inc., (collectively, ATC) filed, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and Part 35 of the Commission's Rules of Practice and Procedure,<sup>2</sup> an executed Joint Development Agreement (Agreement) by and between ATC and Northern States Power Company, a Wisconsin Corporation (NSPW) (collectively, Owners or Parties).<sup>3</sup> For the reasons discussed below, we dismiss the filing.

**I. Background**

2. ATC states that it is a Wisconsin limited liability company created as a single-purpose, for-profit transmission company, and that MISO provides transmission service over ATC's transmission facilities pursuant to the terms of the MISO Tariff, with ATC operating its transmission facilities in accordance with the direction of MISO. ATC states that NSPW is a Wisconsin corporation and a transmission-owning member of MISO.

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> 18 C.F.R. Part 35 (2014).

<sup>3</sup> MISO states that it joins in the filing as the Administrator of the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff), but takes no position on the substance of the filing.

3. ATC states that the Agreement governs the development of the approximately 145-mile, 345 kV electric transmission line connecting NSPW's facilities near La Crosse, Wisconsin, with ATC's facilities near Madison, Wisconsin (Badger-Coulee Project). ATC explains that the Owners entered into the Agreement to jointly develop the Badger-Coulee Project as a Multi-Value Project under the MISO Tariff in conformance with the MISO transmission planning process.<sup>4</sup>

4. ATC states that Article II of the Agreement governs the legal relationship of NSPW and ATC, which is cooperative, limited to the Badger-Coulee Project, and governed solely by the terms of the Agreement. ATC also states that the Agreement contemplates the execution and delivery of "Project Agreements," which mean, collectively, "the Joint Ownership Agreement, a Construction Management Agreement, the Operation and Maintenance Agreement(s), the [Transmission Capacity Exchange Agreement], and other agreements . . . as necessary or desirable for addressing the Parties' rights and obligations respecting the [Badger-Coulee] Project."<sup>5</sup>

5. ATC explains that Articles IV, V, and VI of the Agreement govern development activities and commencement of construction. ATC states that the Administrative Committee shall have primary responsibility for planning and coordination of Development Work, where "Development Work" is defined as all activities necessary or desirable and in accordance with Good Utility Practice for development of the Badger-Coulee Project.<sup>6</sup> ATC states that the Parties will determine whether the Development Work has been sufficiently completed to commence construction, upon recommendation of the Administrative Committee, pursuant to a written report submitted to the Administrative Committee by ATC.

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<sup>4</sup> ATC notes that the Agreement was entered into in accord with the Commission's findings in Docket No. EL12-28-000, in which, according to ATC, the Commission confirmed that ownership and the responsibilities to construct the Badger-Coulee Project belong equally to NSPW and ATC. *See Xcel Energy Services Inc. v. American Transmission Co., LLC*, 140 FERC ¶ 61,058 (2012).

<sup>5</sup> Filing at 4 (quoting Agreement Section 1, Definitions).

<sup>6</sup> ATC states such activities for the Badger-Coulee Project include: (1) completion of the conceptual design; (2) determination of the recommended interconnection/termination points; (3) determination of the recommended alignment for the route; (4) determination of the scope; (5) estimating the cost and schedule; (6) obtaining the governmental approvals necessary to complete Development Work and to be authorized to proceed to construction; (7) other necessary studies and analyses; and (8) limited construction-related activities, including surveying, real estate title work, soil borings, engineering support, and easement document preparation.

6. ATC explains that the Agreement provides that each Owner is responsible for 50 percent of all Development Costs and advanced construction costs that are: (1) provided for in the approved budget; or (2) required pursuant to Good Utility Practice, and approved in writing by both Owners. ATC notes that each Owner is entitled to reimbursement from the other Owner for 50 percent of any Development Costs and advanced construction costs.

## **II. Request for Jurisdictional Determination**

7. ATC explains that over the past few months, it has undertaken a comprehensive review of all of its contracts and agreements to ensure compliance with the prior notice requirements of section 205 of the FPA, and as part of this effort, ATC is filing the Agreement out of an abundance of caution. ATC requests that the Commission determine that the Agreement is not a jurisdictional agreement under the FPA and the Commission's *Prior Notice* policy,<sup>7</sup> dismiss the instant filing, and reject its eTariff filing without prejudice. ATC states that the jurisdictional nature of the Agreement as a strictly standalone development contract is unclear, even if such service is provided by a public utility. ATC asserts that unlike the contribution in aid of construction contracts discussed in *Prior Notice*, the Agreement does not affect rates and is merely an agreement delineating the ownership, development and cost responsibilities for ATC and NSPW prior to primary facility construction or operations.<sup>8</sup>

8. In the event that the Commission declines to dismiss the filing, ATC requests that the Commission waive the 60-day notice requirement and accept the Agreement for filing effective on March 19, 2014, the date the Agreement was executed.

## **III. Notice of Filing and Responsive Pleadings**

9. Notice of the filing was published in the *Federal Register*, 80 Fed. Reg. 31,901 (2015), with interventions and protests due on or before June 18, 2015.

10. WPPI Energy filed a timely motion to intervene. Xcel Energy Services Inc. (Xcel), on behalf of itself and its utility operating company NSPW, filed a timely motion to intervene and limited protest.

11. Xcel supports ATC's request that the Commission find that the Agreement is not a jurisdictional agreement and dismiss MISO's filing. Xcel argues that finding development agreements such as the Agreement jurisdictional would be inconsistent with

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<sup>7</sup> Filing at 3 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,993, *on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*)).

<sup>8</sup> *Id.* at 2 (citing *Prior Notice*, 64 FERC at 61,986).

the guidance that “only those practices that affect rates and service *significantly*, that are realistically *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous” need be filed with the Commission.<sup>9</sup> Xcel states that nothing in the Agreement affects jurisdictional rates or services, but rather that the Agreement is a pre-construction agreement to define the Parties’ responsibilities and relationship in complying with the MISO Tariff while developing the Badger-Coulee Project and obtaining the necessary state and local regulatory authorizations.

12. Xcel states that the Agreement provides the terms and conditions for NSPW’s and ATC’s Development Work for the Badger-Coulee Project, which is mainly related to studying the project, determining the necessary engineering and other details, and obtaining required state construction permits. Xcel notes that the Commission previously found that “the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects”<sup>10</sup> and that “the responsibility for such obligations is within the jurisdiction of state and local governments.”<sup>11</sup> Thus, Xcel concludes that the material subject matter of the Agreement is not jurisdictional.

13. Additionally, Xcel explains that the costs incurred for the development work will not directly impact the costs of other jurisdictional services. Xcel states that the Development Work for the Badger-Coulee Project will not act as an offset or otherwise modify other rates for jurisdictional service and therefore does not affect rates in a way that would make it jurisdictional.

14. Xcel does recognize that ATC and NSPW will incur costs for the Development Work that will ultimately be included in the total cost of the Badger-Coulee Project placed into NSPW’s and ATC’s rates under the MISO Tariff. Xcel asserts, however, that this work is not related to or affecting rates as the Commission has applied this requirement. Xcel notes that the Commission has, in the past, determined that “[i]f and when [the utility] seeks to recover the costs of the new line . . . the Commission will consider the prudence of such costs at that time.”<sup>12</sup>

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<sup>9</sup> Xcel Protest at 2 (quoting *Prior Notice*, 64 FERC at 61,988) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)).

<sup>10</sup> *Id.* at 13 (quoting *PacifiCorp*, 72 FERC ¶ 61,087, at 61,488 (1995)).

<sup>11</sup> *Id.* (quoting *PSI Energy, Inc. and Consumer Power Company*, 56 FERC ¶ 61,237, at 61,908 & n.4 (1991)).

<sup>12</sup> *Id.* at 14 (quoting *PSI Energy, Inc. and Consumers Power Co*, 55 FERC ¶ 61,254, at 61,811 (1991)).

15. Further, Xcel notes that the joint ownership of the Badger-Coulee Project reflected in the Agreement was determined by MISO under the MISO Tariff in MTEP2011 and not through the Agreement, as the Commission confirmed in Docket No. EL12-28-000. Xcel states that final jurisdictional terms of Badger-Coulee Project ownership will be established through the Transmission Capacity Exchange Agreement and not the Agreement itself.

16. Xcel explains that unlike in *Prior Notice*, where the Commission determined that if an agent has functional control to make decisions on behalf of the entity for which it is acting as agent then the terms of such agency are jurisdictional,<sup>13</sup> under the Agreement, ATC's agency is severely restricted as it may only act at the direction of the Administrative Committee. Xcel asserts that the Agreement contains no "jurisdictional hook" that the Commission would normally require to determine that the nature of the Development Work under the Agreement would make the agreement jurisdictional. Xcel asserts that, under the Agreement, no material construction will occur; such work is limited to acquisition of real property.

17. Xcel explains that both NSPW and ATC recognize the need to ensure that the terms of their operations, maintenance, and other jurisdictional matters related to construction and ownership of the joint Badger-Coulee Project are documented and on file with the Commission. Xcel notes the Agreement does contemplate future, jurisdictional, Project Agreements, including the Construction Management Agreement, the Operation and Maintenance Agreement, and the Transmission Capacity Exchange Agreement, to be entered into to provide the terms of construction, operations and maintenance, and the allocation of capacity for the Badger-Coulee Project amongst the owners of the Badger-Coulee Project. Xcel asserts that the contemplation of separate jurisdictional agreements in a non-jurisdictional agreement does not "affect or relate to" jurisdictional rates or services.

18. Alternatively, Xcel states that if the Commission does find that provisions of the Agreement are jurisdictional, the Commission should apply the rule of reason, disclaim jurisdiction, and exempt the Agreement from the filing requirements. Xcel asserts that both Commission precedent and judicial precedent recognize the "rule of reason," granting the Commission discretion to disclaim jurisdiction and exclude the public utility from filing requirements when the policy, practices, or agreements in question deal only with matters of "practical insignificance."<sup>14</sup> Xcel explains that "[t]he rule of reason applies when the Commission *has* jurisdiction over the particular contract or practice, but

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<sup>13</sup> *Id.* at 16 (citing *Prior Notice*, 64 FERC at 61,994).

<sup>14</sup> *Id.* at 20 (citing *Pub. Serv. Comm'n of New York v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987)).

nevertheless exercises its discretion to allow utilities to forego filing contracts or practices.”<sup>15</sup> Xcel explains that under FPA section 205:

[T]here is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the recitation of only those practices that affect rates and service *significantly*, that are realistically *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous.<sup>16</sup>

19. Xcel argues that the Commission should apply the rule of reason in this instance because any potentially jurisdictional provisions in the Agreement are ancillary to the actual purpose of the agreement. Xcel asserts that instead, the material provisions of the Agreement — governing the completion of state and local permitting activities — do not affect or relate to rates; no jurisdictional services are being provided; and the Parties have already agreed to document the jurisdictional terms of their joint construction.

20. Xcel argues that finding the Agreement jurisdictional could also confound the Commission’s goals in Order No. 1000<sup>17</sup> to encourage joint planning and development of cost-effective and efficient transmission by requiring that all joint development arrangements for transmission development be publicly filed with the Commission. Xcel asserts that finding development agreements such as the Agreement jurisdictional could impede the Commission’s goals of encouraging competitive transmission development through regionally managed competitive solicitation processes or could result in reduced cost to consumers. Xcel explains that the execution of the development agreement could require disclosure of the arrangement through an FPA section 205 filing, thus discouraging parties from entering into business relationships that could facilitate market entry by additional market participants.

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<sup>15</sup> *Id.* (quoting *Pub. Serv. Co. of Colorado*, 67 FERC ¶ 61,371, at 62,267 (1994) (*PSC Colorado*)).

<sup>16</sup> *Id.* (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (emphasis in original)).

<sup>17</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

#### IV. Discussion

##### A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

##### B. Substantive Matters

22. Section 205(c) of the FPA requires public utilities to file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, *together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.*"<sup>18</sup> However, as Xcel notes, the Commission may apply the rule of reason to not "render recitation superfluous."<sup>19</sup> As the Commission has stated on several occasions, "the determination of what agreements 'affect or relate to' electric service . . . must be judged by the rule of reason."<sup>20</sup> As the D.C. Circuit has noted, the rule of reason allows the Commission to exercise its discretion to allow utilities to forego filing particular contracts that deal only with matters of "practical insignificance."<sup>21</sup> In *PacifiCorp*, the Commission further elaborated on the rationale underlying the rule of reason:

Under the rule of reason, the Commission does not require [contracts such as the Agreement] to be filed unless they significantly affect rates and services. In deciding what must be filed, the Commission balances the need for full disclosure of pertinent contracts, which provide real benefits to existing and potential customers, against the burden that would be imposed by requiring public utilities to file contracts that do not significantly affect rates and services. The Commission does not believe it is appropriate to deprive utilities of the flexibility to manage their operations by introducing delay and layered decision-making as would arise from filing obligations

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<sup>18</sup> 16 U.S.C. § 824d(c) (2012) (emphasis added); *see also PSC Colorado*, 67 FERC at 62,267.

<sup>19</sup> *See supra* notes 9, 16.

<sup>20</sup> *See Town of Easton, Maryland v. Delmarva Power and Light Co.*, 24 FERC ¶ 61,251 (1983) (*Town of Easton*) (quoting *Pacific Gas and Elec. Co.*, 7 FERC ¶ 61,267, at 61,565 (1979)).

<sup>21</sup> *Pub. Serv. Comm'n of New York v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987).

for agreements that have an insignificant impact on rates, where such filing and posting would serve no practical purpose.<sup>22</sup>

23. Based on ATC's filing and the representations made by ATC and Xcel, we find that, under the rule of reason, ATC does not need to file the Agreement with the Commission. The Agreement acts as a guide for development activities that must occur prior to construction of the Badger-Coulee Project. In limited respects, the Agreement provides terms and conditions related to cost sharing that could potentially affect rates for future jurisdictional services. We find that such activities do not exceed the "significant" threshold contemplated by the rule of reason in the *Prior Notice* order.<sup>23</sup> Additionally, as noted by both ATC and Xcel, the Agreement contemplates future agreements for all eventual jurisdictional activity, which the parties intend to file at the Commission. However, the Commission retains authority to request the production of the Agreement in the future, for example, to investigate the reasonableness of the costs incurred thereunder to the extent they are recovered in jurisdictional rates.<sup>24</sup>

The Commission orders:

ATC's request to dismiss the filing is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>22</sup> 127 FERC ¶ 61,144, at P 11 (2009) (citing *Town of Easton*, 24 FERC at 61,531).

<sup>23</sup> The application of the rule of reason by the Commission does not make an agreement non-jurisdictional; it merely means that the Commission has decided that it does not need a public utility to file the agreement. *LG&E Energy Marketing, Inc.*, 123 FERC ¶ 61,147, at P 12 & n.20 (2008). *Cf. PSC Colorado*, 67 FERC at 62,267.

<sup>24</sup> *See Prior Notice*, 64 FERC at 61,988 & n.3; *id.* at 61,994 n.6.