

FOR BOARD ACTION

Agenda Item # 5

Meeting Date:

02/27/07

SUBJECT: SE Minnesota Transmission Project Development Agreement

PREPARED BY: Walt Lorber, Director of Core Services

The participants in the planning of a SE Minnesota 345 kV transmission line that would provide a new interconnection to the City of Rochester electric system have drafted the attached agreement to establish the terms for performing the next phase of project development. The agreement covers activities required to complete the certificate of need and route selection processes. The associated expenses will be shared by the participants as follows:

Dairyland Power Cooperative	11%
City of Rochester	9%
Southern Minnesota Municipal Power Agency	13%
Wisconsin Public Power, Inc.	3%
Xcel Energy, Inc. d/b/a Xcel Energy	64%

RPU's 9% share of the estimated \$22 million cost will be \$1.98 million.

The total cost of the completed line is now estimated to be \$260M. RPU's 9% share of this total cost (which includes the \$1.98M) would be \$23.4M. This amount includes the 345-161kV substation and associated 161kV transmission line connections at Northern Hills and Chester Substations.

Following the CON and route selection, three additional agreements will be required to obtain right-of-way, construct, and operate the line:

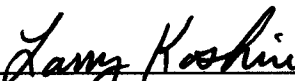
- Ownership agreement
- Project construction agreement
- Operation and maintenance agreement

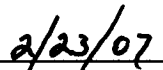
The in-service date of the line is now projected to be 2012 – 2014.

Note: Information on CapX can be found at www.capx2020.com.

UTILITY BOARD ACTION REQUESTED:

It is requested that the Board request the Council to approve a contract agreement with Dairyland Power Cooperative, Southern Minnesota Municipal Power Agency, Wisconsin Public Power, Inc., and Xcel Energy, at a not-to-exceed cost of \$1.98 million, for the collaborative performance of those activities required to obtain a certificate of need and route for the CapX Twin-Cities – Rochester – LaCrosse 345 kilovolt transmission line, and to authorize the Mayor and City Clerk to execute the documents.


General Manager


Date

ROCHESTER PUBLIC UTILITIES

**SE – TC – ROCHESTER - LACROSSE
TRANSMISSION PROJECT**

PROJECT DEVELOPMENT AGREEMENT

Dated as of February 28, 2007

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PROJECT DEVELOPMENT AGREEMENT

THIS PROJECT DEVELOPMENT AGREEMENT dated as of February 28, 2007 (this "**Agreement**") is entered into by and among **Dairyland Power Cooperative**, a cooperative association incorporated under the laws of the State of Wisconsin, the **City of Rochester**, a Minnesota municipal corporation acting through its Public Utility Board, **Southern Minnesota Municipal Power Agency**, a municipal corporation and political subdivision of the State of Minnesota, **Wisconsin Public Power, Inc.**, a municipal electric company, political subdivision and body public and corporate of the State of Wisconsin, **Northern States Power Company**, a Minnesota corporation and **Northern States Power Company**, a Wisconsin corporation, each a wholly owned subsidiary of Xcel Energy Inc., d/b/a Xcel Energy ("**Xcel Energy**") and Northern States Power Company, the Minnesota corporation, in its capacity as the Development Manager.

RECITALS

A. Each Participant is empowered by law to acquire, construct, maintain and operate facilities for the transmission of electrical energy for public or private use and to acquire, construct and maintain all rights, properties, improvements and other interests necessary therefor in the State of Minnesota and the surrounding region in which such Participant has a load serving obligation;

B. The Participants have determined that the existing transmission system for the region to be served by the Project appears insufficient to serve reliably the projected growth of the electricity requirements of Participants' respective customers;

C. The Project is one of several transmission projects arising from the CapX 2020 Initiative planning process (the "**CapX Projects**"). The Project is being undertaken to assist in the maintenance of and enhance system reliability for electric customers in Minnesota and the surrounding region;

D. The Participants have further determined that because the Project is regional in nature it is most efficient and effective for the Participants to develop the Project in a collaborative manner to, among other things, prepare and/or obtain such reports, applications and filings that may be required, necessary or desirable to (i) certify the need for the Project, (ii) obtain routing consents and approval(s), and (iii) acquire such other Permits to commence work on the Project;

E. Certain of the Participants have entered into a "Transmission Project Memorandum of Understanding" dated August 24, 2006, as amended (the "**Project MOU**") pursuant to which the Participants have previously undertaken certain matters, actions and activities in furtherance of the Project;

F. The Participants desire to pursue Development Work for the Project, which was initiated under and pursuant to the Project MOU, pursuant to the terms and conditions of this Agreement; and

G. Each Participant enters into this Agreement to facilitate such Participant's pursuit of the Development Work for the Project as described herein.

AGREEMENT

In consideration of the foregoing Recitals, the definitions in which are incorporated by reference herein as terms hereof, the mutual covenants set forth in this Agreement, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Participants agree as follows.

1. DEFINITIONS. In addition to the other terms defined herein, the following terms, whether in the singular or in the plural, when used herein and in the Appendices attached hereto and initially capitalized, shall have the meanings specified:

ADR Rules. The term ADR Rules shall have the meaning ascribed thereto in Paragraph 1 of **Appendix D** to this Agreement.

Additive Expenses. The term Additive Expenses shall have the meaning ascribed thereto in **Appendix C** hereof.

Additive Expenses Percentage. The term Additive Expenses Percentage shall have the meaning ascribed thereto in **Appendix C** hereof.

Affiliate. An Affiliate means any Person that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, a Participant.

Agreement. This Project Development Agreement, as the same may be supplemented or amended.

Applicable Law. The term Applicable Law shall mean any and all laws (including all statutory enactments and common law), ordinances, constitutions, regulations, treaties, rules, codes, standards, Permits, requirements and Orders that (i) have been adopted, enacted, implemented, promulgated, ordered, issued, entered or deemed applicable by or under the authority of any Governmental Body or arbitrator having jurisdiction over a specified Person (or the properties or assets of such Person), and (ii) are applicable to the Development Work or the performance of the obligations of the Participants under this Agreement.

Approved Amount of Increase in Maximum Development Costs. The term Approved Amount of Increase in Maximum Development Costs shall have the meaning ascribed thereto in Section 5.4.1 hereof.

Available Percentages. The term Available Percentages shall have the meaning ascribed thereto in Section 2.6.1 hereof.

CapX Projects. The term CapX Projects shall have the meaning ascribed thereto in Recital C hereof.

CapX 2020 Initiative. The cooperative efforts of certain Participants and other Persons to engage in electric transmission projects designed to serve reliably the projected growth of electricity requirements in the transmission grid in Minnesota and the immediately surrounding region, which efforts are anticipated to include, in the aggregate over a long-term period, the study, planning, coordination, development, construction and ownership of electric transmission facilities.

Cause. The term Cause shall have the meaning ascribed thereto in Section 4.11.1 hereof.

Chairperson. The term Chairperson shall have the meaning ascribed thereto in Section 3.5 hereof.

Confidential Information. The term Confidential Information shall have the meaning ascribed thereto in Section 9.1 hereof.

Construction Industry Rules. The term Construction Industry Rules shall have the meaning ascribed thereto in Paragraph 4 of Appendix D to this Agreement.

Construction Management Agreement. The Construction Management Agreement in the form approved by the Management Committee as provided herein, as the same may be amended or supplemented.

Cost Offering. The term Cost Offering shall have the meaning ascribed thereto in Section 5.5 hereof.

Critical Permits. Certificates of need, certificates of public convenience, and routing permits, and such other applicable Permits that the Management Committee may designate from time to time as a Critical Permit.

DPC. The term DPC shall have the meaning ascribed thereto in Section 2.5.2.5 hereof.

Damages. The term Damages means without limitation any loss arising from claims, suits, actions, costs (including reasonable fees and/or reasonable costs of investigation), expenses, fines, interest, penalties, assessments, judgments, demands, causes of action and litigation of any kind.

Defaulted Amount. The term Defaulted Amount shall have the meaning ascribed thereto in Section 2.11.2.1 hereof.

Development Costs. The costs of carrying out Development Work and Joint Development Work, as well as those costs which, pursuant to the terms of this Agreement are, or are deemed to be, Development Costs. The following Development Costs shall not be counted in the calculation of Maximum Development Costs: (i) amounts paid to MOU Participants in accordance with Section 2.10 hereof, and (ii) costs arising from or paid under the Project MOU.

Development Manager. The Participant who is responsible, in accordance with the terms of this Agreement, for carrying out Development Work. The Development Manager shall be a Participant. Reference to the "Development Manager" excludes any reference to such Participant in any other capacity.

Development Work. The term Development Work shall have the meaning ascribed thereto in Section 5.1.1 hereof. Development Work shall include Joint Development Work.

Disclosing Party. The term Disclosing Party shall have the meaning ascribed thereto in Section 9.3 hereof.

Elected Project Participation. The term Elected Project Participation shall have the meaning ascribed thereto in Section 6.4 hereof.

Election Right. As to any Participant, the maximum percentage of its Participant Percentage which such Participant shall have the right of first refusal to elect to take in accordance with Section 6 hereof,

which percentage for each Participant shall be the indicated percentage set forth opposite such Participant's name on **Appendix A** hereto.

FERC. FERC means the Federal Energy Regulatory Commission, a regulatory Governmental Body of the United States, or any successor thereto.

FERC Standards of Conduct. The term FERC Standards of Conduct shall have the meaning ascribed thereto in Section 9.4.

Final Order. The term Final Order shall have the meaning ascribed thereto in Section 6.1.1 hereof.

Force Majeure. Force Majeure means the occurrence of an event or series of events that is/are beyond the reasonable control of the Person affected that affects the performance under contract of such Person. Such events include acts of God, fire, flood, earthquake, explosion, labor-called strike, sabotage, pestilence, catastrophe, act of a public enemy, terrorism, Order of a civil or military authority or other Governmental Bodies, insurrection or riot, Applicable Laws that prevent performance, and events of similar uncontrollable import.

GAAP. GAAP means generally accepted accounting principles practiced in the United States of America, as in effect from time to time, applied on a consistent basis.

Good Reason. The term Good Reason shall have the meaning ascribed thereto in Section 4.12.1 hereof.

Good Utility Practice. Any of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method or act, or the exclusion of all others, but rather to be a range of acceptable practices, methods, or acts generally accepted in the region.

Governmental Body. Governmental Body shall mean any: (i) nation, state, county, city, town, village, district or other jurisdiction of any nature, and/or (ii) federal, state, local, municipal, foreign or other government, and/or (iii) governmental or quasi governmental authority of any nature (including any governmental agency, branch, board, commission, department, instrumentality, office or other entity, and any court), in any such case exercising, or entitled to exercise, administrative, executive, judicial, legislative, police, regulatory or taxing authority or power of any nature over the Agreement, the performance of the Development Work or any of the Participants.

Independent Accountants. The term Independent Accountants shall have the meaning ascribed thereto in Section 5.6.3 hereof.

Initial Budget. The term Initial Budget shall have the meaning ascribed thereto in Section 5.3.1.1 hereof.

Initial Elected Project Participation. The term Initial Elected Project Participation shall have the meaning ascribed thereto in Section 6.3.1 hereof.

Initial Term. The term Initial Term shall have the meaning ascribed thereto in Section 10.1.2 hereof.

Injunction. Injunction means any and all writs, rulings, awards, directives, injunctions (whether temporary, preliminary or permanent), judgments, decrees or other orders adopted, enacted, implemented, promulgated, issued, entered or deemed applicable by or under the authority of any Governmental Body or arbitrator.

Interest Rate. The term Interest Rate means, for each month, the monthly average of the daily one-month LIBOR, plus an adder equal to one-half of 1% (0.50%) or such other adder as the Management Committee approves in accordance with Section 2.11.1 hereof.

Joint Development Work. The term Joint Development Work shall have the meaning ascribed thereto in Section 5.2.1.2 hereof.

LIBOR. The term LIBOR means the London Interbank Offered Rate of interest equal to the per annum rate of interest at which United States dollar deposits of a Eurodollar loan for the applicable period are offered in the London Interbank Eurodollar market at 11:00 a.m. (London time) by the British Bankers' Association, as displayed in its website (<http://www.bba.org.uk>) in the Bloomberg Financial Markets System, or other authoritative source selected by the Development Manager in its reasonable discretion.

Late Payment Fee. The term Late Payment Fee shall have the meaning ascribed thereto in Section 2.11.2.

Level A Vote. The term Level A Vote shall have the meaning ascribed thereto in Sections 3.3.4.1 and 3.3.4.4 hereof.

Level B Vote. The term Level B Vote shall have the meaning ascribed thereto in Sections 3.3.4.2 and 3.3.4.4 hereof.

Level C Vote. The term Level C Vote shall have the meaning ascribed thereto in Section 3.3.4.3 hereof.

MAPP. MAPP means the Mid-Continent Area Power Pool, or its successor entity.

Major Contract. Major Contract means: (i) any contract with respect to Development Work: (A) that at the time of execution has a total cost to the Project greater than \$500,000, or (B) involves acquisition of any electric transmission line equipment or real property rights, to the extent permitted by Applicable Law, and (ii) any other contract which the Management Committee may designate as a Major Contract. If any contract referred to above is a time-and-materials contract, the total cost of such contract, for purposes of this Agreement, shall be estimated in good faith by the Development Manager.

Management Committee. The term Management Committee means the management committee established pursuant to Section 3 hereof.

Material Change in Project Withdrawal Event. The term Material Change in Project Withdrawal Event shall have the meaning ascribed thereto in Section 2.5.2.1 hereof.

Maximum Development Costs. The term Maximum Development Costs shall have the meaning ascribed thereto in Section 5.3.1.3 hereof.

Mediator. The term Mediator shall have the meaning ascribed thereto in Paragraph 3.1.1 of Appendix D hereof.

Midwest ISO. Midwest ISO means Midwest Independent Transmission System Operator, Inc., or its successor entity.

Monthly Development Costs. The term Monthly Development Costs shall have the meaning ascribed thereto in Section 4.4.4 hereof.

MOU Participant. The term MOU Participant shall have the meaning ascribed thereto in Section 2.10 hereof.

Non-Elected Amount. The term Non-Elected Amount shall have the meaning ascribed thereto in Section 6.3.2 hereof.

Offered Interest. The term Offered Interest shall have the meaning ascribed thereto in Section 2.9.2.2 hereof.

Officers. The term Officers shall have the meaning ascribed thereto in Section 3.5 hereof.

Option Period. The term Option Period shall have the meaning ascribed thereto in Section 2.9.2.2 hereof.

Order. Order means any judgment, award, decision, consent decree, Injunction, ruling, writ or order of any Governmental Body or arbitrator that is binding on any Person or its property under Applicable Law.

Ownership and Operation Agreement. The Ownership and Operation Agreement (which may be in the form of one or more agreements) in the form approved by the Management Committee as provided herein, as the same may be amended or supplemented.

Participant. Each Person listed as a Participant on Appendix A hereto; provided, however, that the term Participant shall (i) exclude, from and after the date of withdrawal or termination, any Participant who withdraws after the date of this Agreement or whose rights are terminated in accordance with the terms of this Agreement, and (ii) include a Person that later becomes a Participant pursuant to the provisions of Section 2.9 hereof from and after the effective date of the admission of such Person. Wherever in this Agreement the term "Participant" is used, where applicable, such term shall also refer to any other capacity of such Participant under this Agreement, including that of Development Manager or Subcontractor.

Participant Percentage. The term Participant Percentage means the percentage stated in Appendix A hereto opposite the Participant name set forth therein. Participant Percentages may be adjusted pursuant to the terms of this Agreement, with Appendix A hereto adjusted accordingly.

Participant Transferee. The term Participant Transferees shall have the meaning ascribed thereto in Section 2.9.2.1 hereof.

Permits. Permits means all waivers, franchises, variances, permits, authorizations, certificates, licenses and Orders of or from any Governmental Body having jurisdiction over the Participants and their respective obligations under this Agreement or the Development Work, as may be in effect from time to time.

Permitted Purpose. The term Permitted Purpose shall have the meaning ascribed thereto in Section 9.1 hereof.

Person. Person means any individual, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, joint venture, Governmental Body or other entity with legal constitution under Applicable Laws.

Preliminary Increase in Maximum Development Costs. The term Preliminary Increase in Maximum Development Costs shall have the meaning ascribed thereto in Section 5.3.1.5 hereof.

Proceeding. The term Proceeding means any suit, litigation, arbitration, hearing, audit, investigation or other action (whether civil, criminal, administrative or investigative) commenced, brought, conducted, heard by or before, or otherwise involving, any Governmental Body or arbitrator.

Project. The proposed facilities relating to electric transmission described in Appendix F, as may be modified in accordance with this Agreement or in accordance with the Critical Permits.

Project Agreements. The term Project Agreements means the Ownership and Operation Agreement, the Construction Management Agreement, and any other agreement designated a Project Agreement by the Management Committee.

Project MOU. The term Project MOU shall have the meaning ascribed thereto in Recital E hereof.

Purchase Price. The term Purchase Price shall have the meaning set forth in Section 2.9.2.2 hereof.

RPU. The term RPU shall have the meaning ascribed thereto in Section 6.1.3 hereof.

Removal Notice. The term Removal Notice shall have the meaning ascribed thereto in Section 4.1.1 hereof.

Representatives. The term Representatives shall have the meaning ascribed thereto in Section 9.1 hereof.

Rochester Segment. The term Rochester Segment shall have the meaning ascribed thereto in Section 6.1.3 hereof.

Seams Issues. The term Seams Issues shall have the meaning ascribed thereto in Section 3.6.1.1 hereof.

Secretary. The term Secretary shall have the meaning ascribed thereto in Section 3.5 hereof.

Subcontract. The term Subcontract means any contract between the Development Manager and a Subcontractor with respect to performing any part of the Development Work or providing any goods, including equipment and materials, in connection with the Development Work.

Subcontractor. The term Subcontractor means each and every supplier, subcontractor, consultant or contractor of any tier performing any part of the Development Work or providing any studies, reports, plans, evaluations, goods, including equipment and materials, in connection with the Development Work, directly or indirectly for or to the Development Manager. Reference to a Participant as a "Subcontractor" excludes any reference to such Person in any other capacity.

Term. The term Term shall have the meaning ascribed thereto in Section 10.1.2 hereof.

Transfer. The term Transfer shall have the meaning ascribed thereto in Section 2.9 hereof.

Transfer Notice. The term Transfer Notice shall have the meaning ascribed thereto in Section 2.9.2.2 hereof.

Transferring Participant. The term Transferring Participant shall have the meaning ascribed thereto in Section 2.9.2.1 hereof.

Vice Chairperson. The term Vice Chairperson shall have the meaning ascribed thereto in Section 3.5 hereof.

Withdrawing Participant. The term Withdrawing Participant shall have the meaning ascribed thereto in Section 2.5.2 hereof.

2. PARTICIPANTS.

2.1 Actions Reserved to Participants. All powers that are not granted to the Management Committee or the Development Manager under this Agreement are reserved to the Participants.

2.2 Participant Covenants Regarding Project Agreements and Critical Permits.

2.2.1 Development of Project Agreements. Each Participant shall comply with the covenants and procedures set forth in Section 3.6 hereof in connection with the development of Project Agreements, including the covenant of good faith and facilitation described in Section 3.6.1.

2.2.2 Cooperation. Each Participant shall make good faith efforts to cooperate with the other Participants to facilitate the granting or issuance of all Critical Permits required to proceed with the Project. The preceding sentence shall not in any way limit any Participant's right to seek protective Orders for, or otherwise seek to preserve the confidentiality of, information provided to any Governmental Body in connection with any Proceeding. Nothing herein shall entitle any Participant to seek to treat as Development Costs its costs to comply with any condition applicable solely to it under the terms of a Critical Permit.

2.3 **Designation of Management Committee Representatives.**

- 2.3.1 Appointment of Representatives and Alternates. **Appendix E** identifies the duly authorized representative and alternate of each Participant. The alternate may act as a Participant's representative on the Management Committee in the absence of the regular representative. Each Participant may change its Management Committee representative or alternate at any time, subject to the provisions of Section 2.3.2.
- 2.3.2 Changes in Designation of Representative or Alternate. Each Participant shall promptly give notice to all other Participants of any changes in the designation of its representative or alternate on the Management Committee and any other committee. Any such notice shall be effective if given at or before the first meeting of the Management Committee at which such new representative or alternate will act as a representative.

2.4 **Participant Breach of Agreement.** The following provisions apply to default by a Participant solely in its capacity as a Participant, and do not apply to (i) a Participant acting in its role as Development Manager, or (ii) a Participant acting in a role as a Subcontractor pursuant to Section 4.2.3.

- 2.4.1 Notice of Participant Default. If the Management Committee is advised by a Participant, including the Development Manager, that another Participant may be in default under this Agreement, the Management Committee shall give written notice to all Participants of the alleged default and such notice shall contain the asserted factual basis for such default and reference the applicable provision(s) of this Agreement to which such factual basis may apply. Within ten (10) business days after such written notice has been given, the Management Committee shall meet to attempt to resolve the matter. If no such resolution is achieved within ten (10) business days after such meeting of the Management Committee, it shall determine the existence and nature of the alleged default by a Level B Vote, excluding the alleged defaulting Participant and allocating the alleged defaulting Participant's Participant Percentage to the non-defaulting Participants, solely for purposes of such vote, in accordance with Section 2.4.5 hereof. If it is determined by such vote that a default exists, a representative of the Management Committee shall give written notice of such default to the defaulting Participant and shall send copies of such notification to each non-defaulting Participant. Said notice shall include a demand to immediately cure the default.
- 2.4.2 Disputing Finding of Default. The defaulting Participant may appeal such determination pursuant to the dispute resolution provisions of Section 8.1 of this Agreement. Any such appeal must be made by the Participant within ten (10) business days after the Participant receives the Management Committee's notice of default determination. If such an appeal is timely made, the default determination by the Management Committee shall be stayed until final determination of such appeal process.
- 2.4.3 Obligation to Cure Default and Excuse of Performance.
- 2.4.3.1 Obligation to Cure. Subject to Sections 2.4.2 and 2.4.3.2 hereof, a Participant determined to be in default by the Management Committee under Section 2.4.1 shall take all steps necessary to cure such default as promptly as possible.

2.4.3.2 Excuse of Performance. Other than with respect to the obligation of a Participant to make payments as provided in this Agreement, no Participant shall be considered to be in default in the performance of any of its obligations under this Agreement when a failure of performance is due to Force Majeure. An event of Force Majeure shall excuse the timely performance of such Person for a reasonable period following such event or events. If a Participant is rendered unable to fulfill any of its obligations under this Agreement by reason of Force Majeure, such Participant shall (i) give prompt written notice of such Force Majeure to each other Participant, and (ii) exercise reasonable commercial efforts to effect performance following the occurrence of such Force Majeure. Nothing contained herein shall be construed to require a Participant to settle any labor-called strike or dispute in which it may be involved.

2.4.4 Termination of Participant Rights.

2.4.4.1 Termination of Rights of Defaulting Participant. Subject to any stay on appeal pursuant to Section 2.4.2 hereof, if a Participant that has been determined by action of the Management Committee under Section 2.4.1 to be in default hereunder has not (i) cured such default within fifteen (15) days after notice to the Participant concerning such default, (ii) in the case of a default that cannot be cured within fifteen (15) days, initiated within fifteen (15) days actions reasonably likely to cure such default and diligently pursued and completed such cure within no more than forty-five (45) days after notice to the Participant concerning such default, or (iii) complied with subsections (i) or (ii) of this Section 2.4.4.1, as applicable, following an unsuccessful appeal of the Management Committee's default determination pursuant to the dispute resolution process described in Section 2.4.2, then except as otherwise determined by the Management Committee at a Level B Vote, the defaulting Participant shall no longer be a Participant under this Agreement and all rights and obligations of the defaulting Participant shall terminate (except those obligations which would survive a termination of this Agreement pursuant to Section 12.9) except it will remain liable for such defaulting Participant's Participant Percentage of the then current Maximum Development Costs under this Agreement at the time of termination, less those Development Costs already paid by such Participant under this Agreement, all of which shall be promptly paid. Subject to Section 2.11.2.2, upon receipt of payment for such Development Costs from the defaulting Participant, the Development Manager shall hold such monies for the non-defaulting Participants (including any new or existing Participants electing to take the defaulting Participant's Participant Percentage), which shall incur interest at the Interest Rate, and apply such monies as a credit for Monthly Development Costs on a pro rata basis based upon the remaining, non-defaulting Participants' Participant Percentages. Within ten (10) business days of any such termination, the Management Committee shall give written notification of such termination to each non-defaulting Participant.

2.4.4.2 Available Percentages Upon Default. The defaulting Participant's Participant Percentage in the Project shall be treated as an Available Percentage, and the Participants shall follow the procedures set forth in Sections 2.6.2 through 2.6.4 hereof to reallocate the defaulting Participant's Participant Percentage.

2.4.5 Effect of Breach by Participant and Modification of Voting Percentages. So long as a Participant is in default under this Agreement, a defaulting Participant's representative on the Management Committee shall not be entitled to vote. During the period a Participant is in default, such defaulting Participant's Participant Percentage shall be allocated to the non-defaulting Participants, pro rata, solely for purposes of determining the vote of the Management Committee.

2.5 **Participant Withdrawal.**

2.5.1 Right to Withdraw. A Participant may not withdraw from this Agreement nor avoid its obligation to pay for its Participant Percentage of Development Costs except as expressly provided for in this Agreement, including Section 2.5.2 hereof.

2.5.2 Withdrawal Events. A Participant may withdraw (the "**Withdrawing Participant**") as set forth below.

2.5.2.1 Material Change in Project Withdrawal Event. A Participant may withdraw from this Agreement upon the issuance or approval of the Certificate of Need, Certificate of Public Convenience and Necessity or Minnesota routing permit, with conditions or modifications that are determined by a Participant, in its sole discretion, to materially change the Project or the feasibility thereof (a "**Material Change in Project Withdrawal Event**").

2.5.2.1.1 Each Participant desiring to withdraw due to a Material Change in Project Withdrawal Event shall give notice within sixty (60) days from the date of issuance or approval of the Certificate of Need, Certificate of Public Convenience of Necessity, or Minnesota routing permit, as applicable, to all other Participants that it is withdrawing from the Project.

2.5.2.2 Increase in Maximum Development Costs Withdrawal Event. A Participant has the right to withdraw from this Agreement as a result of an increase in the Maximum Development Costs approved by the Management Committee as provided in Section 5.3.1.5, and is subject to Sections 5.4.2 and 5.4.4 hereof. By way of clarification, such right of withdrawal shall not apply if Maximum Development Costs are increased pursuant to the Cost Offering described in Section 5.5 of this Agreement. A Participant may provide written notice to all other Participants, within thirty (30) days from the date of the notice of the Preliminary Increase in Maximum Development Costs, that it irrevocably exercises its right to withdraw from this Agreement if the Management Committee subsequently approves as final the amount of increase in Development Costs as provided in the notice of Preliminary Increase in

Maximum Development Costs as provided in Section 5.3.1.5 hereof, and will be deemed to have withdrawn if such approval occurs.

- 2.5.2.3 Development Manager Withdrawal After Removal Vote. If the Management Committee votes to remove the Development Manager: (i) without the Development Manager having initiated an arbitration appeal as permitted by Section 4.11.5, or (ii) if the Development Manager is not successful in its arbitration appeal of such Management Committee removal vote, then within ten (10) days following the receipt of the notice of either event (as applicable), the Development Manager shall have the right to withdraw from this Agreement solely as a Participant by giving written notice of withdrawal to each other Participant, and the effective date of such withdrawal shall be the date of the applicable removal event.
- 2.5.2.4 Participant Withdrawal After Removal Appeal. If the Development Manager exercises its right to appeal the decision of the Management Committee to remove the Development Manager and the Development Manager is successful in its appeal and is not removed, any Participant (except the Development Manager, whose withdrawal rights are described under Section 2.5.2.3) may withdraw from this Agreement if, on the date of the Management Committee's vote to remove the Development Manager, not more than fifty percent (50%) of the initial Maximum Development Costs has been paid or committed to be paid (as evidenced, as of such date, by binding contractual commitments to pay Development Costs in the future). To so withdraw, the Withdrawing Participant must give written notice of withdrawal to each other Participant within ten (10) days of its receipt of the arbitration appeal decision, and the effective date of such withdrawal shall be the date of receipt of the arbitration appeal decision.
- 2.5.2.5 RUS Financing Withdrawal Event. Dairyland Power Cooperative ("DPC") may withdraw from this Agreement, at any time before March 31, 2010, if DPC seeks interim financing for its share of Development Costs from a lender that may require a DPC/RUS mortgage lien accommodation, and if, despite DPC's commercially reasonable efforts, DPC has not obtained such financing or RUS approval of a mortgage lien accommodation on terms acceptable to DPC in its sole discretion. To exercise this withdrawal right, DPC must present to the other Participants written evidence from one or more lenders denying credit on the terms described above.

2.5.3 Effect of Withdrawal.

- 2.5.3.1 Withdrawing Participant Rights and Obligations. Upon giving notice of withdrawal to the other Participants, a Withdrawing Participant (i) shall no longer be a Participant under this Agreement, (ii) shall forfeit its rights and interests as set forth in Section 2.8.2, (iii) shall not be allowed to participate in the Project in the future, and (iv) shall not be relieved of its obligations incurred through the date of withdrawal except as expressly set forth in this

Agreement. Except for withdrawals under Sections 2.5.2.3, 2.5.2.4 and 2.5.2.5, a Withdrawing Participant shall remain obligated to pay its Participant Percentage of Development Costs up to the Maximum Development Costs that existed in accordance with Section 5.3.1 at the time: (A) the notice of a Material Change in Project Withdrawal Event was issued, if the Withdrawing Participant has withdrawn pursuant to Section 2.5.2.1 hereof, or (B) the notice of a Preliminary Increase in Maximum Development Costs was issued pursuant to Section 5.3.1.5 hereof, if the Withdrawing Participant has withdrawn pursuant to Section 2.5.2.2 hereof. With respect to withdrawals under Sections 2.5.2.3, 2.5.2.4 and 2.5.2.5, a Withdrawing Participant shall be obligated for its Participant Percentage of Development Costs (including for all contractual commitments that existed on the date of such withdrawal) incurred through the date of such withdrawal. The Withdrawing Participant's Participant Percentage shall be deemed an Available Percentage and shall be reallocated in accordance with Section 2.6 hereof.

- 2.5.3.2 No Reimbursement of Payments for Development Costs. No Withdrawing Participant shall be reimbursed for Development Costs paid by such Withdrawing Participant.

2.6 Participant Percentages and Offering of Available Percentages.

- 2.6.1 Available Percentages. Under Sections 2.4 and 2.5 hereof, a Participant may be terminated or withdraw from this Agreement and, in either event, the resulting relinquished or withdrawn Participant Percentage of such a Participant ("**Available Percentage**") must be reallocated among the remaining Participants or allocated to third parties as provided in this Section 2.6.
- 2.6.2 Initial Offering of Available Percentages. Promptly following the creation or availability of Available Percentages, the Development Manager shall provide written notice thereof to each Participant that it has a right of first refusal to a pro rata share of such Available Percentages. Within thirty (30) days of the date of such notification (or such other period of time determined by the Management Committee), each Participant shall provide written responses to the Development Manager indicating either the Participant has elected not to increase its Participant Percentage or that it elects to increase its Participant Percentage by exercising its right to accept Available Percentages. In the latter case, the Participant shall include in its written response the specific amount (up to but not to exceed its pro rata share) of Available Percentages it accepts, which will result in a corresponding increase in its Participant Percentage set forth in Appendix A. The Development Manager shall advise all Participants of the results of the first offering of Available Percentages. The amount of outstanding Available Percentages shall be reduced by the aggregate amount of Available Percentages elected to be accepted by the Participants. Appendix A shall be revised to reflect each Participant's election to accept Available Percentages and correspondently increase its Participant Percentage.
- 2.6.3 Second Offering to Participants. If there are outstanding Available Percentages remaining following the completion of the initial offering under Section 2.6.2 hereof, the

Development Manager shall promptly provide written notice thereof to all Participants and a Participant may offer to increase its Participant Percentage up to the total amount of outstanding Available Percentages. If the responding Participants' total amount of requests exceed the total amount of outstanding Available Percentages, the outstanding Available Percentages shall be allocated to such Participants on a pro rata basis based upon their relative Participant Percentages as adjusted pursuant to Section 2.6.2. The Development Manager shall advise all Participants of the results of the second offering of Available Percentages. A Participant who accepts Available Percentages under this Section 2.6.3 shall have its Participant Percentage increased by a corresponding amount and **Appendix A** shall be modified accordingly.

- 2.6.4 **Final Offering and Reallocation of Available Percentages.** If there are outstanding Available Percentages after the initial and second offering pursuant to Sections 2.6.2 and 2.6.3 hereof, the Management Committee shall offer the outstanding Available Percentages first to other CapX Project participants and then to third parties on terms and conditions determined by the Management Committee at a Level B Vote. For purposes of this Section 2.6.4 only, "third parties" as referred to in the previous sentence may include a Participant that previously elected not to increase its Participant Percentage. If offers to other CapX Project participants or third parties to participate in this Agreement fail to dispose of all remaining Available Percentages, and the Participant Percentages equal less than one hundred percent (100%), the Management Committee shall determine at a Level C Vote, within ninety (90) days after expiration of the final offering of Available Percentages, whether there should be a revision in the size, character or capacity of the Development Work under this Agreement and allow each Participant to modify its Participant Percentage so that they aggregate one hundred percent (100%) or take such other action at a Level C Vote. If the Management Committee does not approve such a revision within such ninety (90) day period, this Agreement shall automatically terminate.

- 2.7 **Representations and Warranties of Participants.** Each Participant, on a continuing basis, respectively represents and warrants as follows:

- 2.7.1 **Organization and Good Standing.** Participant is, as set forth in the preamble to this Agreement, an agency, non-profit corporation, cooperative, association, municipal corporation, political subdivision, limited liability company, corporation or a similar Person organized, existing and in good standing under the laws of the state of its formation and authorized to conduct business in the state(s) in which authorization may be required to perform its obligations under this Agreement.
- 2.7.2 **Power and Authority.** Participant has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 2.7.3 **Authorization.** Participant has taken all action required by Applicable Law and its governing documents, including its charter, in order to approve, execute and deliver this Agreement.

- 2.7.4 No Violation. The execution and delivery of this Agreement by Participant, the performance by Participant of its obligations hereunder and the consummation by Participant of the transactions contemplated herein do not and will not (i) contravene any Applicable Law in effect on the date hereof or any Order in effect on the date hereof of any Governmental Body or arbitrator having jurisdiction over Participant or its property, or (ii) result in a breach or violation of any of the terms and provisions of, or constitute a default under, any indenture, mortgage, deed of trust or other agreement in effect on the date hereof and to which Participant is a party or by which it or its property is bound.
- 2.7.5 Approvals and Consents. No approval, consent or authorization of any Governmental Body or other Person is required for the execution and delivery by Participant of this Agreement, or the performance by Participant of its obligations hereunder, except such approvals, consents or authorizations that have been given or obtained by Participant and are in full force and effect.
- 2.7.6 Binding Effect. This Agreement has been executed and delivered by Participant. Assuming that the other Participants have all the requisite power and authority, and have taken all necessary action to execute and deliver this Agreement, this Agreement is the legal, valid and binding obligation of such Participant enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditor's rights (e.g., bankruptcy, insolvency, moratorium) or by the exercise of judicial discretion in accordance with general principles of equity.

2.8 **Property Interests.**

- 2.8.1 Property Interests. All tangible, intangible and mixed property interests (which include any and all rights and licenses, express or implied) that arise as a result of the Development Work under this Agreement shall be owned by the Participants as tenants in common in undivided ownership interests; subject, however, to the limitations set forth in this Section 2.8 and as otherwise provided in this Agreement. Such ownership interests shall be in accordance with the Participant Percentages set forth in Appendix A to this Agreement, as adjusted pursuant to this Agreement. During the Term, such tangible, intangible and mixed property interests that arise as a result of the Development Work under this Agreement shall be used for the Project (and with respect to Joint Development Work, for other applicable CapX Projects) on such terms as approved and permitted by this Agreement (and to the extent empowered hereunder, by the Management Committee).
- 2.8.2 Effect of Withdrawal, Termination or Non-election on Property Interests. Any Participant that (i) withdraws from this Agreement pursuant to Section 2.5, or (ii) is terminated from this Agreement pursuant to Section 2.4, or (iii) does not elect into the Project pursuant to Section 6.3 shall irrevocably forfeit and release any and all rights to any tangible, intangible or mixed property interests which may have been obtained pursuant to this Agreement. The forfeiture and release of any rights of any such withdrawing, terminated or non-electing Participants in and to any such property interests that must be and are transferred or granted to the owners of the Project in the manner contemplated by this Section 2.8 shall not affect rights acquired by such withdrawing, terminated or non-

electing Participants as an electing owner in, or purchaser of an interest in, any CapX Project(s) pursuant to the provisions of other transactions and/or agreements.

- 2.8.3 Property Interests with Respect to Projects. It is understood and agreed that the work of the Participants (including the Development Manager) which gives rise to the creation of such property interests is undertaken and funded with the specific intent of the Participants that such interests will be (i) used for the Project and for no other purpose, other than as expressly authorized herein, and (ii) deemed created and owned by the Project, in the name of the owners of such Project, by right and/or license (perpetual, royalty-free, transferable (limited) and non-exclusive) for use in and by the owners of such Project, free and clear of any and all liens, encumbrances and interests (other than such liens, encumbrances and interests of the other Participants therein).
- 2.8.4 Estoppel with Respect to Property Interests. Based upon, and in furtherance of the foregoing Sections 2.8.1 through 2.8.3, each Participant acknowledges and agrees that it does not have and shall not claim, except as expressly provided herein, either through itself or any other Person, any right, title or other interest in or to any of the tangible, intangible or mixed property interests that may arise as a result of this Agreement except insofar as such interests are conclusively established in this Agreement. Each Participant further acknowledges and agrees that any assertion by any Participant, or any Person claiming interests through a Participant, of any right, title or other interest in such property interests inconsistent with the foregoing shall be null and void. Any such claim made by a Participant in all or any part of the property interests created hereunder, shall be estopped by the provisions of this Section 2.8, and any costs and expenses incurred by the non-claiming Participants in defense of such claim shall be chargeable to the Participant making the claim (and the Person claiming interests through such Participant). The foregoing is intended to eliminate assertion of any claim of right or other interest inconsistent with the rights and interests established in this Agreement by any Person against the tangible, intangible or mixed property interests that may arise as a result of this Agreement, including without limitation the security interests of lenders of any Participant and/or the interests of any trustee of the bankruptcy estate of any Participant, such that the property interests created hereunder are transferred to and utilized by the Project, in the name of the owners of such Project, free and clear of any and all liens, encumbrances and interests.
- 2.8.5 Further Assurances of Participants. Each Participant agrees that at any time and from time-to-time it will do or cause to be done all reasonable further acts and things, and execute, acknowledge and deliver, any and all papers, documents, instruments, agreements, assignments, transfers, assurances and conveyances that may be necessary or desirable to carry out and give effect to the provisions and intent of this Agreement with respect to the property interests described herein.
- 2.8.6 Effect of Agreement Termination on Property Interests. If this Agreement is terminated, the property interests hereunder shall be governed by Section 10.2.2 of this Agreement.

2.9 **Assignment and Transfer of Participant Interest.** The following shall govern the sale or transfer (collectively, "**Transfer**") or assignment of this Agreement and/or the rights, interests and obligations under and pursuant to this Agreement:

2.9.1 **Assignment by Participants.** Except as set forth in Sections 2.9.1.1 (collateral assignment and assignment to an Affiliate) and 2.9.2.1 (Transfer of a Participant interest) of this Agreement, a Participant may not assign this Agreement, or its rights or interests under this Agreement, including its Participant Percentage and its property interests herein and hereunder, without the prior written consent of all other Participants. Any such purported assignment by a Participant without such consent shall be null, void and of no legal effect whatsoever. By way of clarification, not less than all of the rights and interests under this Agreement shall be assigned with respect to any permitted assignment; no partial assignments of any rights or interests under this Agreement shall be permitted.

Any Subcontract entered into by the Development Manager in connection with the Development Work shall not be deemed to be an assignment for purposes of this Agreement.

2.9.1.1 **Permitted Assignment.** A Participant may without the prior written consent of any other Participants (i) grant a collateral assignment of this Agreement, and the rights and interests hereunder, to one or more of its lenders as security for such Participant's performance under one or more lending instruments pursuant to which Participant is the borrower, and (ii) assign this Agreement (together with all the rights, interests and obligations hereunder) to any Person that is an Affiliate of the Participant. Any such assignment under any such lending instrument(s) to which it applies shall not be deemed to (A) convey or perfect to such lender or Affiliate any right, interest or obligation greater than that held by the Participant, and/or (B) abrogate or otherwise depreciate any right, interest or obligation held by the assigning Participant.

2.9.1.2 **Notice of Assignment/Transfer.** After the date hereof, any Participant desiring to assign or Transfer its rights, interests, and obligations as a Participant under and pursuant to Section 2.9 of this Agreement shall provide prior written notice of any proposed assignment or Transfer (excluding collateral assignment) to each other Participant and to the Management Committee. Such notice shall include (i) the name of the assigning/transferring Participant, (ii) the name, address, description and qualifications, and contact representative(s) of the assignee/transferee of the Participant's interest, (iii) the terms of the assignment or Transfer and whether the consent of the Participants is required, (iv) a copy of the proposed assignment or Transfer instrument, and (v) the form of consent desired by the Participant and/or its assignee/transferee, if required hereunder.

2.9.1.3 **No Relief from Liability.** No assignment of this Agreement, or any duties and obligations hereunder, shall relieve the assigning Person from such duties and obligations unless pursuant to a novation of such duties and obligations that is executed and delivered by the assignor, the assignee and the parties to this Agreement.

2.9.1.4 No Application to Transfer. This Section 2.9.1 does not address the Transfer or other alienation of (i) a Participant's rights, interests and obligations as a Participant to a third party (other than an Affiliate) for the purpose of such third party becoming a Participant in and to this Agreement, which is governed by Section 2.9.2.2, and (ii) the Development Manager's rights, interests and obligations as the Development Manager to a third party for the purpose of such third party assuming the position of Development Manager hereunder, which is governed by Section 4.11 hereof.

2.9.2 Transfer of Agreement. Except as set forth in Section 2.9.2.1 of this Agreement, a Participant may not Transfer this Agreement, or its rights, interests and obligations under this Agreement, including its Participant Percentage and its property interests herein and hereunder, without the prior written consent of all other Participants. Any such purported Transfer by a Participant without such consent shall be null, void and of no legal effect whatsoever.

2.9.2.1 Participant Transferee. Subject to Section 2.9.2.2, Participant may Transfer its interest in this Agreement (the "**Transferring Participant**") to one or more other Participants (the "**Participant Transferee**"). Any such Transfer shall be deemed a novation to the extent of its interest transferred and shall transfer all rights, interests, duties and obligations arising from such Transferring Participant's interests transferred.

2.9.2.2 Right of First Refusal. If a Transferring Participant desires to Transfer all or part of its interest (the "**Offered Interest**") in this Agreement to Participant Transferees as permitted in Section 2.9.2.1 the Transferring Participant shall give the other Participants (including the Participant Transferee(s)) written notice of the proposed Transfer (the "**Transfer Notice**"). The Transfer Notice shall be in the form required by Section 2.9.1.2 of this Agreement. Upon receipt of the Transfer Notice, the other Participants shall have the following rights of first refusal with regard to the Offered Interest:

- (i) Participants' Option. For a period of thirty (30) days beginning with the other Participants' receipt of the Transfer Notice (the "**Option Period**"), the other Participants shall have the right to purchase all or any portion of the Offered Interests at the Purchase Price and in accordance with the terms of this Section. Each of the other Participants shall be entitled to elect to purchase that portion of the Offered Interests that bears the same ratio to the Offered Interests as such other Participant's Participant Percentage bears to the Participant Percentages of all other Participants, not including the Participant Percentage of the Transferring Participant. If any of the other Participants do not elect to purchase their pro-rata portion of the Offered Interests, the other Participants who have elected to purchase their pro-rata portion may elect to purchase such non-electing Participants' pro-rata portions in the same ratio as their Participant Percentages bear to the total number of Participant Percentages of all

Participants electing to so purchase. Each of the other Participants shall exercise their right to purchase the Offered Interests by delivering to the Transferring Participant and all other Participants within the Option Period, written notice specifying the Offered Interests to be purchased.

- (ii) Purchase Price. The aggregate purchase price to be paid for the entire amount of Offered Interests to be purchased shall be equal to the price set forth in the Transfer Notice, and the purchase price paid by each purchasing Participant shall equal such purchasing Participant's pro rata share (based on the portion of the Offered Interests purchased by such Participant versus the entirety of the Offered Interest) of the aggregate purchase price (such pro rata share of the aggregate purchase price being the "**Purchase Price**"). Unless otherwise agreed to by the Transferring Participant and the Participant purchaser(s), the Purchase Price shall, at the option of the Participant purchaser(s), be payable either (i) as specified in the Transfer Notice, or (ii) in cash at closing.
- (iii) Closing. The closing for the sale of the Offered Interests shall occur within forty-five (45) days after the end of the Option Period. The closing may occur earlier, and shall be held at a location mutually agreed upon by the Transferring Participant and the Participant purchasers. The Transferring Participant shall deliver documentation representing the Offered Interests to be purchased, duly endorsed for transfer, shall represent and warrant that it has good and marketable title and interest to such Offered Interests and that such Offered Interests are free and clear from all liens, encumbrances and interests of third parties at the time of the closing and shall take all other actions necessary to Transfer the Offered Interests as the Participant purchaser(s) may reasonably request.
- (iv) Failure to Purchase Offered Interests. If the other Participants do not elect to purchase all of the Offered Interests pursuant to the terms of Section 2.9.2.2(i) above, the Transferring Participant shall be free to Transfer all of the Offered Interests to the Participant Transferee set forth in the Transfer Notice within forty-five (45) days after the end of the Option Period. If the Transferring Participant does not sell the Offered Interests to either the Participant Transferee or the other Participants in accordance with the terms set forth in the Transfer Notice within such forty-five (45) day period, any subsequent offer of the Offered Interests shall again be subject to this Section.

2.9.2.3 Conditions to Transfer. Notwithstanding any other provisions of this Agreement, no Participant may Transfer any portion of the Participant interests associated with this Agreement unless items (i) and (ii) below are satisfied:

- (i) Accepts Agreement. The transferee accepts and agrees to be bound by the terms and provisions of this Agreement, and executes such documents and instruments as the Management Committee may require as evidence of such acceptance and agreement; and
- (ii) Authority. The transferee provides the Management Committee with evidence satisfactory to the Management Committee of the authority of such transferee to become a Participant under the terms and provisions of this Agreement.

2.9.2.4 Adjustment of Participant Percentages. If Participant Percentages are transferred pursuant to the provisions of this Section 2.9.2, the Participant Percentages set forth on Appendix A to this Agreement shall be amended and restated to reflect such Transfers.

2.10 **Reimbursement of MOU Participants.** Section 6 of the Project MOU provides that any participant of the MOU ("MOU Participant") may withdraw from the Project MOU at any time, subject to certain provisions set forth in the Project MOU. Section 9 of the Project MOU also provides that no MOU Participant is required to execute this Agreement. If at least two MOU Participants, whose percentages set forth in Appendix A of the Project MOU aggregate fifty percent (50%) or more, execute this Agreement, then the following provisions shall apply:

2.10.1 Reimbursement; No Continuing Rights. An MOU Participant failing to execute this Agreement (i) shall have no further rights or obligations in or with respect to the Project and shall be reimbursed its Development Costs paid under the MOU, within ninety (90) days of the execution of this Agreement, and (ii) shall not be allowed to participate in the Project in the future except upon the unanimous agreement (which agreement may be withheld for any reason) of all parties executing this Agreement.

2.10.2 Reimbursements Are Development Costs. Reimbursements paid to MOU Participants pursuant to Section 2.10.1 shall be deemed to be Development Costs pursuant to Section 5.1.2.1(x) of this Agreement.

2.11 **Payment of Development Costs.**

2.11.1 Participant Reimbursement and Disputed Invoices. After the Development Manager's payment of Development Costs under Section 4.4.4, and subject to Section 5.4.4(iii) (costs allocable after a Cost Offering), within ten (10) days from the date a Participant receives an invoice for Monthly Development Costs, a Participant shall pay by wire transfer of immediately available funds or shall authorize remittance and payment through automated clearing house (ACH) procedures reasonably acceptable to the Development Manager, the Participant's Participant Percentage (or such other amount as is determined in accordance with Section 5.4.4(iii) of this Agreement) of Monthly Development Costs as set forth in the invoice. If the tenth (10th) day following receipt of a given invoice falls on a weekend day or holiday, payment is instead due the business day preceding such weekend day or holiday. The Development Manager shall calculate carrying costs for the Monthly Development Costs by applying the Interest Rate to the average monthly balance of such

Monthly Development Costs (which is based on the monthly beginning and ending balances for such Monthly Development Costs). The component of the Interest Rate that is an adder to LIBOR may be increased upon the recommendation of the Development Manager and the approval of the Management Committee at a Level B Vote. If a Participant disputes its Monthly Development Costs invoice, a Participant shall nevertheless pay the disputed amount of such invoice, under protest, and may seek resolution of the dispute, after making such payment, by submitting to the Development Manager a written request for an adjustment of its invoice and the basis therefor. The Development Manager shall provide a written response to the Participant within sixty (60) days of the date of such written request. If requested, the Development Manager shall meet with the Participant within thirty (30) days of a written request from the Participant. If the matter is not resolved, the Participant may request the Management Committee to resolve the matter. At the next scheduled Management Committee meeting, the Management Committee shall consider and act upon the disputed invoice issue at a Level B Vote. The Management Committee's action shall be final and binding upon all parties involved.

2.11.2 Failure to Reimburse. Invoices for Monthly Development Costs not paid by a Participant in full by the due date shall thereafter bear, in addition to the ongoing Interest Rate payments required, a monthly charge as a late payment fee on the unpaid portion at two percent (2%) per month or the maximum interest rate allowable by law, if it is less, and shall be computed based upon the actual number of days elapsed from the due date to the date payment is received (the "**Late Payment Fee**"). Non-payment or late payment of invoices shall be deemed a default under this Agreement as provided in Section 2.4 hereof. Any monies received by the Development Manager with respect to Late Payment Fees shall be credited, on a pro rata basis, on the next Monthly Development Cost invoice for all Participants other than the Participant paying such Late Payment Fees.

2.11.2.1 Participant Costs for Defaulted Amounts. For up to three (3) months (or such longer period of time as determined by a Level B Vote of the Management Committee), the Development Manager may increase the Monthly Development Costs invoices to non-defaulting Participants, on a pro rata basis, in an amount equal to the amount the defaulting Participant failed to pay ("**Defaulted Amount**"); provided, however, that any Defaulted Amount related to additional payment obligations incurred by a Participant as a result of a Cost Offering shall be assessed solely to the non-defaulting Participants that elected to incur such additional Development Costs pursuant to such applicable Cost Offering.

2.11.2.2 Reduction of Participant Costs for Defaulted Amount Repayment. If the Development Manager receives payments from a defaulting Participant for Defaulted Amounts that actually were added to non-defaulting Participants' Monthly Development Cost invoices, as provided in Section 2.11.2.1 hereof, such non-defaulting Participants' subsequent Monthly Development Cost invoices shall be reduced, on a pro rata basis, to the extent of the Development Manager's subsequent receipt of payments with respect to such Defaulted

Amounts, up to the additional payments made by such non-defaulting Participants under Section 2.11.2.1.

3. MANAGEMENT COMMITTEE. Oversight and management of matters arising under this Agreement shall be governed by a management committee (the "**Management Committee**"), whose duties, responsibilities, composition and powers are set forth herein.

3.1 Duties and Responsibilities. The Management Committee shall, among others things:

- (i) Provide liaison among the Participants at the management level and between them and the Development Manager with respect to policy matters relating to Development Work;
- (ii) Exercise general supervision over, and review, discuss and attempt to resolve any disputes within, any committees established pursuant to Section 3.4 hereof;
- (iii) Review and act upon budgets for Development Work submitted pursuant to Section 4.4.1, subject to the provisions in Section 5.3.1 regarding Development Costs;
- (iv) Oversee the development of Project Agreements in accordance with Section 3.6 hereof;
- (v) Review and act upon (A) the proposed initial forms of Project Agreements developed in accordance with Section 3.6.1 hereof, and (B) the proposed final forms of Project Agreements developed in accordance with Section 3.6.5 hereof;
- (vi) Review and take action regarding periodic agreed-upon procedures (the scope of which shall be determined by the Management Committee), as described in Section 5.6.3, of the books and cost records regarding Development Costs of the Development Manager, any Participant carrying out Development Work and any cost reimbursable to a Subcontractor, including all Development Costs incurred by the Development Manager or any Participant before the effective date of this Agreement;
- (vii) Conduct or cause to be conducted final agreed-upon procedures described in Section 5.6.3 relating to all Development Costs upon determination of the Management Committee that the Development Work is complete and shall, within thirty (30) days following completion of the final agreed-upon procedures, furnish a report of such audited costs to the Participants;
- (viii) Monitor the continuation and completion of Development Work;
- (ix) Make recommendations to the Development Manager with respect to Development Work;
- (x) Provide such other assistance to the Development Manager in carrying out the Development Work as the Management Committee shall deem reasonable and proper and as the Development Manager shall request;
- (xi) Review and act upon any Major Contract presented to the Management Committee in accordance with Section 4.2.1 and designate contracts or matters from time to time as being Major Contracts;

- (xii) Review and act upon the conceptual design of the Project formulated by the Development Manager in accordance with Section 4.3.2 hereof;
- (xiii) Review and act upon matters related to any Critical Permits as presented or recommended by the Development Manager for construction of the Project in accordance with Section 4.3.3 hereof;
- (xiv) Review and act upon the bidders' lists submitted by the Development Manager with respect to Major Contracts in accordance with Section 4.2.4.1 hereof;
- (xv) Consider and act upon any matter relating to the general supervision of the Development Work proposed by the Development Manager or any representative on the Management Committee;
- (xvi) Supervise and review the Development Manager in the performance of its duties and obligations under this Agreement, including without limitation those arising in connection with Major Contracts, uninsured claims and Development Manager default;
- (xvii) Address issues arising from a prudency review by a Governmental Body as described in Section 5.3.1.2; and
- (xviii) Review and, in its discretion, act upon, reports provided by the Development Manager pursuant to Section 4.5.

3.2 **Members of the Management Committee.** The Management Committee shall consist of the representatives appointed by the Participants in accordance with and as specified in Section 2.3.

3.3 **Governance.**

3.3.1 Meetings and Notice of Meetings.

3.3.1.1 Regular Meetings. The Management Committee shall meet on a regular basis, at least monthly. The Management Committee shall endeavor to provide agendas at least two (2) business days in advance of each regular meeting, but notwithstanding the foregoing and subject to this Section 3.3.1.1, any failure to provide an agenda or notice of a particular matter shall not prevent review and action on such items, and regularly scheduled meetings of the Management Committee may consider any business that may come before the Management Committee. With respect to matters that are raised at a regular meeting which were not identified on an agenda that was provided at least two (2) business days before such meeting, any Management Committee representative may require that the Management Committee suspend voting on such item for a period not to exceed two (2) business days following adjournment of the Management Committee meeting at which it was raised. Such delay shall constitute an adjournment of the meeting, and no new notice or other act shall be required to continue such meeting (or vote on such matter).

- 3.3.1.2 Special Meetings. Special meetings of the Management Committee shall be called by the Chairperson of the Management Committee upon the written request of any Participant.
- 3.3.1.3 Notices of Meetings. Unless there is a change in the date, time or location of a regularly scheduled meeting of the Management Committee, no further notice of the regular meeting will be required. If there is a change in the date, time or location of a regularly scheduled meeting, then not less than ten (10) business days' prior notice to each member of the Management Committee shall be required.
- Except as may be provided in Section 4.11, special meetings of the Management Committee shall be called not later than ten (10) business days after the date such request is given by a Participant and not less than five (5) business days before the date of the meeting. The notice of such special meeting shall (i) be in writing, (ii) state the date, time and place of the meeting, (iii) state the specific purpose(s) of the special meeting in the notice, and (iv) state that the actions that may be taken at the special meeting shall be confined to the specific purpose(s) stated in the notice.
- 3.3.1.4 Method of Meeting; Minutes. Any meeting of the Management Committee may be held by an assembled meeting or by telephone or other electronic means by which all Management Committee members participating in the meeting can hear each other. Voting matters delayed by an adjournment as described in Section 3.3.1.1 may be voted on by electronic transmission by the number of representatives that would ordinarily be required to approve such matter. Minutes shall be taken by the Secretary for each meeting of the Management Committee. All actions taken at meetings of the Management Committee shall be stated in the minutes. The Secretary shall promptly prepare and distribute such minutes to the Management Committee representatives.
- 3.3.2 Quorum. The quorum for a Management Committee meeting shall be a minimum of two representatives on the Management Committee, or their designated alternates, that represent Participants having Participant Percentages totaling greater than fifty percent (50%).
- 3.3.3 Voting Rights of Representatives. Each representative on the Management Committee shall be entitled to a vote equal to the Participant Percentage of the Participant it represents.
- 3.3.4 Acts of Management Committee. When determining matters with respect to this Agreement, the Management Committee shall have three different voting levels.
- 3.3.4.1 Routine Vote. Except as otherwise provided in this Agreement, an action by the Management Committee shall mean an affirmative vote of (i) greater than fifty percent (50%) of total Participant Percentages entitled to vote, and (ii) not

less than two (2) Management Committee representatives affirmatively voting (subject to Section 3.3.4.4, a "**Level A Vote**").

3.3.4.2 Supermajority Vote. Certain actions of the Management Committee with respect to those matters specifically identified in this Agreement shall require an affirmative vote of (i) greater than fifty percent (50%) of total Participant Percentages entitled to vote, and (ii) not less than three (3) Management Committee representatives affirmatively voting (subject to Section 3.3.4.4, a "**Level B Vote**").

3.3.4.3 Unanimous Vote. Certain actions of the Management Committee with respect to those matters specifically identified in this Agreement shall require the unanimous affirmative vote of all representatives of the Management Committee entitled to vote (a "**Level C Vote**").

3.3.4.4 Less than Four Participants. The foregoing Sections 3.3.4.1 through 3.3.4.3 shall remain in effect if there are at least four (4) Participants. If there are three (3) Participants, "**Level A Vote**" and "**Level B Vote**" shall mean an affirmative vote of (i) greater than fifty percent (50%) of total Participant Percentages entitled to vote, and (ii) not less than two (2) Management Committee representatives affirmatively voting. If there are two (2) Participants, "Level A Vote" and "Level B Vote" shall mean greater than fifty percent (50%) of total Participant Percentages entitled to vote.

3.3.5 Terms and Phrases Regarding Management Committee Actions. When the phrases "review and take action," "review and act upon," "review and action" or language of similar import are used in this Agreement with respect to the Management Committee, such action shall include, but not be limited to, rejection of a matter, modification and approval of a matter or approval of a matter.

3.4 **Committees.**

3.4.1 Establishment of Committee. The Management Committee may establish committees reporting to the Management Committee that relate to matters arising under this Agreement, including, but not limited to, committees for Critical Permits, engineering, environmental, insurance, auditing, and legal matters.

3.4.2 Appointment of Representatives. Each Participant may appoint a duly authorized representative to serve on each committee so established. Each Participant may, by giving notice to all other Participants, designate an alternate to act as its representative on each committee so established in the absence of the regular representative or to act on specified occasions with respect to specified matters. Any such notice shall be effective if given at or before the first meeting at which such alternate will act as a representative.

3.4.3 Authority and Duties. The authority and duties of any committee shall be established by the Management Committee, and such committee shall be subject to the provisions of this Agreement. Each such committee may establish its own rules, regulations, standards and procedures for carrying out the authorities and duties so established for it. Each such

committee shall be responsible to and subject to the supervision and directives of the Management Committee.

3.5 **Officers of the Management Committee.** The Management Committee shall elect a Chairperson of the Management Committee from among the representatives of the Participants (who shall not be the Management Committee representative of the Development Manager) (the "**Chairperson**") who shall act in a general executive capacity of the Management Committee, subject to the direction of the Management Committee, and shall be responsible for calling and presiding over all meetings of the Management Committee at which he or she is present. The Management Committee shall elect a Vice Chairperson of the Management Committee ("**Vice Chairperson**") who shall perform the duties of the Chairperson in his or her absence. The Management Committee shall elect a Secretary of the Management Committee ("**Secretary**") who shall keep the minutes of the meetings of the Management Committee (or cause such minutes to be kept), endeavor to prepare and send agendas, send all required notices of Management Committee meetings and exercise such other powers as usually incident to such office. The Chairperson or Vice Chairperson may also serve in the capacity as Secretary. The Chairperson, Vice Chairperson and Secretary (collectively, the "**Officers**") shall perform such further duties as are assigned to them by the Management Committee and may be removed at any time with or without cause by the Management Committee pursuant to the affirmative vote of the Management Committee. The Management Committee shall appoint the Officers on an annual basis to terms of one (1) year, and the Officers shall serve until their successors are elected, subject to resignation, death, disability, removal as a representative by the Participant, appointing such Officer, or the removal of an Officer as an Officer by the Management Committee. Each of the Officers shall be selected from members of the Management Committee and approved by a Level B Vote.

3.6 **Development of Project Agreements.** The Management Committee shall oversee the development, and review and act upon proposed initial and final forms, of Project Agreements as provided in this Section 3.6. The Management Committee may from time to time designate an agreement as a Project Agreement. Except as otherwise determined by the Management Committee, the Project Agreements shall be drafted by counsel appointed by the Management Committee in consultation with the Participants and their respective counsel.

3.6.1 Participant Project Agreement Covenants and Acknowledgements Related to Initial Forms. Each Participant shall attempt in good faith to facilitate development of proposed initial forms of Project Agreements that contain substantially complete and final provisions concerning those matters that can be addressed before the date established by the Management Committee under Section 3.6.2 hereof to vote on proposed initial forms of Project Agreements. Each Participant acknowledges that not all material terms and information necessary to complete final forms of Project Agreements will be known at the time the proposed initial forms of Project Agreements are prepared. By way of illustration and not limitation, each Participant acknowledges that to the extent Critical Permits are pending, the Participants will not know final project routing, approval conditions, etc.

3.6.1.1 Other Understandings – Seams Issues. The Participants acknowledge and agree that certain Participants are members of Midwest ISO and other Participants are not. As a consequence, the ownership structure of the Project transmission facilities which are planned and constructed pursuant to the

Project Agreements could create seams issues and regulatory concerns (collectively, "**Seams Issues**"). Seams Issues might include, for example, rate pancakes, operational conflicts for determining capacity availability and curtailment obligations, and the conditions (including tariffs) under which Midwest ISO would agree to assume functional control of the Project transmission facilities constructed under any Project Agreement.

In order to facilitate resolution of Seams Issues that may affect (i) the determination of Project ownership structure among the Participants, (ii) the timely execution and delivery of Project Agreements, and/or (iii) the recovery by any Participant of its development and construction costs, commencing in the first (1st) year under this Agreement, the Participants shall diligently and in good faith attempt to address Seams Issues and Project transmission facility ownership structures. During the first three (3) years of this Agreement, any Participant may, at its own expense, analyze Seams Issues and present Seams Issues to the other Participants, together with any proposed actions for resolution, and/or participate in Midwest ISO, MAPP and/or other working groups reviewing Seams Issues on a regional scale. If the effort to resolve Seams Issues involves presentations to or inquiries of Midwest ISO, MAPP or FERC, each of the Participants shall have the opportunity to participate in any such presentations (to the extent permitted under FERC regulations and Midwest ISO and MAPP procedures, as applicable) and, subject to compliance with the provisions of Section 9 of this Agreement, present their views for discussion and consideration. If any specific Seams Issue appears likely to increase the costs of transmission service to a Participant or become an impediment to (A) any required regulatory approval of the Project for any Participant, (B) assumption by Midwest ISO of functional control of Project transmission facilities by members of Midwest ISO, (C) cost recovery, or (D) optimal reliability of the Project transmission system, and such Seams Issue could possibly be resolved by, among other things, ownership of the Project transmission facilities under a tenancy in common structure, the Participants will cooperate and negotiate among themselves in good faith concerning potential means of resolution of any Seams Issue (including such an ownership structure for Project transmission facilities).

- 3.6.2 Commencement of Project Agreements; Vote Date for Initial Forms of Project Agreements. The Management Committee shall, at such time as it deems appropriate, provide notice to the Participants of its request that they begin work to develop proposed initial forms of Project Agreements and shall establish the date on which the Management Committee shall review and act on proposed initial forms of Project Agreements, such date to be set to provide an amount of time the Management Committee deems adequate to allow for the drafting and negotiation of such initial forms of Project Agreements. Notice of the date established under this Section 3.6.2, together with the Management Committee's request that the Participants begin work to develop proposed initial forms of Project Agreements, shall be delivered promptly thereafter to each Participant in accordance with Section 11 (Notices).

- 3.6.3 Vote on Project Agreement Initial Forms. On the date established by the Management Committee under Section 3.6.2 hereof (or such later date as the Management Committee may subsequently set by a Level B Vote), the Management Committee shall review and act on the proposed initial forms of Project Agreements. If the Management Committee does not approve, at a Level B Vote, proposed initial forms of Project Agreement, such lack of approval shall have no effect on the obligations of any Participant, including, without limitation, obligations to comply with Sections 3.6.5 hereof.
- 3.6.4 Vote Date for Final Forms of Project Agreements. Following the Management Committee's vote on initial forms of Project Agreements, the Management Committee shall monitor the progress of Development Work and in particular resolution of matters necessary for the completion of final forms of Project Agreements. At such time as the Management Committee deems appropriate, the Management Committee shall establish the date on which the Management Committee shall review and act on proposed final forms of Project Agreements, such date to (i) occur at least three (3) months after the Management Committee's action to establish the date, and not less than six (6) months before the date on which the Management Committee anticipates that the Project Agreements will be executed (assuming successful completion of the Project election process under Section 6 hereof), (ii) provide an amount of time the Management Committee deems adequate to allow for the drafting and negotiation of such final forms of Project Agreement, and (iii) occur after the date on which the Management Committee anticipates that all Critical Permits necessary to determine the final routing for the Project shall have been granted or issued. Within three (3) business days following the Management Committee's action under this Section 3.6.4 to establish the date on which the Management Committee shall review and act on proposed final forms of Project Agreements, the Management Committee shall deliver, or cause to be delivered, to each Participant in accordance with Section 11: (A) notice of such date, and (B) complete drafts of the proposed final forms of Project Agreements the Management Committee intends to review and act upon on such date (subject to further any revisions and additions negotiated by the Participants after such notice).
- 3.6.5 Participant Obligations Related to Final Forms. Each Participant shall, during the course of work to develop the final forms of Project Agreements before the date established by the Management Committee under Section 3.6.4, comply with the obligations and follow the procedures set forth below.
- 3.6.5.1 Covenant Regarding Proposed Revisions. If, pursuant to vote required under Section 3.6.3 hereof, the Management Committee approves proposed initial forms of Project Agreements, each Participant shall make good faith efforts to limit areas in which it requests revisions or additional provisions to the initial forms of Project Agreements approved by the Management Committee to such revisions or additional provisions as are required to address matters for which (i) necessary information was not available at the time of the Management Committee's approval of the initial forms of Project Agreements under Section 3.6.3 hereof, (ii) changes in relevant facts or circumstances occurred after the date of the Management Committee's approval under Section 3.6.3 hereof, or (iii) the Participant considers adequate resolution to be essential to

its willingness or ability to execute the Project Agreements. Notwithstanding the foregoing, each Participant shall review and consider in good faith all revisions and additions to the proposed initial forms of Project Agreements proposed by any other Participant.

- 3.6.6 Management Committee Vote on Proposed Final Forms of Project Agreements. On the date established by the Management Committee under Section 3.6.4 hereof (or such later date as the Management Committee may subsequently set by a Level B Vote), the Management Committee shall review and act on, at a Level B Vote, proposed final forms of Project Agreements.

4. DEVELOPMENT MANAGER.

4.1 Appointment and General Duties.

- 4.1.1 Appointment. The Participants have hereby appointed and designated a Development Manager, as named in the preamble to this Agreement. The Participants authorize and direct the Development Manager to carry out, as agent for and on behalf of the Participants, Development Work in accordance with the terms of this Agreement. This agency relationship is expressly limited to this Agreement and the terms hereof, and no agency relationship is hereby created for any purpose other than carrying out Development Work pursuant to this Agreement. The fact that a Participant is serving in the capacity of the Development Manager, as well as a Participant, does not in any way change, modify or release the Development Manager from its rights, interests and obligations in its capacity as a Participant under this Agreement.

- 4.1.2 General Duties. The Development Manager shall competently and diligently, and in compliance with all Applicable Laws, directives and policies of the Management Committee, and in accordance with Good Utility Practice, (i) carry out the duties and obligations of the Development Manager specified in this Agreement, (ii) conduct all other activities deemed necessary and proper to complete the Development Work pursuant to and consistent with the requirements of this Agreement, and (iii) perform such other functions and duties as may be assigned to it and appropriately budgeted by the Management Committee pursuant to a Level B Vote.

- 4.1.3 Not Permit Liens. The Development Manager shall not permit any unsatisfied liens incurred in connection with Development Work to remain in effect other than (i) liens for taxes or assessments not yet delinquent, (ii) liens for workers' compensation awards, and (iii) liens for labor and material not yet perfected; provided, however, that the Development Manager shall not be required to arrange payment or discharge of any such lien as long as the Development Manager is timely contesting such lien in accordance with Applicable Law.

4.2 Contracting Responsibilities.

- 4.2.1 Development Work Contracts. Subject to Sections 4.2.2 and 4.2.3 below, the Development Manager shall, on behalf of and as agent for each of the Participants, bid, negotiate, enter into contracts for, and otherwise arrange from any source (including the

Development Manager's employees, Participants or third parties) the resources necessary to perform and complete the Development Work, including engineering, labor, legal counsel, consultants studies, equipment, apparatus, machinery, materials, tools, water, power and supplies necessary for the performance and completion of Development Work including materials and supplies inventory. All contracts for Development Work, as well as all amendments thereto, shall be approved solely by the Development Manager (pursuant to procedures developed by the Development Manager and submitted to the Management Committee for its information), except for Major Contracts that are subject to prior Management Committee approval pursuant to Section 4.2.5.1 of this Agreement. In performing Development Work, the Development Manager may use its own or another Participant's employees, equipment, facilities and similar resources without the approval of the Management Committee.

4.2.2 Administration and Reporting of Contracts.

4.2.2.1 Contract Administration. The Development Manager shall (i) perform, administer and enforce all contracts for Development Work, and (ii) furnish one (1) conformed copy of all such contracts to the Management Committee, and any Participant upon the written request by a Participant.

4.2.2.2 Reporting. The Development Manager shall provide a listing of each of the contracts it has entered into under and pursuant to this Agreement since the preceding regular Management Committee meeting. Such listing shall include the date of the contract, the contracting parties, a summary of the work to be performed and the contract price and payment terms.

4.2.3 Development Manager Work and Contracting with Participants Without Bid Process. Nothing in this Agreement shall require the Development Manager to engage in a bid process before (i) performing Development Work, or (ii) entering into a contract with a Participant as a Subcontractor to perform Development Work, so long as the contract is consistent with the Development Manager's contracting procedures as submitted to the Management Committee under Section 4.2.1.

4.2.4 Approved Bidders.

4.2.4.1 Preparation of Bid List. The Development Manager shall prepare and submit to the Management Committee for its approval a list of approved bidders with respect to each Major Contract before offering such contract for bid.

4.2.4.2 Notice to Participants. Before engaging in the contract bid process for third party vendors that is anticipated by the procedures to be developed by the Development Manager as described in Section 4.2.1, the Development Manager shall provide prior written notice to each of the Participants that it has determined to utilize a third party vendor for certain Development Work. Such notice shall include (i) the scope and specifications of the Development Work to be performed, (ii) the qualifications required of the third party vendor, (iii) the time schedule in which such Development Work is to be performed,

(iv) the budget range for such Development Work, and (v) the bid procedures to be followed, including the documents and instruments to be submitted in the bid package.

4.2.4.3 Participant Bid Response.

- (i) The Participant(s) shall have ten (10) business days from the date of the Development Manager's notice to provide a written response to the Development Manager. The Participant's response with respect to such Development Work shall include (i) the Participant's offer to perform and its professional qualifications, (ii) the Participant's workplan for the scope and specifications of such Development Work, (iii) the contract amount to be paid to the Participant, (iv) the contract that Participant is willing to enter into, and (v) any other information and/or documentation reasonably requested by the Development Manager, including whether the Participant will utilize Subcontractors, and to what extent such Development Work will be completed by Subcontractors. The information and documentation requested by the Development Manager shall not exceed that required of any third party vendor.
- (ii) After compliance with subsections (i) above, to the extent reasonably practicable, with due consideration to economic considerations, including requirements under Applicable Law (such as open bidding and prudence requirements) and/or cost and rate base recovery concerns of the Participants, a qualified Participant shall be selected to perform Development Work that the Development Manager will not perform through its employees. If more than one (1) Participant responds to the notice of the Development Manager, and the Development Manager determines to select a Participant for such Development Work, the Development Manager shall have the right to select the Participant that will be engaged for such Development Work in its sole discretion.
- (iii) If no Participant submits a response under Section 4.2.3.2(i), or the response(s) received from one or more Participants is not deemed acceptable to the Development Manager in its reasonable determination, then the Development Manager may seek to use a third party vendor to perform such Development Work.
- (iv) If a Participant fails to provide such a written response to the Development Manager within the time period prescribed in subsection (i) above a Participant shall be deemed to have waived its opportunity to be considered for and perform such Development Work; provided, however, a Participant may participate in the bid process and submit a bid in connection with any third party request for bids thereafter initiated by the Development Manager.

4.2.5 Major Contracts – Contracting Procedures. The following shall govern the contracting procedures for Major Contracts. All Major Contracts, including all amendments thereto, shall be reviewed, approved and entered into only in accordance with the procedures set forth in this Section 4.2.5. Such procedures shall not apply to the execution of contracts executed and delivered before the effective date of this Agreement.

4.2.5.1 Major Contracts – Management Committee Approval. The Management Committee may from time to time designate a contract as a Major Contract, provided that no such designation shall be deemed to require the approval of a contract or matter executed or determined on or before the date of such designation. The Development Manager shall present all Major Contracts, including any amendments thereto, to the Management Committee for its review and action at a Level B Vote. If the Management Committee approves such Major Contract, or an amendment thereto, the Development Manager shall have the authority to execute and deliver same.

4.2.5.2 Effect of Approval. Any Major Contract executed by the Development Manager without prior approval of the Management Committee shall be at the risk of the Development Manager. In such event, the Development Manager shall advise in writing the Management Committee and indicate why the Development Manager executed a Major Contract without prior approval of the Management Committee. The issue shall be presented and acted upon, at a Level B Vote, at the next Management Committee meeting. If the Management Committee fails to ratify the action of the Development Manager, the contract executed by the Development Manager shall not constitute Development Costs and the Development Manager shall be responsible for all costs related thereto. If the Management Committee fails to so ratify, nothing herein shall prevent the Development Manager from terminating such Major Contract or otherwise withholding the benefits and interests of such Major Contract from the Participants under and pursuant to this Agreement.

4.3 **Technical Duties and Responsibilities.**

4.3.1 Development Work Schedule and Plan and Modifications.

4.3.1.1 Prepare Initial Development Work Schedule and Work Plan. The Development Manager shall promptly (within a commercially reasonable time) following the effective date of this Agreement prepare and submit to the Management Committee the initial Development Work schedule and initial work plan. Approval of such schedule and plan by the Management Committee shall require a Level B Vote. Such schedule shall depict in graphic form the overall performance plan of Development Work displayed in time-framed format, with critical milestones identified. Such work plan shall set forth, in general terms, how the Development Manager proposes to carry out Development Work. The Development Manager shall update, from time to time, the Development Work schedule and work plan on its own initiative and also at the request of the Management Committee. Any updated Development

Work schedule and work plan to be adopted by the Management Committee shall also require a Level B Vote to become effective.

- 4.3.1.2 Revise Development Work Schedule. The Development Manager shall revise the Development Work schedule quarterly to reflect changes in the progress of Development Work.
- 4.3.2 Conceptual Design. The Development Manager shall prepare the conceptual design for the Project for review and action by the Management Committee at a Level B Vote.
- 4.3.3 Critical Permit Applications. The Development Manager shall prepare and file, or cause to be prepared and filed, applications for Critical Permits. Where any Critical Permit is being sought on a joint or consolidated basis with one or more other CapX Projects, the oversight and supervision of such process shall be on a coordinated basis with the development managers of the other CapX Projects, except as otherwise determined by the Management Committee at a Level B Vote. The Development Manager also shall prepare and file, or cause to be prepared and filed, applications for other applicable Permits and approvals for the Project. Approval of Critical Permit applications shall require a Level B Vote of the Management Committee.

4.4 **Management of Development Costs.**

- 4.4.1 Initial Budget and Revision. The Development Manager shall develop the budgets for the Development Work and make forecasts and recommendations regarding revisions to such budgets in accordance with Section 5.3 hereof.
- 4.4.2 Limitation on Development Costs. The Development Manager shall not incur, or allow to be incurred, Development Costs that exceed the Maximum Development Costs as defined in Section 5.3.1.
- 4.4.3 Development Costs. The Development Manager shall incur and pay only those Development Costs that are described in Section 5.1.2.1 hereof. The Development Manager shall not incur, pay or be reimbursed for the costs set forth in Section 5.1.2.2 hereof.
- 4.4.4 Expenditure on Development Costs. Utilizing the Development Manager's own funds, the Development Manager shall pay, when due, all Development Costs and shall be reimbursed for same by the Participants in accordance with Section 2.11 of this Agreement. Each month the Development Manager shall prepare and distribute to each Participant an invoice setting forth the aggregate amount of Development Costs paid by the Development Manager but not included in a previous invoice ("**Monthly Development Costs**").
- 4.4.5 Payment and Reimbursement of Development Costs.
 - 4.4.5.1 Development Manager Payments. Before the Development Manager shall pay Development Costs, the Development Manager shall create and file for auditing purposes a payment request therefor, signed by two Development

Manager representatives, stating in respect of each such payment (i) the amount of such payment due, (ii) the name and address of the Person, corporation or firm to whom the payment is due, (iii) a brief description of the work, services or products covered by such payment, and (iv) that the amount is properly due and payable for work done or services rendered and has not been paid.

4.4.5.2 Participant Reimbursement and Disputed Invoices. Except as set forth in Section 5.4.4(iii) (costs allocable after a Cost Offering), Participants shall reimburse the Development Manager for the Participant's Participant Percentage of Monthly Development Costs and may dispute the invoices rendered by the Development Manager pursuant to the provisions of Section 2.11 hereof.

4.4.6 Records of Expenditures. The Development Manager shall keep and maintain records of monies expended, obligations incurred and credits accrued; and maintain for auditing by the Management Committee those accounting records used by the Development Manager for the purpose of accumulating financial and statistical data for Development Work. The Development Manager shall retain each such record for five (5) years or such longer period of time as determined by the Management Committee; provided, however, that the Development Manager shall have the right at the end of such five (5) year period to advise the Participants that it intends to dispose of such records within six (6) months of the date the notice is given, and shall have the right to so dispose of the records unless a Participant or Participants provide the Development Manager with written notice prior to the end of such six (6) month period that the Participant(s) shall take custody of such records no later than the end of such six (6) month period.

4.5 **Development Manager Reports.**

4.5.1 Management Committee Reports. The Development Manager shall prepare and submit to the Management Committee the following reports:

- (i) monthly reports (or such other time frame as reasonably determined by the Management Committee) regarding the progress of Development Work, contracts entered into (to comply with Section 4.2.2.1), and financial reports of Development Costs paid or incurred, including budget-to-actual comparisons (on a current period, yearly and overall budget basis);
- (ii) monthly cost reports (or such other period of time as determined by the Management Committee), which shall include the accumulated total disbursements for Development Work including a comparison to the most recently approved budget for Development Work;
- (iii) a statement of quarterly Development Cost cash flow estimates for the next quarter, including budget-to-actual comparisons (on a current period, yearly and overall budget basis). Such reports shall commence on or before the tenth (10th) business day before the first (1st) business day of the first (1st) full

calendar quarter following the effective date of this Agreement, and on or before the tenth (10th) business day before the first (1st) business day of each calendar quarter thereafter; and

- (iv) all financial reports submitted by the Development Manager shall be prepared in accordance with GAAP; provided, however, interim internal financial reports may be presented to the Management Committee subject to year-end adjustments and may lack footnotes and other required GAAP presentation items.

4.5.2 **Final Completion Report.** The Development Manager shall prepare and distribute to the Management Committee and each Participant a final completion report within a commercially reasonable period of time following termination of this Agreement, which shall include a complete cost report for Development Work.

4.6 **Development Manager Assistance and Information.** Upon request the Development Manager shall provide assistance and information that is reasonably available and arises in connection with Development Work to the Management Committee, any committee established by the Management Committee and any Participant.

4.7 **Insurance.**

4.7.1 **Insurance Coverage.** The Development Manager will maintain insurance for and with respect to the Development Work for the Term (and any applicable statute(s) of limitations thereafter). The types and amount(s) of such insurance coverage shall at a minimum include: worker's compensation (statutory limits); employer's liability (\$1 million); commercial general liability (combined single limits of not less than \$5 million, providing for bodily injury, personal injury, property Damage and cross-liability); comprehensive auto liability (combined single limits of not less than \$5 million and cross-liability); and professional liabilities/errors and omissions (\$1 million). Other insurance, as may be appropriate in the circumstances, may be obtained and/or acquired, as determined in the reasonable discretion of the Development Manager or the Management Committee. The type and amount of coverage above such minimum amounts, individually and in the aggregate, shall be determined by the Development Manager, subject to the approval of the Management Committee. All such coverage (both the base policy and any excess policies) shall be primary and non-contributory coverage in relation to the Participants' separate insurance and self-insured coverages.

4.7.2 **Required Coverage Attributes.** All insurance policy coverage maintained by the Development Manager shall (i) be from an insurance company rated at least A- VII by Best Insurance Rating Service, (ii) be endorsed to show that the insurers waive subrogation against the Participants and their respective Affiliates, directors, officers and employees, (iii) not expire, terminate or otherwise discontinue coverage except upon not less than thirty (30) days prior written notice to the Management Committee, (iv) name each Participant and its respective Affiliates, directors, officers and employees as additional insureds under each such policy (excluding the policies for worker's compensation and

automobile liability) and contain no special limitations on the scope of protection afforded to said additional insureds, and (v) carry cross-liability.

- 4.7.3 Certificates and Endorsements. Certificates of insurance and endorsement acceptable in the reasonable determination of the Management Committee shall be filed with the Management Committee by the Development Manager before the commencement of the Development Work and at least once each calendar year during the Term.
- 4.7.4 Subcontractors. The Development Manager shall require its Subcontractors (including any Participant acting as a Subcontractor) to maintain the equivalent insurance coverage and amounts required of the Development Manager in Sections 4.7.1 and 4.7.2 above, and provide proof of coverage for the Development Manager to submit to the Management Committee for approval.
- 4.7.5 Participant Insurable Interest. It is expressly understood and agreed that each Participant has an insurable interest in the property interests arising under this Agreement and may procure for its own account additional insurance with respect to its interest as it may determine. The cost of such insurance shall be paid by such Participant from its own funds and shall not constitute Development Costs. The proceeds of such insurance shall be payable to such Participant. Other Participants shall not have any rights or interest in such insurance or the proceeds thereof.

4.8 **Settlement of Third-Party Claims Against Participants.**

- 4.8.1 Insured Claims Against Participants.
 - 4.8.1.1 Development Manager Rights and Obligations. The Development Manager shall, through tender of such claims to (and cooperation with) one or more applicable insurers, investigate, adjust, defend and settle insured claims against any Participant arising out of or attributable to Development Work asserted by any Person (other than a Participant) against any one or more of the Participants, so long as such claim is within the scope of coverage and policy limits provided by any of the applicable insurance policies.
 - 4.8.1.2 Limitation on Development Manager Rights and Obligations. The foregoing right to settle insured claims is conditioned upon (i) the payment of the claim pursuant to such insurance policies; provided, however, the existence of commercially reasonable deductibles, self-insured retentions and co-insurance limits shall not affect such settlement rights, and (ii) the settlement contains the conditions set forth in clauses (i) and (iii) of Section 4.8.2.2.
 - 4.8.1.3 No Right to Settle Independently. No Participant shall have the right to independently settle any claim covered under the provisions of this Section 4.8.1.

4.8.2 Uninsured Claims Against Participants.

4.8.2.1 Development Manager Rights and Obligations. The Development Manager shall investigate and, subject to Section 4.8.2.2, adjust, defend and settle uninsured claims arising out of or attributable to Development Work by any Person (other than a Participant) against any one or more of the Participants and, consequently, for which no insurance coverage is available for payment of such claim or claims.

4.8.2.2 Limitation on Development Manager Rights and Obligations. Except with the written consent of each Participant (which consent shall not be unreasonably withheld, delayed or conditioned), the Development Manager does not have the authority pursuant to Section 4.8.2.1 to enter into any settlement or to consent to entry of any judgment (other than a judgment of dismissal on the merits without costs) unless (i) there is no finding or admission of any violation of law and no material effect on any claims that could reasonably be expected to be made against the Participants or any of them, (ii) the sole relief provided is monetary in an amount (x) not to exceed the amount set by the Management Committee pursuant to Section 4.10 hereof, or (y) such amount as is approved by the Management Committee upon request by the Development Manager for such specific matter, and (iii) the settlement shall include a comprehensive release of each Participant by the claimant or the plaintiff of all claims, liabilities or obligations in respect of such claim or Proceeding.

Any Participant may independently, on its own behalf only, and at its sole expense, settle, or consent to an entry of judgment on, such uninsured claim if and only if the terms of such settlement or judgment do not adversely affect another Participant, the Project, or the Development Manager's ability to prosecute the Development Work, and if the settling Participant gives ten (10) days' prior written notice to each other Participant of such settlement or judgment and its terms. The act of settlement or consent to entry of judgment in and of itself shall not be determined to have such an adverse affect. In such event, the settling Participant (i) shall not be included in any other settlement of such uninsured claim by the other Participants or Development Manager, and (ii) shall not be responsible for and shall not be charged for any such other settlement of such uninsured claim, notwithstanding Sections 7.2(i) and (ii) hereof.

4.8.2.3 Participant Limited Right Participation. Each Participant shall be entitled to participate in the prosecution, defense or settlement of any claim or Proceeding undertaken by the Development Manager pursuant to Sections 4.8.2.1 and 4.8.2.2, provided that (i) such participation shall be limited to observation and comment to the Development Manager, and (ii) the counsel selected by such Participant shall not appear on such Participant's behalf in any negotiation or Proceeding resulting therefrom unless any affected Participant's legal counsel shall advise the Development Manager in writing that there is a conflict of

interest that would make it inappropriate under applicable standards of professional conduct to have common counsel for some or all of the Participants, in which event each such interested Participant shall be entitled to participate in the prosecution or defense of any claim or Proceeding through its own counsel. Each Participant shall bear the fees and expenses of any additional counsel retained by it to participate in the prosecution or defense of any claim or Proceeding, unless such counsel is required due to a conflict as described in the preceding sentence of this Section 4.8.2.3.

- 4.9 **Claims Against Third Parties.** The Development Manager shall have the right, duty and obligation to investigate, present, prosecute, settle and enforce any and all claims against any Person for Damages in connection with Development Work, including contractors, Subcontractors, suppliers and other contract vendors, consultants and professionals arising out of Development Work. (The foregoing includes claims against a Participant acting as a Subcontractor pursuant to Section 4.2.3.) Notwithstanding the foregoing, the Development Manager shall not have the right to release a claim against a third party or a Participant acting as a Subcontractor hereunder that has a dollar amount in excess of the amount set by the Management Committee pursuant to Section 4.10 without the consent of the Management Committee.
- 4.10 **Maximum Claim Settlement and Release Amounts.** The maximum amount for which the Development Manager may settle or consent to the entry of judgment for any individual uninsured claim for purposes of Section 4.8.2.2. shall be initially established at \$500,000. The maximum amount for which the Development Manager may release any third party from liability or potential liability without the consent of the Management Committee for purposes of Section 4.9 shall be initially established at \$250,000. The Management Committee may, from time to time, reduce or increase either or both of such maximum amounts set forth in this Section 4.10.
- 4.11 **Removal of Development Manager.** The Development Manager may be removed only for Cause. If two or more Participants believe that the Development Manager should be removed for Cause, such Participants shall jointly provide written notice to the Development Manager and all other Participants calling for a meeting of the Management Committee to discuss and determine what action, if any, should be taken with respect to such proposed removal (the "**Removal Notice**"). The Removal Notice shall contain the asserted factual basis for such removal and reference the applicable provision(s) of this Agreement to which such factual basis may apply. Upon receipt of the Removal Notice, the Management Committee shall schedule a meeting of the Management Committee within ten (10) business days of such receipt to review and discuss the asserted factual basis set forth in the Removal Notice. The subject matter of such meeting shall be confined to the asserted factual basis for removal as described in the Removal Notice.
- 4.11.1 Definition of "Cause." Subject to an opportunity to cure (if applicable) as provided in Section 4.11.2 below, "Cause" for removal of the Development Manager shall have occurred if the Development Manager has:
- (i) committed an act of dishonesty, fraud or breach of trust involving the Development Work;

- (ii) failed to follow any material policy or directive of the Management Committee of which the Development Manager had knowledge or for which the Development Manager should have had knowledge;
- (iii) been convicted of or entered a plea of nolo contendere to any felony;
- (iv) abandoned or suspended progress of the Development Work for at least four (4) consecutive weeks for any reason other than by directive of the Management Committee, Force Majeure or as otherwise permitted by this Agreement;
- (v) assigned its rights or obligations as Development Manager under this Agreement or any part thereof to any Participant without the prior written consent of Management Committee, or the interest of Development Manager in this Agreement passes to any Person, otherwise than as herein permitted;
- (vi) failed or refused to perform any material obligation under the Agreement;
- (vii) failed or refused to comply with any Applicable Law, which failure or refusal results in a material adverse effect on the Development Work or the Project; or
- (viii) failed to remove, or post bond (within ten (10) business days after filing of the lien) with respect to, any unsatisfied liens incurred in connection with the Development Work, other than to the extent permitted pursuant to Section 4.1.3.

4.11.2 Development Manager Opportunity to Cure. Notwithstanding anything in this Agreement to the contrary, the events described in Sections 4.11.1(ii), 4.11.1(iv), and 4.11.1(vi) through (viii) above shall not constitute Cause unless and until Development Manager has failed to cure such default (with respect to Section 4.11.1(vii), the required cure of such default shall only include cure of the material adverse effect) within fifteen (15) days after delivery of notice from two or more Participants that believe one or more such events have occurred, or, in the case of a default which cannot be cured within fifteen (15) days, has failed to initiate, within fifteen (15) days, actions reasonably likely to cure such default and to diligently pursue such cure to completion within forty-five (45) days after notice to Development Manager concerning such default.

4.11.3 Process for Removal. The meeting of the Management Committee to review the Removal Notice and to determine if the conduct of the Development Manager warrants removal for Cause shall be segmented into two (2) sessions as provided below.

- (i) The first session shall be an open meeting of the Management Committee, in which the assertions (and all evidence documentary or otherwise with respect to such assertions) made against the Development Manager will be reviewed and discussed. Such meeting shall include the representative of the Development Manager and such other representatives of the Development Manager as the Development Manager deems reasonably necessary or desirable to address the asserted factual basis made in the Removal Notice and the evidence. All representatives on the Management Committee, including the Development Manager, shall have the right to have separate counsel and other advisors present in and participate in such

session. The Development Manager shall provide such evidence and defense against the assertions made for its removal and may (A) question Management Committee members to examine the factual basis asserted and the evidence presented with respect to such removal (with the Participants agreeing that such questioning shall not constitute an admission, be discoverable or produced in any appeal process described in Section 4.11.5), and (B) provide such evidence as it deems relevant to its defense.

- (ii) The second session shall be an open meeting of the Management Committee, including the representative of the Development Manager, to further review and discuss the asserted factual basis and the evidence made against the Development Manager and the action(s) (and remedies, if any) to be taken. A vote by the Management Committee to remove the Development Manager shall require a Level C Vote of all members of the Management Committee, except the representative of the Development Manager (who shall not have the right to vote on removal).

4.11.4 No Vote to Remove. If the Management Committee does not vote to remove the Development Manager under Section 4.11.3, it shall promptly (in any event, not later than five (5) days after such determination) notify the Development Manager in writing of such determination.

4.11.5 Vote to Remove and Appeal. If the Management Committee determines that the Development Manager should be removed for Cause, it shall promptly (in any event, not later than five (5) days after such determination) notify the Development Manager in writing that it has been removed by the Management Committee and the date upon which such removal shall become effective. The determination by the Management Committee to remove the Development Manager shall be appealable by the Development Manager pursuant to the dispute resolution procedures set forth in Section 8.2.2 hereof. Any such appeal (i) must be made by the Development Manager within ten (10) business days after the Development Manager receives notice of removal from the Management Committee, and (ii) shall stay the removal determination of the Management Committee.

If the Management Committee has voted to remove the Development Manager and the Development Manager has appealed the decision of the Management Committee, the Development Manager shall continue its duties hereunder with respect to contracts and commitments existing as of the date of the Management Committee's vote to remove; provided, however, that, during the pendency of the arbitration appeal, if the Development Manager enters into or performs any additional contracts or commitments that did not exist on the date of such Management Committee vote (including incurrence of new Development Costs) without prior written Management Committee direction to do so, then any such additional costs and expenses so incurred during the pendency of the arbitration appeal that were not so directed by or later ratified by the Management Committee shall not be considered Development Costs that are reimbursable to the Development Manager by the other Participants.

The Development Manager shall not be required to enter into or perform any additional contracts or commitments that did not exist on the date of the Management Committee

removal vote (including incurrence of new Development Costs) during the pendency of the arbitration appeal. In furtherance of the foregoing, all Participants waive any claims against the Development Manager in connection with non-performance under this Agreement with respect to the duties and responsibilities that the Development Manager is not required to perform during the pendency of the arbitration appeal.

A good faith finding by the Management Committee of the existence or absence of Cause, and the provision of the particular detail thereof to the Development Manager, shall not constitute an actionable claim of defamation by the Development Manager against the Management Committee or any Participant, it being understood that the Development Manager has required that such finding be published to the Development Manager by the Management Committee.

4.12 **Resignation of the Development Manager.**

- 4.12.1 Resignation for Good Reason. The Development Manager may resign as Development Manager for Good Reason only upon written notice to the Management Committee at least ninety (90) days before the effective date of such resignation. Such notice shall state (i) the effective date upon which the Development Manager shall relinquish its rights, duties and obligations hereunder, (ii) the acknowledgement of the Development Manager that it shall be bound by the terms and conditions to and through such effective date, subject to the survival provisions of this Agreement, and (iii) the Development Manager's intentions, if any, with respect to status as a Participant. At any time after such notice from the Development Manager is given, the Management Committee may name a replacement Development Manager and by written notice to the Development Manager specify the date on which the replacement Development Manager shall assume its duties.

With respect to the resignation of the Development Manager the term "Good Reason" shall mean: (A) the termination or withdrawal of the Development Manager as a Participant, (B) unreasonable interference by the Management Committee by issuance of directives and guidelines to the Development Manager which impedes or renders infeasible the ability of the Development Manager to properly perform its duties and obligations hereunder in a timely and/or cost effective manner, (C) amendment of the scope of work required by the Development Manager without a commensurate adjustment of budgetary costs for Development Work, (D) directive(s) from the Management Committee to continue Development Work when such work is not authorized hereunder or will exceed the Maximum Development Costs hereunder, (E) chronic failure of the Participants to timely remit Development Cost reimbursement to the Development Manager, or (F) receipt of a Removal Notice.

- 4.12.2 Resignation Upon Completion of Development Work. Upon completion of the Development Work, and the Development Manager's duties and responsibilities with respect thereto, including but not limited to completion of the transition from Project development to Project construction, the Development Manager may resign. The determination as to the completion of such transition shall be a facts-and-circumstances assessment by the Management Committee.

4.13 **Impairment of Development Manager By Bankruptcy or Other Proceedings.**

4.13.1 Effect of Development Manager Bankruptcy. If the Development Manager is the subject of a bankruptcy Proceeding under the United States Bankruptcy Code, the Development Manager shall continue to perform its duties and responsibilities, and shall not resign, except pursuant to a Final Order of the applicable bankruptcy court which specifies the rejection of this Agreement under such Proceeding and specifies the date upon which the Development Manager shall no longer be a party to this Agreement in its capacity as Development Manager. If such a Final Order is rendered, the Participants and the Development Manager shall comply with the terms of such Final Order. If such Final Order prohibits the Development Manager from acting as Development Manager under this Agreement, the Development Manager shall be deemed to have resigned on the date and pursuant to the provisions of such Final Order.

4.13.2 Effect of Other Proceedings. If the Development Manager is the subject of a Proceeding in which its ability to function as the Development Manager hereunder is or may be at issue, the Development Manager shall promptly provide the Management Committee with written notice of such Proceeding, specifying (i) the Governmental Body or arbitrator in which such Proceeding is occurring or will occur, (ii) the subject matter of the Proceeding, (iii) the reason or reasons that the Development Manager's ability to function hereunder may be at issue, and (iv) the timeframe in which a Final Order could reasonably be anticipated. Nothing herein shall prevent one or more Participants from intervening or otherwise involving such Participant in the Proceeding to the extent that such Participant may have standing before such Governmental Body or arbitrator. If the Governmental Body or arbitrator enters a Final Order which prohibits or substantially impairs the Development Manager's ability to perform pursuant to this Agreement, the Participants and the Development Manager shall comply with the terms of such Final Order. If any such Final Order prohibits the Development Manager from acting as Development Manager under this Agreement, the Development Manager shall be deemed to have resigned on the effective date and pursuant to the provisions of such Final Order.

4.14 **Duties Upon Removal or Resignation.** If the Development Manager (i) is removed either by the Management Committee (without appeal) or the removal determination of the Management Committee is affirmed through the dispute resolution procedures contemplated by Section 4.11.3, 4.11.4 and 4.11.5 above or Section 8.2.2 below, or (ii) resigns or is ordered to resign in accordance with the provisions of Section 4.11.6, 4.11.7 or 4.11.8 above, the Development Manager, subject to the contrary provisions of an Order of a Governmental Body or arbitrator shall:

- (A) continue to perform its duties and responsibilities until a replacement Development Manager is named and appointed by the Management Committee, which appointment shall be made within a period not to exceed the later of (A) forty-five (45) days after such removal decision is final and non-appealable, or (B) the effective date given in the Development Manager's notice of resignation,
- (B) promptly and cooperatively assist in the transition process to the new development manager, including the transfer of all informational documents possessed or under the control of the Development Manager, including records, reports, studies, business plans, budgets and other

financial accounting records, and all other confidential, proprietary or other records with respect to the Development Work performed or to be performed by the Development Manager, as directed by the Management Committee or the new development manager, and

- (C) promptly complete its duties and responsibilities hereunder, including the timely compilation and transmittal of reports and timely submittal of billings to the Participants.

5. DEVELOPMENT WORK AND DEVELOPMENT COSTS.

5.1 Development Work and Development Costs.

5.1.1 Development Work. Development Work shall include all activities necessary or desirable and in accordance with Good Utility Practice to (i) determine the conceptual design of the Project, (ii) determine the recommended interconnection/termination points of the Project, (iii) determine the recommended alignment for the Project route, (iv) determine the scope for the Project, (v) estimate the Project's cost and schedule, (vi) obtain the Critical Permits, (vii) make or undertake such other necessary Project related studies and analyses as deemed appropriate by the Development Manager, and (viii) perform other activities as determined by this Agreement or the Management Committee ("**Development Work**").

5.1.2 Development Costs. Development Costs include both costs for Development Work and Joint Development Work (Section 5.2). The Maximum Development Costs are set forth in Section 5.3.1.3. Development Costs are determined as follows:

5.1.2.1 Development Costs. Development Costs shall include, to the extent related to Development Work:

- (i) all costs of labor, services, transportation and studies, including costs of consultants and legal counsel (except as set forth in Section 5.1.2.1), performed by the Development Manager or by others in connection with this Agreement, and approved by the Development Manager;
- (ii) all costs related to the acquisition of facilities or personal property rights solely in connection with the Project;
- (iii) all costs of insurance procured in accordance with Section 4.7;
- (iv) costs and expenses of Development Manager's employees while performing Development Work in connection with this Agreement as determined in accordance with Appendix C attached hereto;
- (v) applicable costs of materials, supplies, tools, machinery, equipment, and apparatus used solely in connection with this Agreement, including rental charges, such costs to be offset by any proceeds from salvage;
- (vi) the costs of the Development Manager, to the extent not provided for by insurance, of discharging or paying any liability and loss, Damage and expense, including costs and expenses for attorney's fees and other

costs of defending, settling or otherwise administering claims, liabilities or losses arising out of worker's compensation or employers' liability claims or by reason of property Damage or injuries to or death of any Person or Persons or by reason of claims of any and every character resulting from, arising out of or connected with the performance of the Development Work, whether caused wholly or partially by the negligence of the Development Manager or its employees or agents; provided, however, that Development Costs do not include loss or Damage resulting from gross negligence or intentional wrongdoing of the Development Manager or its employees;

- (vii) taxes arising from and payable to any Governmental Body and payments in lieu of taxes and Permit related fees of any character arising out of the performance of this Agreement, excluding income, gross receipts, franchise or taxes similarly imposed or assessed on the results of operations of any Participant;
- (viii) costs that are (A) stated to be Development Costs pursuant to this Agreement, or (B) determined by the Management Committee to be Development Costs at a Level B Vote;
- (ix) all costs and expenses incurred by any Participant in respect of carrying out Development Work (except pursuant to reimbursed contracts), subject to (A) the prior approval of the Development Manager, (B) the ratification by the Development Manager of such costs and expenses by a Participant, or (C) prior approval or ratification by the Management Committee;
- (x) the cost of reimbursement of MOU Participants in accordance with Section 2.10; and
- (xi) the costs and expenses incurred in the wind-up of the Project as described under Sections 10.2.2 and 10.2.3.

5.1.2.2 Costs That Are Not Development Costs. Notwithstanding the provisions of Section 5.1.2.1, Development Costs shall not include:

- (i) to the extent not specifically provided under Section 5.1.2.1(ix), costs of studies conducted by any Participant to determine for such Participant the usefulness, economics, legality and/or feasibility of proceeding with the Project;
- (ii) to the extent not specifically provided under Section 5.1.2.1(ix), costs of any Participant associated with the preparation and negotiation of any contracts regarding the Project and Project -related facilities;
- (iii) costs incurred by each Participant in functions of the Management Committee, or any other committees established pursuant to this

Agreement, and expenses of its personnel while performing such functions, except regarding the Development Manager with respect to its duties and responsibilities to prosecute Development Work (or a Participant that undertakes and carries out Development Work as provided in Section 5.1.2.1(ix) hereof) and to carry out any other obligations of the Development Manager set forth in this Agreement;

- (iv) costs, fees and expenses of any Participant incurred in connection with the dispute resolution appeal by the Development Manager which arises from the removal of the Development Manager pursuant to Section 4.11 of this Agreement, or other disputes under the alternative dispute resolution process, as further described in Section 4.9 of **Appendix D**;
- (v) insurance purchased by individual Participants covered under Section 4.7.5; and
- (vi) costs and expenses arising from new contracts and arrangements entered into by a Development Manager during the pendency of an arbitration appeal following a removal vote against such Development Manager, except to the extent directed by or later ratified by the Management Committee in accordance with Section 4.11.5.

5.2 Joint Development Work and Costs.

5.2.1 **Joint Development Work.** One or more of the Participants are participants in the CapX 2020 Initiative.

5.2.1.1 **CapX 2020 Goals.** A primary goal of the CapX 2020 Initiative is to plan, facilitate and assist in the design and construction of new transmission projects to help maintain and enhance system reliability for electric customers in Minnesota and the surrounding region. The Project is one of the CapX Projects.

5.2.1.2 **Joint Development Work.** Certain activities related to the Project and its Development Work have been and will be undertaken on a joint basis for the benefit of the Project and other CapX Projects ("**Joint Development Work**"). Joint Development Work activities include technical standards, certificate of need processes, the drafting and negotiation of CapX Project template agreements (including but not limited to this Agreement and the Project Agreements) to be undertaken by counsel appointed by the Management Committee in consultation with the Participants and their respective counsel, and general CapX Project planning, coordination and execution activities.

5.2.1.3 **Joint Development Work Cost Allocation.** The Participants believe Joint Development Work is a benefit to the Project and the costs of Joint Development Work, as set forth in **Appendix B**, are equitably allocated among the CapX Projects.

- 5.2.1.4 Withdrawal from CapX 2020. From time to time, the Management Committee may review the benefits to the Project of Joint Development Work and/or the allocation to the Project of the costs thereof. If the Management Committee determines that Joint Development Work is no longer a sufficient benefit to the Project and/or the costs related to the Joint Development Work are no longer justified or equitably allocated, the Management Committee shall, upon a Level B Vote, provide written notice thereof to the participants in the other CapX Projects of its determination to withdraw from Joint Development Work. Said notice shall inform, among other things, that the participants in the other CapX Projects shall have sixty (60) days from the date of such written notice to respond to the Management Committee determination regarding Joint Development Work. If, within such sixty (60) day period, written comments are received or a participant in one of the other CapX Projects requests an opportunity to address the Management Committee, the Management Committee shall promptly convene a Management Committee meeting to consider the written comments and/or provide an opportunity for one or more participants in other CapX Projects to address the Management Committee. Following consideration of all written comments and any presentations, the Management Committee shall again review and take such action it deems appropriate, at a Level B Vote, and advise the participants in the other CapX Projects in writing of the Management Committee's subsequent determination regarding Joint Development Work. If such subsequent determination is to withdraw from Joint Development Work, such determination shall not be effective until sixty (60) days following the date of the written notification of such subsequent determination. The obligation of the Participants to pay allocable costs relating to Joint Development Work, including costs with respect to any contract relating to Joint Development Work, shall cease and terminate upon sixty (60) days following the date of such written notification of such determination. If the Management Committee makes a determination not to withdraw from Joint Development Work, the Management Committee may reconsider the issue of Joint Development Work and/or the related benefits and costs at any time, following the same process and notice provisions set forth in this subsection.
- 5.2.2 Oversight of Joint Development Work. The Development Manager shall coordinate with representatives of the CapX 2020 Initiative and other CapX Project development managers in the supervision, oversight, undertaking and completion of Joint Development Work.
- 5.2.3 Allocation and Payment of Costs. The Development Manager and the development managers of other CapX Projects shall account, consolidate and pay for the costs of Joint Development Work. The Development Manager and the development managers of the other CapX Projects shall then invoice (in a manner, format and frequency mutually agreed upon among the Development Manager and the other CapX Project development managers) and allocate such Joint Development Work costs to the Participants in this Agreement and the other CapX Projects in accordance with the percentages set forth in Appendix B. Subject to the provisions of Section 5.2.1.4 hereof, the Participants agree to

pay, as Development Costs, the percentage of Joint Development Work costs allocated to the Development Work related to this Project as set forth in **Appendix B**.

5.3 Development Costs, Budgets and Maximum Development Costs.

5.3.1 Initial Budget, Prudency Review and Maximum Development Costs.

- 5.3.1.1 Initial Budget, Approval and Revision. The initial budget for Development Work shall be for a period of three (3) years from the date of this Agreement and shall promptly be developed by the Development Manager following the effective date of this Agreement and submitted for review and action by the Management Committee at a Level B Vote (the "**Initial Budget**"). The Development Manager shall update, from time to time, the Initial Budget at the request of the Management Committee. Such update shall be submitted to the Management Committee for its review and action at a Level B Vote and, as updated, shall continue to be the "Initial Budget." The Initial Budget shall be for informational purposes only, and shall not restrict the Development Manager in any way, including from incurring costs in excess of the amounts set forth therein.
- 5.3.1.2 Prudency Review Undertakings. If, in connection with a prudency review or similar process, a Governmental Body determines that any Development Costs were imprudently incurred by one or more Participants or otherwise disallows such costs, then the Management Committee shall work promptly, in good faith, and using reasonable efforts, to address the issues identified by such Governmental Body, which efforts may include, but are not limited to, revising the Development Work plan, the Initial Budget and any other budget for the Development Work; provided, however, that nothing in this Section 5.3.1.2 shall require any Participant to pay costs in excess of its Participant Percentage of Development Costs as otherwise required under this Agreement.
- 5.3.1.3 Maximum Development Costs. The Development Manager shall not incur, or allow to be incurred, Development Costs that exceed, in the aggregate, the amount of \$22,000,000 (the "**Maximum Development Costs**"). Any change in the Maximum Development Costs shall be made in accordance with Sections 5.3.1.4, 5.3.1.5, 5.4 and 5.5 hereof. The following Development Costs shall not be counted in the calculation of Maximum Development Costs: (i) amounts paid to MOU Participants in accordance with Section 2.10 hereof, and (ii) costs arising or from or paid under the Project MOU.
- 5.3.1.4 Projection of Exceeding Maximum Development Costs. At least six (6) months before the Development Manager projects that the Maximum Development Costs set forth in Section 5.3.1.3 hereof may be reached, the Development Manager shall provide to all Participants an estimate of the amount of an increase in the Maximum Development Costs which reasonably would be necessary to complete Development Work and cause the election process to be initiated as provided in Section 6 hereof. If such estimated

increase is provided by the Development Manager to the Participants, the Development Manager shall thereafter provide monthly reports to the Management Committee regarding such expenditures and the time period anticipated to equal or exceed the Maximum Development Costs.

- 5.3.1.5 Increase in Maximum Development Costs. Within thirty (30) days of receipt of the Development Manager's estimate of the amount of an increase of the Maximum Development Costs, the Management Committee shall review and take action regarding a possible increase in the Maximum Development Costs. If the Management Committee approves by a Level B Vote a proposed increase in the Maximum Development Costs (or a further increase to any previously established maximum) ("**Preliminary Increase in Maximum Development Costs**"), it shall promptly provide to all Participants written notice thereof.

5.4 **Preliminary and Approved Increase in Development Costs.** With respect to any notice of Preliminary Increase in Maximum Development Costs, the following provisions shall apply.

- 5.4.1 Preliminary Increase Deemed Approved. If no Participant provides written notice that it irrevocably exercises its right to withdraw from this Agreement as provided in Section 2.5.2 hereof, the amount of increase in Development Costs as provided in the notice of Preliminary Increase in Maximum Development Costs shall, without further action or vote by the Management Committee, be deemed to be the authorized amount of increase in Development Costs ("**Approved Amount of Increase in Maximum Development Costs**") and the amount in Section 5.3.1.3 hereof shall be increased by the Approved Amount of Increase in Maximum Development Costs.

- 5.4.2 Final Action for Increase of Development Costs. If any Participant provides written notice that it irrevocably exercises its right to withdraw from this Agreement as provided in Section 2.5 hereof, the Management Committee shall promptly meet, but in no event later than thirty (30) days following receipt of such written notice, and review and take action, by a Level B Vote, regarding whether it should provide final approval of the amount of increase in Development Costs as provided in the notice of Preliminary Increase in Maximum Development Costs as provided in Section 5.3.1.5 hereof. If the Management Committee approves the Preliminary Increase in Maximum Development Costs as the Approved Amount of Increase in Maximum Development Costs, the provisions of Section 5.4.4 shall apply. If the Management Committee does not approve the Preliminary Increase in Maximum Development Costs as the Approved Amount of Increase in Maximum Development Costs (either pursuant to this Section 5.4.2 or Section 5.4.3), then (i) any irrevocable written notice of withdrawal given by any Participant shall be void, and no Participant shall be considered to have withdrawn due to such notice, and (ii) the amount of Maximum Development Costs in Section 5.3.1.3 shall not change. If the Management Committee does not approve the Preliminary Increase in Maximum Development Costs pursuant to this Section 5.4.2, then the procedures set forth in Section 5.4.3 shall apply.

5.4.3 Reconsideration of Preliminary Approval after Disapproval. If the Management Committee does not approve the Preliminary Increase in Maximum Development Costs as the Approved Amount of Increase in Maximum Development Costs pursuant to Sections 5.3.1.5 or 5.4.2, and is thereafter advised in a written notice given by the Development Manager that the Maximum Development Costs are not sufficient to complete the Development Work (along with the Development Manager's estimate of the amount of increase in Maximum Development Costs required to complete the required Development Work as described in Section 5.3.1.4), then the Management Committee shall hold a meeting within thirty (30) days after such notice is given and shall reconsider and may approve by a Level B Vote the Preliminary Increase in Maximum Development Costs that is not less than the increase recommended by the Development Manager. Any such approval will be governed by this Section 5.4.3. If the Management Committee does not upon such reconsideration vote to approve the Preliminary Increase in Maximum Development Costs, the provisions of Section 5.5 shall apply. If the Management Committee approves the Preliminary Increase in Maximum Development Costs, the provisions of Section 5.4.4 shall apply.

5.4.4 Effect of Final Approval of Increased Development Costs and Subscribed Cost Offering.

- (i) If the Management Committee approves the Preliminary Increase in Maximum Development Costs as the Approved Amount of Increase in Maximum Development Costs as described in Sections 5.4.2 or 5.4.3, or (ii) the Cost Offering described in Section 5.5 below is fully subscribed (A) the Maximum Development Costs shall be increased by the Approved Amount of Increase in Maximum Development Costs or the amount of the fully subscribed Cost Offering, and (B) any Participant who provided written notice of its irrevocable exercise of its right to withdraw from this Agreement as provided in Section 2.5.2 above (1) shall be deemed to be a Withdrawing Participant and Section 2.5.3 shall apply only if the Management Committee approved the Approved Increase in Maximum Development Costs, and (2) shall not have a right to withdraw and shall not be a Withdrawing Participant if Maximum Development Costs are increased pursuant to the Cost Offering set forth in Section 5.5 below;
- (ii) if the Management Committee approves the Preliminary Increase in Maximum Development Costs, Development Costs will continue to be charged to the Participants on a pro rata basis as set forth in Section 4.4.5.2; and
- (iii) notwithstanding any provision of this Agreement to the contrary, if the Cost Offering results in an increase in Maximum Development Costs, such increase in Development Costs above the Maximum Development Costs shall be chargeable only to the Participants that elected to incur such additional Development Costs and such additional Development Costs shall be allocated among such electing Participants in accordance with their respective elections on a pro rata basis; provided, however, that the Development Costs incurred to the amount of the Maximum Development Costs before any increase to Maximum Development Costs arising because of the Cost Offering shall continue to be charged to the

Participants at the Participant Percentage in effect immediately before the Cost Offering.

5.5 Maximum Development Cost Increase Offering. If the Management Committee has not increased the Maximum Development Costs pursuant to Section 5.4.2 or 5.4.3, the Management Committee shall direct the Development Manager to, within fifteen (15) days after the expiration of the thirty (30) day period described in Section 5.4.3, provide a written notice to all Participants of an offering to fund the Development Manager's recommended increase in Maximum Development Costs (the "**Cost Offering**") which states (i) the amount of the Cost Offering, (ii) each Participant's right to elect to increase its payment obligation for Development Costs up to its pro rata Participant Percentage of the Cost Offering on the date of the Management Committee notice (as adjusted by the procedures in this Section 5.5), (iii) the offering process described in this Section 5.5 (including required response dates), and (iv) the mandatory termination of this Agreement if the Cost Offering is not fully subscribed by the Participants or otherwise subscribed by third parties under Section 5.5.3. If the Cost Offering is fully subscribed (A) the Maximum Development Costs shall be increased by the amount of such Cost Offering, and (B) the Participant Percentages set forth in **Appendix A** shall be determined and modified after the Cost Offering (1) if only existing Participants subscribe to the Cost Offering, by computing the dollar amount of each Participant's aggregate financial obligation under this Agreement (all amounts paid and committed to be paid by such Participant hereunder) and dividing such amount by the new amount of the Maximum Development Costs (giving effect to the increase in the Maximum Development Costs by the amount of such Cost Offering described in this Section 5.5 above), or (2) if both existing Participants and third parties as described in Section 5.5.3 subscribe to the Cost Offering, then such third parties shall become Participants to this Agreement in accordance with the terms of the Cost Offering, and the Participant Percentages shall be adjusted in accordance with such terms.

5.5.1 Initial Offering of the Cost Offering. Within thirty (30) days of the date that the Development Manager's Cost Offering notice is given, each Participant shall provide written responses to the Development Manager indicating either that the Participant has elected not to increase its Development Cost payment obligation or that it elects to increase its Development Cost payment obligation pursuant to the Cost Offering. In the latter case, the Participant shall include in its written response the specific amount (up to but not to exceed its pro rata share) of the Cost Offering it elects to accept. The Development Manager shall advise all Participants of the results of the first round of the Cost Offering. The amount of the Cost Offering shall be reduced by the aggregate amount of the Cost Offering subscribed by the Participants in such round. A Participant who accepts additional Cost Offering amounts under this Section 5.5.1 shall have its Participant Percentage increased (the amount of such increase shall be determined in the manner provided in Section 5.5 above as if the amount of the Cost Offering subscribed by Participants in the first round comprised the entire Cost Offering) and **Appendix A** shall be modified accordingly, subject to and only effective upon (except for purposes of determining the pro rata rights of the Participants to subscribe in the Cost Offering pursuant to Sections 5.5.2 and 5.5.3) the full subscription of the Cost Offering by the Participants.

5.5.2 Second Offering of the Offering Cost Increase. If there are unsubscribed amounts of the Cost Offering remaining following the completion of the initial round of the Cost Offering

under Section 5.5.1 hereof, the Development Manager shall promptly provide written notice thereof to all Participants (including Participants who elected not to participate in the initial round of the Cost Offering pursuant to Section 5.5.1) and a Participant may offer to increase its amount of the Cost Offering up to the total outstanding Cost Offering amounts remaining. If the responding Participants' total amount of requests exceed the total Cost Offering amounts remaining, the outstanding Cost Offering amounts remaining shall be allocated to such Participants on a pro rata basis based upon their relative Participant Percentages as adjusted pursuant to the resulting Participant Percentages after giving effect to the Cost Offering subscribed by the Participants pursuant to Section 5.5.1. The Development Manager shall advise all Participants of the results of the second round offering. A Participant that accepts additional Cost Offering amounts under this Section 5.5.2 shall have its Participant Percentage increased in the manner contemplated by Section 5.5.1 and **Appendix A** shall be modified accordingly, subject to and only effective upon (except for purposes of determining the pro rata rights of the Participants to subscribe in the Cost Offering pursuant to Section 5.5.3) the full subscription of the Cost Offering by the Participants.

- 5.5.3 **Final Offering of the Offering Cost Increase – Termination of Agreement.** If there are unsubscribed amounts of the Cost Offering after the initial and second round offering pursuant to Sections 5.5.1 and 5.5.2, the Management Committee shall offer the outstanding unsubscribed amounts of the Cost Offering first to other CapX Project participants and then to third parties on terms and conditions determined by the Management Committee at a Level B Vote. For purposes of this Section 5.5.3 only, "third parties" as referred to in the previous sentence may include a Participant that previously elected not to increase its payment obligation by electing to subscribe in the Cost Offering. If offers to other CapX Project participants or third parties to participate in this Agreement fail to dispose of all remaining unsubscribed amounts of the Cost Offering, and the subscription commitments for the Cost Offering equal less than one hundred percent (100%), (i) the Cost Offering shall be deemed to have failed, (ii) the Participant Percentages shall not be adjusted, and (iii) the Management Committee shall determine at a Level C Vote, within ninety (90) days after expiration of the final offering of the unsubscribed amounts of the Cost Offering pursuant to this Section 5.5.3, whether there should be a revision in the size, character or capacity of the Development Work under this Agreement or take other action at a Level C Vote. If the Management Committee does not approve such a revision within such ninety (90) day period or vote to take other action, this Agreement shall automatically terminate upon the expiration of such ninety (90) day period. In the event other CapX Project participants or third parties subscribe in the Cost Offering, **Appendix A** shall be modified in accordance with Section 5.5 above. In order for a CapX Project participant or a third party to become a Participant hereunder, such Person must accept and agree to be bound by the terms and provisions of this Agreement, as modified by the Cost Offering, and execute such documents and instruments as the Management Committee may require as evidence of such acceptance and agreement.

5.6 **Financial Accounts, Reports and Independent Accountants.**

- 5.6.1 **Accounts.** There shall be strict accountability of all funds, and reporting of all receipts and disbursements made under this Agreement. The Development Manager shall establish and

maintain such funds and accounts as may be required by good accounting practice. All of the Development Manager's books and records of account, and other financial and Development Work records shall be current, complete, true and correct in all material respects. All such books and records shall be consistent with the all financial reports provided hereunder. The books and records of the Development Manager maintained with respect to the Development Work shall be open to inspection at all reasonable times established at least five (5) business days in advance of such inspection to each Participant.

5.6.2 Financial Accounting Reports. The Development Manager shall prepare the reports set forth in Section 4.5 of this Agreement and shall also coordinate, prepare and provide accounting data, information and schedules to the Independent Accountants (defined in Section 5.6.3 below) for the year-end agreed-upon procedure.

5.6.3 Year End and Final Reports. After the completion of each calendar year during the Term, or such other fiscal year agreed upon by the Management Committee and the Development Manager, and any partial year for the last year of this Agreement, the Development Costs described by this Agreement shall undergo an agreed-upon procedure by a public accounting firm experienced in utility and regulated industry accounting (the "**Independent Accountants**"). The Independent Accountants shall be retained by the Development Manager, subject to the approval of the Management Committee, which approval shall not be unreasonably withheld, delayed or conditioned. The Independent Accountants shall be engaged pursuant to a written engagement letter for the applicable year. The report of the Independent Accountants shall be completed and a report issued by the Independent Accountants within seventy-five (75) days after the applicable year-end. The Management Committee shall furnish any report(s) of the Independent Accountants to the Participants promptly following receipt.

6. COMPLETION OF DEVELOPMENT WORK AND COMMENCEMENT OF PROJECT.

6.1 **Completion of Development Work.** Upon the recommendation of the Development Manager pursuant to a written report submitted to the Management Committee, the Management Committee shall consider whether the Development Work has been sufficiently completed to commence the Project. Based upon the Development Manager's recommendation, and report, and any other information that the Management Committee independently considers, the Management Committee may either (i) approve commencement of the Project, or (ii) defer commencement of the Project pursuant to a determination that the Project conditions precedent required for Management Committee approval as set forth in Section 6.1.1 below have not yet been satisfied.

6.1.1 Conditions Precedent to Approval. The Management Committee shall have the authority to approve the Project upon the satisfaction of the following conditions: (i) the receipt of Final Orders for all (A) environmental impact statements issued under Applicable Law for the Project, and (B) Critical Permits, and (ii) the Project Agreements have been approved by the Management Committee under Section 3.6.6 hereof.

"**Final Order**" means action by a Governmental Body which has become effective and has not been vacated, reversed, set aside, annulled or suspended and as to which: (1) no request for stay by such Governmental Body of the action is pending, no such stay is in effect, and,

if any deadline for filing any such request is designated by Applicable Law, such deadline has passed, (2) no petition for rehearing or reconsideration of such action is pending before such Governmental Body, and if any deadline for filing any such petition is designated by Applicable Law, such deadline has passed, (3) such Governmental Body does not have the action under reconsideration on its own motion, and (4) no appeal to a court, or request for stay by a court, of such Governmental Body's action is pending or in effect, and, if any deadline for filing any such appeal or request is designated by Applicable Law, such deadline has passed.

6.1.2 Management Committee Approval. If the Development Manager has recommended to the Management Committee that the Project be commenced, and the conditions set forth above in Section 6.1 have been satisfied, the Management Committee may approve commencement of the Project by a Level B Vote of the Management Committee, subject to the subsequent election of Participants to participate in one hundred percent (100%) of the ownership in the Project pursuant to the procedures set forth in the provisions of Section 6.3 below. If one hundred percent (100%) of the ownership interest in the Project are not subscribed, the Project shall not be deemed approved by the Management Committee.

6.1.3 North Rochester Segment and Northern Hills 161 kV Line. At the request of the City of Rochester, acting through its Public Utility Board ("**RPU**"), the segment of the Project for the North Rochester Substation and the connected Rochester Northern Hills 161 kV Line (the "**Rochester Segment**") shall proceed to election, subject to compliance with the provisions of this Section 6 above. If RPU has requested that the Rochester Segment be commenced, the Management Committee shall approve commencement of the Rochester Project subject to the election of Participants to participate in one hundred percent (100%) of the ownership in the Rochester Segment pursuant to the procedures set forth in the provisions of Section 6.3 below; provided, however, that notwithstanding anything to the contrary in this Agreement, the RPU may elect any and all Non-Elected Amounts if the election of Participants to participate in the Rochester Segment does not reach one hundred percent (100%). Nothing herein shall prevent the City of Rochester from acquiring Elected Project Participation of one hundred percent (100%) if no other Participants participate in the Rochester Segment. If the Rochester Segment is approved, it shall become a separate "Project" under this Agreement and shall be subject to all terms and provisions of this Agreement with respect to a Project. To the extent practicable, the Project Agreements developed for the Project shall be utilized for the Rochester Segment, subject to revisions required to conform the Project Agreement to the particular requirements of the Rochester Project. The Rochester Segment shall be constructed in accordance with the standards and requirements required of the Project (such as original design and routing) to enable the Rochester Segment to have connectivity with the remaining Project segment, if and when constructed.

6.2 **Required Actions Before Offer of Ownership in Project.** Upon and after approval of the Project as described in Section 6.1 above, the Management Committee shall not commence the Project offering process described in Section 6.3 below unless and until the Management Committee has reviewed and approved a preliminary Project (i) scope of work, (ii) construction cost estimate, and

(iii) schedule of work for the Project. Such preliminary Project materials will be provided to the Participants in connection with the election notice described in Section 6.3 below.

6.3 **Participant Exercise of Right to Elect Project Ownership.** Upon completion and satisfaction of the approvals and tasks required by Sections 6.1 and 6.2 above as reasonably determined by the Management Committee, the Development Manager shall prepare and provide a written report and notification (subject to approval by the Management Committee) to each Participant in accordance with the notice provisions of this Agreement describing the Project and the notification that each Participant may elect to participate in ownership of the Project as set forth herein. The report of the Development Manager will also include the following attachments: (i) the preliminary Project materials described in Section 6.2 above, (ii) copies of all environmental impact statements issued by Governmental Bodies, (iii) copies of all Critical Permits and other approvals that have been obtained, and (iv) the Project Agreements.

6.3.1 Exercise of Right of First Refusal to Rights in the Project. After notification as provided for by Section 6.3 above, any Participant electing to participate in the Project shall be required to provide written notice to the Development Manager and Management Committee of the exercise of its right to participate in the Project. In order to be effective, such notice must be given within forty-five (45) days (or such longer period as shall be authorized by the Management Committee) after the date of the notification sent by the Development Manager under Section 6.3. Such written notification shall specify the percentage of the Project so elected, which may not exceed the Election Right for such Participant, and such election shall constitute the Participant's initial Elected Project Participation (the "**Initial Elected Project Participation**").

6.3.2 Failure to Exercise Right of First Refusal. Failure of a Participant to so elect or notify in accordance with the provisions of Section 6.3.1 hereof shall be conclusively deemed for all purposes an irrevocable election by the Participant not to participate in the Project and the amount of the Election Right of the Participant which the Participant fails to elect shall be deemed a "**Non-Elected Amount**" and shall be reallocated in accordance with Sections 6.3.3 and 6.3.4 hereof. Any Participant that fails to elect or to notify pursuant to the provisions of Section 6.3.1 hereof shall (i) have no further rights to or in the Project (including but not limited to the results of any Development Work), and (ii) remain obligated under this Agreement to pay its Participant Percentage of outstanding and unpaid Development Costs as provided in this Agreement.

6.3.3 Initial Offer of Non-Elected Amounts. If a Non-Elected Amount becomes available under Section 6.3.2 hereof as a result of action or the failure to act of a Participant, then such Non-Elected Amount shall be offered within forty-five (45) days (or such other period as shall be authorized by the Management Committee) to all other Participants on a pro rata basis by the Development Manager in the same manner proscribed by Section 6.3 above. A Participant shall have the right to elect to increase its Initial Elected Project Participation generally following the notification procedures set forth in Section 6.3.1 above. A Participant who elects to obtain additional ownership through Non-Elected Amounts pursuant to this Section 6.3.3 shall have its Initial Elected Project Participation increased by a corresponding amount of such additional ownership.

6.3.4 **Final Offer to Participants of Non-Elected Amounts.** If Non-Elected Amounts remain available following the completion of the initial offer of Non-Elected Amounts under Section 6.3.3 above, a Participant may offer to increase its Initial Elected Project Participation up to the amount of available Non-Elected Amounts. If Participants' total amount of requests exceed the total amount of Non-Elected Amounts, the Non-Elected Amounts shall be allocated to such Participants on a pro rata basis based upon their respective Initial Elected Project Participation percentage as adjusted pursuant to Section 6.3.3. A Participant who elects to obtain additional ownership through Non-Elected Amounts pursuant to this Section 6.3.4 shall have its Initial Elected Project Participation increased by an amount corresponding to such additional ownership.

6.3.5 **Final Procedure for Disposal of Non-Elected Amounts.** If a Non-Elected Amount remains available and is not disposed of pursuant to Sections 6.3.3 or 6.3.4 above, the Management Committee shall offer such Non-Elected Amounts first to other CapX Project participants and then may offer, subject to compliance with Applicable Law, to third parties on terms and conditions determined by the Management Committee at a Level B Vote. For purposes of this Section 6.3.5 only, "third parties" as referred to in the previous sentence may include a Withdrawing Participant or a Participant described in Sections 6.3.1 and 6.3.2 that previously elected not to participate in the Project. If offers to other CapX Project participants and third parties to participate in the Project fail to dispose of all remaining Non-Elected Amounts, the Management Committee may determine at a Level C Vote appropriate actions to preserve the Project, including without limitation (i) a revision in the size, character or capacity of the Project, and (ii) a re-offering of ownership participation to allow each Participant to modify its Initial Elected Project Participation so that the elected percentages aggregate one hundred percent (100%) participation in the Project.

6.4 **Final Participant Elected Project Participation.** At the conclusion of the election processes set forth in the provisions of Section 6.3 above, if the aggregate of the Participants' Initial Elected Project Participation is one hundred percent (100%), then each Participant's ownership percentages in the Project shall become and be defined as that Participant's **"Elected Project Participation."**

6.5 **Project Agreements.**

6.5.1 **Ownership and Operation Agreement.** Each Participant shall own its interests in the Project in accordance with the Ownership and Operation Agreement. As soon as practicable after the Management Committee has approved the final form of Ownership and Operation Agreement under Section 3.6.6 hereof and all actions contemplated by Sections 6.1 through 6.4 hereof have been completed, counsel appointed by the Management Committee shall complete for execution by each Participant the Ownership and Operation Agreement with such appropriate and necessary ministerial variations, insertions and deletions as shall be required, and approved by the Management Committee, to reflect (i) the ownership interest in the Project of each Participant based upon its Elected Project Participation, (ii) the facts in existence at such time, and (iii) such other matters as shall be necessary to complete said Ownership and Operation Agreement. Any other changes to the Ownership and Operation Agreement must be approved by the Management Committee at a Level C Vote. All rights, properties, studies, certificates, approvals,

options and interests resulting from Development Work hereunder shall be transferred from this Agreement and included in, and be held under, the Ownership and Operation Agreement without further action by the Participants or the Management Committee.

6.5.2 Construction Management Agreement. As soon as practicable after the Management Committee has approved the final form of the Construction Management Agreement under Section 3.6.6 hereof and all actions contemplated by Sections 6.1 through 6.4 hereof have been completed, counsel appointed by the Management Committee shall complete for execution by the Participants a Construction Management Agreement with such appropriate and necessary ministerial variations, insertions and deletions as shall be required, and approved by the Management Committee, to reflect (i) the facts in existence at such time, and (ii) such other matters as shall be necessary to complete said Construction Management Agreement. Any other changes to the Construction Management Agreement must be approved by the Management Committee at a Level C Vote.

6.5.3 Execution and Delivery of Agreements.

6.5.3.1 Finalization of Project Agreements. As soon as practicable after the completion of each of the respective (i) Ownership and Operation Agreement, and (ii) Construction Management Agreement, in accordance with Sections 6.6.1 and 6.6.2 the Management Committee shall deliver copies of each such agreement to each Participant electing into the Project. Each such Participant shall be required to execute and deliver to the Management Committee its executed counterpart within sixty (60) days after receipt thereof. The number of executed counterparts shall be determined by the Management Committee.

6.5.3.2 Failure to Complete Ownership Election. If a Participant fails to comply with any of its obligations in this Section 6.5.3, then such Participant shall be deemed to have elected not to participate in the Project, and said Participant shall have no further rights or interests with respect to the Project; provided, however, that such Participant shall remain obligated under this Agreement, including but not limited to its obligation to pay its Participant Percentage of Development Costs.

6.5.4 Other Agreements. If the Management Committee designates agreements other than the Ownership and Operation Agreement and the Construction Management Agreement as Project Agreements, the process outlined in this Section 6.5 shall apply.

7. LIABILITY, INDEMNIFICATION, CONTRIBUTION AND LIMITATION OF LIABILITY.

7.1 **Participant Liability.** No Participant shall be liable to any other Participant under this Agreement for any special, incidental, consequential, indirect or punitive Damages (whether they be exemplary, treble or punitive Damages, or any other penalty); provided, however, that the foregoing exclusion shall not apply to liability for Damages arising from the third-party claims that are indemnified by a Participant pursuant to the indemnification provisions set forth in Section 7.3 below.

7.2 **Right of Contribution.** In the event that:

- (i) Damages are imposed on the Participants on a joint and several basis arising from a third-party claim that is not covered by insurance or is not indemnified by another Participant, then such Damages will be allocated pro-rata among all of the Participants in accordance with their Participant Percentages, subject to the indemnification provisions set forth in Section 7.3 below.
- (ii) a Participant pays more than its Participant Percentage in connection with discharging a liability of one or more Participants to a Person other than a Participant arising under this Agreement, including Damages in connection with third-party claims, then such Participant shall have a right of contribution against any Participant that has not paid its Participant Percentage of such Damages.
- (iii) a Participant is subject to a stay in bankruptcy or is terminated or withdraws from this Agreement and any amount due hereunder from such Participant remains unpaid for a period of sixty (60) days, then such unpaid amount shall be remitted by the remaining Participants on a pro-rata basis in accordance with the Participant Percentages, as such percentages are adjusted for the removal of the bankrupt, terminated or withdrawn Participant such that the remaining Participants will remit one hundred percent (100%) of such unpaid amount. Nothing herein shall be deemed to relieve the bankrupt, terminated or withdrawn Participant from its payment obligations under this Agreement, and each remaining Participant that remits a payment on behalf of such Participant shall have a right of contribution against the Participant on whose behalf such payment was made.

7.3 **Indemnification.**

- 7.3.1 Indemnification by Participants. Each Participant acting in its capacity as a Participant shall defend, indemnify and hold harmless to the extent allowed by Applicable Law each other Participant and its respective shareholders, members, partners, Affiliates, members of its governing body, officers, employees and agents, from and against third-party claims for Damages arising from such Participant's (i) intentional/willful misconduct, (ii) negligence, and/or (iii) breach of this Agreement; provided, however, that with respect to Damages arising from third-party claims of negligence, such Participant shall be liable only to the extent of its contributory negligence and it shall not be liable to the extent of the negligence of others.
- 7.3.2 Indemnification by Development Manager. The Development Manager acting in its capacity as such under this Agreement shall defend, indemnify and hold harmless to the extent allowed by Applicable Law the Participants (other than the Development Manager) and their respective shareholders, members, partners, Affiliates, members of their governing bodies, officers, employees and agents from and against third-party claims for Damages arising from the Development Manager's (i) intentional/willful misconduct, (ii) negligence, and/or (iii) breach of the Development Manager's obligations with respect to Development Work under this Agreement; provided, however, that with respect to Damages arising from third-party claims of negligence, such Participant acting in its

capacity as Development Manager shall be liable only to the extent of its contributory negligence and it shall not be liable to the extent of the negligence of others.

7.3.3 **Indemnification by Participant Subcontractor.** A Participant acting in its capacity as a Subcontractor under this Agreement or any agreement with the Development Manager shall defend, indemnify and hold harmless to the extent allowed by Applicable Law each other Participant, and their respective shareholders, members, partners, Affiliates, members of their respective governing bodies, officers, employees and agents from and against third-party claims for Damages arising from such Participant's (i) intentional/willful misconduct, (ii) negligence, and/or (iii) breach of such Participant's obligations with respect to Development Work or Joint Development Work under this Agreement or any agreement with the Development Manager to the extent allowed by Applicable Law; provided, however, that with respect to Damages arising from third-party claims of negligence, such Participant acting in its capacity as a Subcontractor under this Agreement shall be liable only to the extent of its contributory negligence and it shall not be liable to the extent of the negligence of others.

7.4 **Participant Obligations Several.** The obligation of a Participant to make payments under this Agreement is a several obligation and not a joint obligation with other Participants, and such obligation is absolute and unconditional irrespective of any rights of setoff or counterclaim a Participant might otherwise have against another Participant. A Participant shall not fail or refuse to make such payment and shall not terminate (other than as is specifically provided for herein) this Agreement for any cause whatsoever, including, without limiting the generality of the foregoing, any acts or circumstances that may constitute a failure of consideration, or commercial frustration of purpose, or any change in Applicable Laws, or any failure of another Participant to perform and observe its agreements hereunder or to discharge any duty or obligation arising out of or connected with this Agreement. This provision shall not be construed to release a Participant from the performance of any of its obligations or undertakings contained in this Agreement.

7.5 **Insurer Obligations.** The provisions of this Section 7 shall not be construed so as to relieve any insurer of its obligation to pay any insurance claims in accordance with insurance policies obtained for the Development Work.

8. **DISPUTE RESOLUTION.** Except as otherwise provided in this Agreement, the following dispute resolution provisions shall govern disputes among and between the Participants.

8.1 **Between and Among Participants.** If a dispute, claim or controversy arises between or among the Participants, which does not arise from (i) disputes between Participants and the Management Committee, on the one hand, and the Development Manager, on the other, in connection with removal of the Development Manager pursuant to Section 4.11 hereof, (ii) a dispute of a Development Manager invoice (which shall be resolved as provided in Section 2.11.1 hereof), or (iii) a claim of third party indemnification pursuant to Section 7 hereof, the Participants shall have the right to seek resolution of such dispute, claim or controversy in accordance with the dispute resolution procedures set forth in **Appendix D**, which procedures shall be the sole and exclusive remedy of the Participants for resolution of such controversy or claim.

8.2 Between Development Manager and Participants.

- 8.2.1 General Dispute Resolution Provisions. If a dispute arises between one or more Participants and the Development Manager, excluding (i) the removal of the Development Manager pursuant to Section 4.11 hereof, (ii) a dispute of a Development Manager invoice (which shall be resolved as provided in Section 2.11.1 hereof), and (iii) a claim of third party indemnification pursuant to Section 7 hereof, the Development Manager and such Participant(s) shall have the right to seek resolution of such dispute, claim or controversy in accordance with the dispute resolution procedures set forth in Appendix D to this Agreement, which procedures shall be the sole and exclusive remedy of the Participants for resolution of such controversy or claim.
- 8.2.2 Development Manager Removal. If the Management Committee determines to remove the Development Manager in accordance with Sections 4.11 hereof, the Development Manager shall have the right to appeal such decision by providing a notice setting forth its intent to engage in binding arbitration pursuant to the fast track procedures of the Construction Industry Rules. Such rules shall contemplate, however, (i) a sixty (60) day time standard for case completion, (ii) establishment of a special pool of arbitrators who are pre-qualified to serve on an expedited basis, (iii) an expedited arbitration appointment process with party input, (iv) a presumption that the case will be decided with submission of testimony and documents, (v) the requirement of a hearing within thirty (30) calendar days of the arbitrator's appointment, (vi) a single day hearing, if the arbitrator deems it reasonable in the circumstances, and (vii) a binding decision to be rendered in no more than fourteen (14) calendar days after completion of the hearing. The use of the fast track procedures shall not preclude a Participant or the Development Manager from seeking injunctive relief under the Rules for Emergency Measures of Protection as described in Paragraph 4.7.2 of Appendix D hereto. In addition to the foregoing, the provisions of Appendix D at Paragraphs 4.7 (Authority of Arbitrator), 4.8 (Award Final and Binding), 4.9 (Costs and Expenses), 5 (Enforcement), and 6 (Confidentiality of Proceedings) are hereby incorporated by reference to this Section 8.2.2.

9. CONFIDENTIALITY PROVISIONS.

- 9.1 Confidentiality of Information. It may be necessary for a Participant to provide confidential or proprietary information with respect to its participation in the Project or a Participant may agree to develop certain confidential or proprietary information as part of the Development Work. Each Participant covenants, with respect to such confidential and proprietary information provided by such Participant, that any and all confidential and proprietary information so provided for use for this Agreement or the Project, whether or not it falls within the definition of "Confidential Information" as defined below, does not infringe upon or violate the rights or interests of any third party (including any trade secret or confidentiality rights of such third party). Each Participant agrees to use the confidential and proprietary information it developed in connection with this Agreement or the Project (provided that the cost of developing such information has been treated as a Development Cost), and confidential and proprietary information provided to it by any other Participant or a CapX 2020 Initiative participant or representative in connection with this Agreement and the Project or another CapX 2020 Initiative project ("**Confidential Information**"), solely (i) in order to evaluate and/or participate in this Agreement and/or the Project, or (ii) for other activities contemplated by this

Agreement, including Development Work (each a "**Permitted Purpose**"). Each Participant shall keep Confidential Information confidential and shall not, and shall advise their respective Representatives (as defined below) not to, disclose to any Person any Confidential Information in any manner whatsoever or otherwise use any Confidential Information other than for a Permitted Purpose; provided, however, that any Confidential Information may be disclosed to a Participant's financial, technical, legal and other professional advisors, members, employees, Affiliates and other representatives (collectively referred to as "**Representatives**") who may need to know such Confidential Information for the purpose of advising the Participant with respect to this Agreement or the Project or another CapX 2020 Initiative project; provided, that such Representatives are informed by the Participant of the confidential nature of the Confidential Information and that they shall be bound by the confidentiality provisions of this Section 9 to the same extent as if they were parties hereto. Each Participant agrees that it will be responsible for any breach of this Section 9 by any of its Representatives and for any use of the Confidential Information by any of them for any purpose other than a Permitted Purpose. Written documents, electronic documents and other physical information shall be deemed Confidential Information, and protected hereby, only if clearly and prominently marked and identified as "CONFIDENTIAL." Oral or other non-written communications shall be deemed Confidential Information only if it is declared to be Confidential Information at the time disclosed.

- 9.2 **Information Not Deemed Confidential Information.** Notwithstanding Section 9.1 hereof, the term "Confidential Information" shall not be deemed to include any information that (i) is or becomes generally available to the public other than as a result of a disclosure by a Participant, or any of their respective Representatives in violation of Section 9.1 hereof, (ii) was within a Participant's possession before its being furnished to such Participant by or on behalf of any other Participant or a CapX 2020 Initiative participant or representative, (iii) becomes available to a Participant on a non-confidential basis from a source other than any other Participant or any of their respective Representatives or a CapX 2020 Initiative participant or representative, provided that such recipient does not know that such source is bound by a confidentiality agreement with, or other contractual, legal or fiduciary obligation of confidentiality to, the Participant, a CapX 2020 Initiative participant or representative or any other party with respect to such information, or (iv) is independently developed by a Participant, without access to the Confidential Information.
- 9.3 **Requirement to Disclose Confidential Information.** If a Participant is required by legal process, a Governmental Body, arbitrator or otherwise by operation of law to disclose any Confidential Information of another Participant or a CapX 2020 Initiative participant or representative ("**Disclosing Party**"), then to the extent legally permissible, the Participant, as applicable, shall provide prompt notice of such requirement to the Disclosing Party so that the Disclosing Party at its own cost may seek a protective Order or other appropriate remedy. The Participant shall disclose only that portion of the Confidential Information which it is legally required to disclose, shall provide prompt notice of same to the Disclosing Party, and shall reasonably cooperate with the Disclosing Party in connection with the efforts of the Disclosing Party seeking its Order or other remedy. If the Disclosing Party fails to obtain a protective Order or other appropriate remedy with respect to the extent of the planned disclosure of Confidential Information by the Participant required under duress to disclose, such Participant may rely on advice of its legal counsel (which may be its in-house counsel) with respect to its obligations of disclosure as contemplated herein.

- 9.4 **No Transmission Information to Sales or Marketing Function.** No Participant receiving confidential and proprietary information, including Confidential Information, as described hereunder shall, directly or indirectly, reveal any non-public Transmission Information provided by a Transmission Function to any Person employed by a Sales or Marketing Function or by an Energy Affiliate (as the defined terms used in this subsection are defined in 18 C.F.R. Part 358, as may be amended from time to time ("**FERC Standards of Conduct**")) in a manner that violates the FERC Standards of Conduct. In the event of an inadvertent disclosure of non-public Transmission Information, the Person subject to FERC Standards of Conduct shall notify such Person's Transmission Function and such Person's Transmission Function shall make arrangements to provide contemporaneous disclosure per the FERC Standards of Conduct, to the extent applicable.
- 9.5 **Restrictions on Access to Critical Energy Infrastructure Information.** Each Participant hereby certifies for itself and its Representatives who may be granted access to confidential and proprietary information, including Confidential Information, that (i) it and each of its Representatives are aware of the requirements of 18 C.F.R. Part 388, and (ii) it has no reason to believe that it or its Representatives would be restricted from access to Critical Energy Infrastructure Information pursuant to 18 C.F.R. Part 388.
- 9.6 **Property of Participant.** Except Confidential Information developed by a Participant as part of Development Work, the costs of which were included as Development Costs for which the Participant was reimbursed in accordance with this Agreement, all confidential and proprietary information, including Confidential Information, shall remain the property of the Participant providing it. Notwithstanding any provision in this Section 9 to the contrary, if such Participant subsequently (i) withdraws from this Agreement, (ii) fails to participate in the Project as provided in Section 6.1 hereof, or (iii) defaults and is terminated from this Agreement as provided in Section 2.4 hereof, such Participant shall have no right to demand that such confidential and proprietary information, including Confidential Information, be returned to such Participant or be destroyed at the instruction of such Participant, it being agreed and understood that the remaining Participants or any other CapX 2020 Initiative project shall have an irrevocable, perpetual right and license to use the confidential and proprietary information, including Confidential Information, for any Permitted Purpose on a royalty free basis thereafter under this Agreement and for the Project.
- 9.7 **No Accuracy Warranty.** The Participant that discloses confidential and propriety information is not providing any warranties or representations as to the accuracy of any such information. Nothing herein is intended to, nor shall it, obligate a Participant to provide any confidential and proprietary information, including Confidential Information, to any other Participant; provided, however, the foregoing shall not abrogate or otherwise absolve a disclosing Participant from the covenant set forth in Section 9.1 above regarding non-infringement and prohibitions on use.
- 9.8 **Breach of Confidentiality Provisions.** Each Participant expressly agrees that a breach of any of the terms or conditions of this Section 9 would result in irreparable harm and that money would not be a sufficient remedy for any such breach. Accordingly, in the event of a breach or threatened breach by a Participant or by any of its Representatives or any CapX 2020 Initiative participant or representative of any of the provisions of this Section 9 (and in addition to any other remedy provided by law or in equity), the Participant such breach would harm shall be entitled to seek appropriate equitable relief, including injunctive relief and specific performance.

- 9.9 **Public Disclosure.** If a Participant intends to make, directly or indirectly, any material public comment, statement, or communication (such as a press release) with respect to, or otherwise to disclose or to permit the disclosure of a material non-public aspect of the CapX 2020 Initiative or any of the material terms, conditions, or other material aspects of this Agreement or a Project, it shall use reasonable commercial efforts to first provide to the CapX 2020 Initiative participants or representatives and the other Participants the content of the proposed disclosure, and the time and place that the disclosure will be made and provide CapX 2020 Initiative participants or representatives and the other Participants a reasonable opportunity to comment on the proposed disclosure; provided, that no such public comment, statement or communication shall include any confidential or proprietary information, including Confidential Information.
- 9.10 **Public Disclosure Laws.** The Participants intend that nothing in this Agreement and no action taken pursuant to this Agreement shall (i) cause confidential or proprietary information, including Confidential Information, that would otherwise have been exempt from public access or inspection to become subject to public access or inspection under any Applicable Law regarding public access to information, or (ii) make unavailable or waive any exception to or protection under public disclosure Applicable Laws that would otherwise enable the Participants to preserve the confidentiality confidential or proprietary information, including Confidential Information.

10. TERM AND TERMINATION OF AGREEMENT.

10.1 Term of Agreement.

- 10.1.1 **Effective Date.** This Agreement shall become effective and in full force and effect when all the Participants have duly executed and delivered this Agreement.
- 10.1.2 **Term.** Unless earlier terminated pursuant to the terms of Section 10.2 below, the initial term of this Agreement is five (5) years from the date of this Agreement (the "**Initial Term**"). If Development Work is not completed at the end of the Initial Term, this Agreement shall automatically extend in one-year increments until Development Work has been completed. The term of this Agreement shall be the period of the Initial Term and any one-year increment extension(s) to the date of termination of this Agreement (the "**Term**").

10.2 Termination.

- 10.2.1 **Termination of Agreement.** The Participants shall have the sole authority to terminate this Agreement except as expressly provided in this Agreement.
- 10.2.1.1 **Voluntary Termination of Agreement.** This Agreement may be terminated at any time for any reason or no reason: (i) by written action executed by all of the Participants with or without the recommendation of the Management Committee, or (ii) upon the recommendation of the Management Committee by a Level B Vote to terminate this Agreement followed by a written action executed by (A) greater than fifty percent (50%) of the Participant Percentages, and (B) not less than three (3) Participants. The foregoing shall remain in effect if there are at least four (4) Participants. If there are three (3) Participants, the vote to terminate this Agreement shall require (1) greater than

fifty percent (50%) of the Participant Percentages, and (2) not less than two (2) Participants. If there are two (2) Participants, then the vote to terminate this Agreement shall require greater than fifty percent (50%) of the total Participant Percentages entitled to vote.

10.2.1.2 Other Termination of Agreement. Continuation of the Development Work for the Project shall be deemed not feasible and this Agreement shall terminate:

- (i) upon failure under Section 5.5.3 to increase the Maximum Development Costs or revised the size, character or capacity of the Development Work under this Agreement or take such other action, as set forth in Section 5.5.3 hereof, or
- (ii) upon failure on the part of Participants to elect or maintain to pay, in the aggregate, one hundred percent (100%) of Development Costs or elect or maintain Elected Project Participation equal to one hundred percent (100%) of the Project pursuant to Sections 2.6 or 6 hereof, continuation of the Development Work for the Project shall not be deemed feasible and this Agreement shall terminate.

10.2.2 Effect of Agreement Termination.

10.2.2.1 Property Rights. If this Agreement is terminated before the execution and delivery of the Project Agreements pursuant to Section 6.6.3.1, the Participants shall each exercise rights as a tenant-in-common pursuant to the operation of this Agreement and under the common law with respect to such property interests; provided, however, no Participant shall have any duty to render an accounting with respect to its use of such property interests following the termination of this Agreement and no Participant shall be entitled, and hereby irrevocably waives its rights, to seek to partition such rights. Upon such termination, the Development Manager shall provide to each Participant a copy of all studies, reports, contracts and other similar data and other similar information constituting Development Work that is in the possession of the Development Manager. Each Participant shall be entitled and permitted to use any such property interests for any purposes desired, subject only to confidentiality restrictions set forth in this Agreement. If the Development Manager acquired tangible personal property in connection with this Agreement and was reimbursed for such property as Development Costs, then the Development Manager, at its option, shall either (i) cause the transfer to each Participant a percentage undivided ownership interest equal to its Participant Percentage, and/or (ii) sell the property and pay a percentage of the proceeds from such sale to the Participants in accordance with their respective Participant Percentages. Upon and after termination of this Agreement (A) nothing herein shall require any Participant to offer any other current or former Participant the right to participate in any subsequent work or project with respect to electric transmission routes or lines, or any other efforts of such

Participant, and (B) no Participant shall claim any right, title or interest in or to any such work or project of another Participant.

10.2.2.2 Wind-Up; Cooperation. Upon termination of this Agreement, each Participant shall promptly and cooperatively assist the Development Manager, at the request of the Development Manager, with the process of winding up the Project, including notification of appropriate Governmental Bodies and Subcontractors, termination of outstanding Development Work contracts and other engagements, and payment of all remaining outstanding obligations and liabilities associated with the Project or otherwise arising under this Agreement or the activities arising hereunder. The Participants and the Development Manager shall use commercially reasonable efforts to cooperate and complete the wind-up process as expeditiously as possible.

10.2.2.3 Costs and Expenses of Wind-Up. Costs and expenses incurred in connection with the wind-up upon termination pursuant to Section 10.2.2.2 (including settlement of Development Work liabilities and obligations for existing contracts) shall be deemed Development Costs, and are subject to the ordinary reimbursement and payment requirements under Section 5.2.3.

11. NOTICES.

- 11.1 **Notices Generally.** All notices, requests or other communications required under this Agreement shall be in writing and shall be sufficient in all respects: (i) if delivered in Person or by courier, upon receipt by the intended recipient or an employee that routinely accepts packages or letters from couriers or other Persons for delivery at the address identified (as confirmed by, if delivered by courier, the records of such courier), (ii) if sent by facsimile transmission, when the sender receives confirmation from the sending facsimile machine that such facsimile transmission was transmitted to the facsimile number of the addressee, (iii) if mailed, upon the date of delivery as shown by the return receipt therefor, or (iv) if delivered by a nationally recognized overnight mail delivery service, upon the date of delivery. Notices shall be sent to the addresses of the entities and Persons set forth on Appendix E to this Agreement, subject to the provisions of Section 11.3 hereof.
- 11.2 **Informal Communications.** Informal communications of a routine nature shall be given in such manner as the Participants deem appropriate, except as otherwise determined by the Management Committee.
- 11.3 **Designation of Different Addresses and Persons.** A Participant may, at any time, by written notice to each other Participant, designate different or additional Persons or different addresses for giving of notices, demands or requests to it hereunder.

12. MISCELLANEOUS PROVISIONS.

- 12.1 **Headings.** The headings of the articles, sections and subsections of this Agreement are intended for the convenience of the Participants only and shall in no way be held to explain, modify, construe, limit, amplify or aid in the interpretation of the provisions hereof. The terms "this Agreement," "hereof," "herein," "hereunder," "hereto" and similar expressions refer to this Agreement as a whole and not to any particular article, section, subsection or other portion hereof and include the

appendices, schedules and exhibits hereto and any document, instrument or agreement executed and/or delivered by the Participants pursuant hereto.

- 12.2 **Scope of Agreement.** Unless the context otherwise requires, all references in this Agreement or in any appendix, schedule, exhibit or instrument hereto, to the assets, property interests, operations, business, financial statements, employees, books and records, accounts receivable, accounts payable, contracts or other attributes of the Development Work hereunder shall mean such items or attributes as they are used in, apply to, or relate to this Agreement.
- 12.3 **Construction.** The Participants have participated jointly in the negotiation and drafting of this Agreement. If an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Participants and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. The terms and phrases used in this Agreement, unless the context otherwise requires, shall be interpreted as follows: (i) the words "including," "include" or "includes" shall mean including without limitation, (ii) reference to any agreement (including this Agreement), appendix, schedule, exhibit, instrument or coverage policy means as such is amended, modified or supplemented, including by waiver or consent, (iii) reference to any Applicable Law means such Applicable Law as amended, modified, codified or reenacted, in whole or part, and in effect from time to time, (iv) reference to any Participant includes such entities' successors and assigns, to the extent that such successors and assigns are permitted by this Agreement, (v) reference to a Participant as a "Participant" shall, where applicable, also refer to any other capacity of such Participant under this Agreement, including that of Development Manager or Subcontractor, except as specifically stated herein, (vi) reference to the "Development Manager" excludes any reference to such Participant in any other capacity, and (vii) reference to a Participant as a "Subcontractor" excludes any reference to such Participant in any other capacity.
- 12.4 **Relationship of Participants.** The covenants, obligations and liabilities of the Participants and the Development Manager are intended to be several and not joint or collective and nothing herein contained shall ever be construed to create an association, joint venture, trust, partnership or other legal relationship, or to impose a trust or partnership covenant, obligation or liability on or with regard to any of the Participants or the Development Manager. No member or customer of a Participant or customer of a member of a Participant shall be deemed a Participant or party under this Agreement unless they have or it has explicitly accepted in writing all of the terms and conditions of this Agreement. Each Participant and the Development Manager shall be individually responsible for its own covenants, obligations and liabilities as herein provided. No Participant shall be under the control of or shall be deemed to control any other Participant or the Participants as a group. No Participant acting in any capacity shall be the agent of or have a right or power to bind any other Participant without its express written consent, except as set forth in this Agreement.
- 12.5 **No Rights or Benefits to Third Parties.** Except as otherwise specifically provided in this Agreement, the Participants do not intend to create rights in or to grant remedies to any third party as a beneficiary of this Agreement or to create any duty to or standard of care on behalf of any third party by any covenant, obligation or undertaking established herein. There shall be no incidental third party beneficiaries to this Agreement and, by way of clarification and not of limitation, no Governmental Body, customer or member of a Participant or customer of a Participant's member is an intended or incidental third party beneficiary hereof.

- 12.6 **Binding Obligations.** This Agreement shall be binding upon and shall inure to the benefit of the permitted successors and assigns, if any, of the Participants. Participants may assign their rights and obligations hereunder only in strict accordance with the provisions of Section 2.9 of this Agreement.
- 12.7 **Severability.** If any term, covenant or condition of this Agreement or the application of such term, covenant or condition, shall be held invalid or unenforceable as to any Person or circumstance by any Governmental Body, all other terms, covenants or conditions of this Agreement and their application shall not be affected thereby, but shall remain in force and effect unless such a Governmental Body holds that the provisions are not separable from all other provisions of this Agreement. The parties hereto specifically consent to the "blue-penciling" of this Agreement by any Governmental Body to construe as valid and enforceable the terms and conditions of this Agreement, consistent with the intent of the parties hereto. Such Governmental Body shall have the authority to reform and interpret the terms and conditions of this Agreement to find a valid and enforceable construction of this Agreement that is consistent with the intent of the parties and holds all invalid and unenforceable provisions, if any, as separable from all other remaining provisions.
- 12.8 **Amendment and Waiver.** The Participants shall have the sole authority to amend this Agreement. No purported amendment of this Agreement shall be effective unless in a writing specifically referring to this Agreement which is executed and delivered by all of the Participants. The terms, conditions, warranties, representations and covenants contained in this Agreement, including the documents, instruments and agreements executed and delivered by the Participants and/or the Development Manager pursuant hereto, may be waived only by a written instrument executed by the Participant waiving compliance. Any such waiver shall only be effective in the specific instance and for the specific purpose for which it was given and shall not be deemed a waiver of any other provision hereof or of the same breach or default upon any recurrence thereof. No failure on the part of a Participant or the Development Manager, as applicable in the circumstances, to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right.
- 12.9 **Survival of Representations and Warranties, Covenants and Agreements.** Each of the (i) representations and warranties of the Participants contained in this Agreement and in any ancillary documents delivered by or on behalf of any of the Participants pursuant to this Agreement and the transactions contemplated hereby shall survive in accordance with the statutes of limitations applicable to claims arising from the breach of any such representations and warranties, and (ii) covenants and agreements arising from, incident to or in connection with this Agreement hereof shall indefinitely survive the termination of this Agreement or the withdrawal or termination of any Participant; provided, however, (A) covenants and agreements shall survive only to the date when they are fully satisfied and require no performance or forbearance, and (B) the rights of a Participant expire on a specific date by the terms hereof, including without limitation the provisions of Sections 2.8 (Property Rights) and 9 (Confidentiality).
- 12.10 **Execution in Counterparts and Delivery of Electronic Signatures.** This Agreement may be executed in any number of counterparts. All such counterparts shall be deemed to be originals and shall together constitute but one and the same instrument. This Agreement shall become effective upon its execution by all of the Participants listed below. The executed counterparts of this Agreement and any ancillary documents hereto, such as amendments, may be delivered by electronic

means, such as email and/or facsimile, by the Participants and the receiving party may rely on the receipt of such executed counterpart as if the original had been received.

- 12.11 **Governing Law and Venue.** This Agreement will be governed by and construed in accordance with the laws of the State of Minnesota (exclusive of conflicts of law provisions of any jurisdiction and the principles of comity). If the dispute resolution provisions of Section 8 hereof are not enforceable for any reason, each Participant and the Development Manager agrees and consents that any Proceeding seeking to enforce any provision of this Agreement shall be instituted and adjudicated solely and exclusively in any court of general jurisdiction in Minnesota, or in the United States District Court having jurisdiction in Minnesota. Each Participant and the Development Manager agrees that each such court shall have personal jurisdiction over it with respect to such Proceeding, and waives any objections it may have, and expressly consents, to such personal jurisdiction.
- 12.12 **Entire Agreement.** This Agreement constitutes the entire agreement among the Participants, and supersedes all prior oral or written agreements, understandings, representations and warranties, and courses of conduct and dealing between the Participants on the subject matter hereof.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Participants have caused this Agreement be executed as of the date above recited.

PARTICIPANTS:

DAIRYLAND POWER COOPERATIVE

By _____
Its _____

**CITY OF ROCHESTER, ACTING THROUGH ITS PUBLIC
UTILITY BOARD**

By _____
Its _____

SOUTHERN MINNESOTA MUNICIPAL POWER AGENCY

By _____
Its _____

WISCONSIN PUBLIC POWER, INC.

By _____
Its _____

**NORTHERN STATES POWER COMPANY – MINNESOTA
AND NORTHERN STATES POWER COMPANY -
WISCONSIN, EACH A WHOLLY OWNED SUBSIDIARY
OF XCEL ENERGY INC., D/B/A XCEL ENERGY (AS
TENANTS-IN-COMMON)**

By _____
Its _____

By _____
Its _____

DEVELOPMENT MANAGER:

**NORTHERN STATES POWER COMPANY, A
MINNESOTA CORPORATION AND A WHOLLY
OWNED SUBSIDIARY OF XCEL ENERGY INC.,
D/B/A XCEL ENERGY**

By _____
Its _____

By _____
Its _____

**[SIGNATURE PAGE FOR SE – TC – ROCHESTER - LACROSSE PROJECT DEVELOPMENT
AGREEMENT]**

APPENDIX A**SCHEDULE OF PARTICIPANT PERCENTAGE
OF DEVELOPMENT COSTS AND ELECTION RIGHTS**

The Percentage of Development Costs and Election Right of each Participant shall be the indicated percentages set forth opposite its name in the following schedule.

	SE-TC- Rochester- LaCrosse (DM: Xcel Energy)
Dairyland Power Cooperative	11.0%
City of Rochester	9.0%
Southern Minnesota Municipal Power Agency	13.0%
Wisconsin Public Power, Inc.	3.0%
Xcel Energy Inc. d/b/a Xcel Energy	64.0%
Total	100%

APPENDIX B**JOINT DEVELOPMENT WORK COST ALLOCATION**

Type of Project Costs	Brookings	Fargo	La Crosse	Bemidji
Technical Standards	46.718%	24.375%	20.470%	8.437%
CON – 345 KV Projects	51.024	26.621	22.355	0
CON – 230 KV Projects	0	0	0	100
Template Project Agreements	46.719	24.375	20.469	8.438
General Project execution activities (Terry & Laura costs)	46.719	24.375	20.469	8.438
General planning to refine Group 1 Projects	46.719	24.375	20.469	8.438

APPENDIX C**REIMBURSEMENT OF DEVELOPMENT MANAGER
FOR
DEVELOPMENT WORK**

Development Costs shall include labor-related charges as set forth below with respect to the use of the Development Manager's employees to perform, undertake and carry out Development Work. These costs shall be charged to the Project as Development Costs and the Development Manager shall be reimbursed by the Participants

1. Direct Labor

All direct labor costs.

2. Labor Additive Expense

Labor-related charges to CapX shall include the labor additive expenses associated with the Development Manager's direct labor charged to CapX. The labor additive shall be based on prevailing policies of the Development Manager, or the affiliate of the Development Manager for which the relevant employee works. The labor additive is typically a percentage developed by taking labor additive expenses including, but not limited to those listed below and dividing by the Development Manager's total Direct Labor costs:

Employer FICA, Medicare, and Federal and State unemployment payroll taxes

Defined Benefit – Pension Plans – FASB 87

Long Term Disability Plans - FASB 112

Employee Medical, Dental, Disability, and Life insurance

Workers Compensation insurance

Vacation, Paid time off (PTO), Sick Leave, Holiday and other non productive payroll

Defined Contribution – 401K match

Post Retirement Benefits – FASB 106

Education assistance

Union Craft Welfare

Training

Annuities

Other Employee Benefits (less than 2% of all payroll Additive Expenses)

3. General and Administrative Costs on Direct Labor.

The Development Manager shall recover general and administrative costs associated with Direct Labor. A percentage (**G&A Percentage**) of 35% shall be applied to the Development Manager's

Direct Labor charged to CapX. Costs considered to be General and Administrative costs recovered through the 35% G&A Percentage adder and not reimbursed by the Participants if directly assigned to CapX include, but are not limited to the following:

- Administrative Temporary Labor
- Employee Procurement
- Office Supplies
- Office Consulting
- Administrative travel and training
- Telephone
- Computer Hardware and Software
- Headquarter Building and Grounds – Interest, depreciation, taxes and insurance
- Headquarter Building and Grounds – Miscellaneous Expense
- Office furniture, equipment, and computer hardware/software depreciation
- Other Office Expense (less than 2% of all G&A expenses)

In addition, the following types of departments of the Development Manager are considered General and Administrative. Therefore, an individual working in any of these departments should not directly assign their time to CapX, as this type of direct labor is non-reimbursable. In lieu of direct charging, the Development Manager shall use the 35% G&A Percentage calculation.

- Accounting
- Budgeting
- Finance
- Administrative
- Office Services
- Human Resources
- Information Technology
- Purchasing
- Building and Grounds – Headquarters

APPENDIX D**DISPUTE RESOLUTION PROCEDURES**

1. **ACKNOWLEDGMENT.** The Participants to this Agreement acknowledge that it is in their respective mutual best interests to promptly and expeditiously resolve any disputes and controversies between and among Participants. To that end, except as set forth in this Paragraph 1, the Participants hereby agree that the rules of dispute resolution set forth in this **Appendix D** (the "ADR Rules") shall be the sole and exclusive remedy for resolution of their differences if such differences shall arise with respect to this Agreement. These ADR Rules shall not, however, govern a dispute between the Participants and the Development Manager if there is an affirmative vote to remove the Development Manager pursuant to Section 4.11 of this Agreement and the Development Manager seeks to appeal the removal determination pursuant to Sections 4.11.4 and 8.2.2.

2. **PARTICIPANT SETTLEMENT CONFERENCE.**
 - 2.1 **Notice.** If a dispute, claim or controversy arises between or among Participants, any such Participant shall have the right to notify all other Participants that it has elected to implement the procedures set out in these ADR Rules. Within five (5) business days after receipt of such notice, an authorized representative of each disputing Participant shall meet at a mutually agreed time and place and attempt, in a commercially reasonable manner, to resolve and settle such dispute or controversy.

 - 2.2 **Assignment of Representatives.** If the dispute or controversy (i) relates primarily to the performance of Development Work or is primarily operational in nature, each disputing Participant shall assign an individual qualified and experienced in electric transmission subject matter, (ii) is primarily financial in nature, each disputing Participant shall assign an experienced financial representative, or (iii) primarily relates to any other subject matter, each disputing Participant shall assign an executive familiar with the subject matter of this Agreement to act on behalf of the Participant, in each case for the purpose of resolving such dispute or controversy.

 - 2.3 **Time Period for Settlement Discussions.** The applicable representatives of the disputing Participants shall have up to ten (10) business days following the commencement of discussions to resolve any such dispute or controversy as conclusively evidenced by a settlement agreement in writing. If a mutual resolution or settlement of such dispute or controversy is not obtained within the period referenced above, any disputing Participant may then initiate non-binding mediation in accordance with the procedures set out below.

3. **NON-BINDING MEDIATION.** Subject to the provisions of Section 2, any disputing Participant may initiate non-binding mediation of a dispute or controversy described above by furnishing a written request for mediation to all other disputing Participants. Such mediation shall be subject to and shall proceed as follows:
 - 3.1 **Selection of Mediator.**
 - 3.1.1 **Participant Selection.** The disputing Participants shall mutually agree to select a mediator who is impartial, has experience in construction project dispute mediation,

and is knowledgeable regarding the design and construction of electric utility transmission projects ("**Mediator**"). The Mediator does not have the authority to impose a settlement upon the parties, but will attempt to help the parties reach a satisfactory resolution of their dispute.

3.1.2 **Court Selection.** If the disputing Participants cannot agree upon a Mediator, a party may apply to a court of competent jurisdiction in Hennepin County, Minnesota, for the appointment of a mediator. Once a Mediator has been appointed, each of the disputing Participants shall participate in such mediation.

3.2 **Location.** Each mediation session shall be held in the Minneapolis-St. Paul, Minnesota metropolitan area at a convenient location agreeable to the Mediator and the disputing Participants, as the Mediator shall determine, or if no such location has been established within five (5) business days of the appointment of the Mediator, the Mediator shall designate such location. The mediation shall be commenced within five (5) business days after the selection of the mediation location, unless otherwise agreed by the disputing Participants.

3.3 **Submissions and Governing Rules.** The disputing Participants shall provide written submissions to the Mediator as the Mediator shall determine. Mediations shall be subject to and governed by Rule 114 of the Minnesota Rules of Practice. Without limiting the foregoing, confidential information disclosed to the Mediator by the parties or by witnesses in the course of mediation shall not be divulged by the Mediator. The Mediator shall not divulge any such information or testify in regard to the mediation in any arbitration or other adversarial Proceeding.

3.4 **Termination of Mediation.** The mediation shall be terminated: (i) by the execution of a settlement agreement by the parties, or (ii) by a written declaration of the Mediator to the effect that further efforts of mediation are no longer worthwhile, or (iii) by a written declaration of any disputing Participant to the effect that the mediation Proceedings are terminated.

4. **BINDING ARBITRATION.** Except as set forth in Paragraph 1 above concerning removal of the Development Manager, all disputes or controversies between or among Participants arising out of or relating to this Agreement that are not resolved by either (i) the disputing Participants, or (ii) mediation, as provided in this **Appendix D** above, shall be conclusively decided by binding arbitration as provided in these ADR Rules. The regular track procedures of the Construction Industry Arbitration Rules of the American Arbitration Association ("**Construction Industry Rules**") shall govern or control all arbitrations of claims or disputes arising from and relating to this Agreement, except as modified and to the extent supplemented below. All arbitrations shall be subject to and shall proceed as follows:

4.1 **Demand for Arbitration.** Demand for arbitration shall be filed in writing with those Participants against whom the claim is made or relief is sought and with the American Arbitration Association. A demand for arbitration shall be made no later than the date when institution of legal or equitable Proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

- 4.2 **No Joinder.** No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any manner, an additional Person who has not furnished services, labor or materials to the Project, except by written consent of the Participants to the arbitration. Further, nothing in the ADR Rules shall create any privity between parties or shall create or give rise to a duty owed by one party to another which does not otherwise arise by operation of law or by the terms of the contract(s) between such parties to which the ADR Rules have been attached and made a part thereof. Consent to arbitration involving an additional Person shall not constitute consent to arbitration of any claim, dispute or other matter not described in the written consent or with a Person not named or described therein.
- 4.3 **Procedures.** The arbitrator (or panel) shall establish reasonable procedures and requirements for the production of relevant documents and require the exchange of information concerning witnesses to be called. The parties shall be entitled to discover all documents and information reasonably necessary for a full understanding of any legitimate issue raised in the arbitration, and the parties may use all methods of discovery available under the Federal Rules of Civil Procedure and shall be governed thereby. Before the deposition of any expert witness, the party proposing to call such a witness shall provide a full and complete report by the expert, together with the expert's calculations and other data by which the expert reached any opinions concerning the subject matter of the arbitration. The report shall be provided no less than ten (10) business days before the date set for the expert witness' deposition. Any disputes arising from such discovery shall be decided by the arbitrator (or panel) and such decision or action taken by the arbitrator (or panel) shall be final as in all factual matters.
- 4.4 **Prehearing Meeting.** There shall be a prehearing meeting between the parties at which each party shall present a memorandum disclosing the factual basis of its claim and defenses and disclosing legal issues raised. The memorandum shall also disclose the names of any expert a party shall present as a witness during the Proceedings. At the prehearing meeting, the arbitrator (or panel) shall make and set schedules for hearings consistent with their powers as set forth in these ADR Rules.
- 4.5 **Abuse of Discovery.** If the arbitrator (or panel) finds, after affording an opportunity to be heard, that a party has abused the discovery process or has failed to act in good faith with regard to discovery or these arbitration rules, the arbitrator (or panel) shall have, in addition to any other powers conferred by law or the Construction Industry Rules, those powers conferred upon trial courts by the Federal Rules of Civil Procedure, subject to the same conditions and limitations set forth therein.
- 4.6 **Rules of Evidence.** The Federal Rules of Evidence shall be applied by the arbitrator (or panel) but liberally construed to allow for the admission of evidence that is helpful in resolving the controversy. Rulings on the admission of evidence made by the arbitrator (or panel) at the hearing shall be final and not subject to any appeal. At the time of the award, the arbitrator (or panel) shall prepare and provide to the parties findings of fact and conclusions of law supporting the award. When such findings of fact and conclusions of law are provided, the findings of fact shall be final, binding and non-appealable.

4.7 **Authority of Arbitrator.**

4.7.1 **Equitable Relief and Limitation of Awards.** In deciding the substance of any dispute, claim or controversy brought before the arbitrator (or panel), the arbitrator (or panel) shall have authority, power and right to award Damages and provide for other remedies as are available at law or in equity including the authority to grant temporary or permanent injunctive relief in a form substantially similar to that which would otherwise be granted by a court of law in accordance with the laws of the State of Minnesota, except that the arbitrator (or panel) shall have no authority to award special, incidental, consequential, indirect or punitive Damages against any Participant under any circumstances (whether they be exemplary, treble or punitive Damages, or any other penalty) regardless of whether such Damages may be available under the laws of the State of Minnesota. The disputing Participants hereby waive their right, if any, to recover such excluded Damages in connection with any disputes, claims or controversies between or among the Participants sought to be resolved under the ADR Rules. The Participants adopt the Rules for Emergency Measures of Protection of the American Arbitration Association under its Commercial Arbitration Rules.

4.7.2 **Appeal of Injunctive Relief.** If injunctive relief is granted under the Rules for Emergency Measures of Protection, then this provision shall not preclude any Participant from seeking temporary or preliminary injunctive relief before the commencement of arbitration from any court of competent jurisdiction and no bond or other security shall be required in connection with such injunctive or provisional relief.

4.8 **Award Final and Binding.** The award of the arbitrator (or panel) shall be final and binding, except as set forth in these ADR Rules (including a Section 4.7.2 appeal of an award of injunctive relief).

4.9 **Costs and Expenses.** Except as otherwise expressly provided in the ADR Rules, each party shall bear its own costs and expenses of the arbitration, including attorneys and expert witness fees, and shall equally share the expense of the arbitrator (or panel) and the administrative expenses of the arbitration.

5. **ENFORCEMENT.** These ADR Rules, together with a final award of the arbitrator (or panel), shall be enforceable in any court of competent jurisdiction, including the State and Federal Courts located in Hennepin County, Minnesota. The enforcement of such agreement and all procedural aspects thereof, including the construction and interpretation of the ADR Rules to arbitrate, scope of the issues subject to arbitration, allegations of waiver, delay or defenses as to arbitrability, and the rules (except as otherwise provided in these ADR Rules) governing the conduct of the arbitration shall be governed by and construed pursuant to the United States Arbitration Act.

6. **CONFIDENTIALITY OF PROCEEDINGS.** All Proceedings in connection with any dispute, claim or controversy shall be brought for resolution pursuant to the ADR Rules, including all documents prepared or obtained during discovery or produced during a hearing or meeting (other than documents which are already part of the public domain) and all testimony or recordings of testimony, including depositions, affidavits, and expert reports exchanged by the parties or produced

during a hearing or meeting, shall be confidential. In addition to the enforcement powers set forth in Section 5 above, the courts described above shall have jurisdiction to enter and enforce such protective Orders and to grant and enforce such appropriate injunctive relief sought by a party hereto to maintain the confidentiality of the Proceedings and to protect the parties from inappropriate disclosure. No bond or other security shall be required in connection with such injunctive relief. The prevailing party in any such action shall be entitled to all of its reasonable attorney fees and other costs and expenses associated with the enforcement of this these confidentiality provisions.

7. **NO JURY TRIAL.** IF LITIGATION IS AUTHORIZED PURSUANT TO ANY UNDERLYING AGREEMENT BETWEEN THE PARTICIPANTS AND IS BROUGHT FOR THE RESOLUTION OF ANY DISPUTE OR CLAIM ARISING FROM THE PROJECT OR THE AGREEMENT, INCLUDING BUT NOT LIMITED TO THE OBLIGATIONS OR RESPONSIBILITIES OF THE PARTICIPANTS WITH REGARD TO THE PROJECT, THE PARTICIPANTS DO HEREBY KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVE THE RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY SUCH LITIGATION AND THE ISSUES TO BE TRIED THEREIN. IT IS THE INTENT OF THE PARTICIPANTS THAT, IN ANY SUCH LITIGATION BETWEEN THE PARTICIPANTS (OR ANY OF THEM), ALL ISSUES IN SUCH LITIGATION SHALL BE TRIED TO A JUDGE AND NOT A JURY.

APPENDIX E

NOTICES

If to Dairyland Power Cooperative:

Dairyland Power Cooperative
3200 E. Avenue S.
P.O. Box 817
LaCrosse, WI 54602-0817
Representative: Chuck Callies
Alternate: Benjamin L. Porath
Telephone: 608-788-4000
Fax: 608-787-1475

If to City of Rochester:

City of Rochester
4000 East River Rd. NE
Rochester, MN 55906-2813
Representative: Gerry Steffens
Alternate: Larry Koshire
Telephone: 507-280-1607
Fax: 507-280-1542

If to Southern Minnesota Municipal Power Agency:

Southern Minnesota Municipal Power
Agency
500 First Avenue Southwest
Rochester, MN 55902-3303
Representative: Richard Hettwer
Alternative: David Geschwind
Telephone: 507-285-0478
Fax: 507-292-6414

If to Wisconsin Public Power, Inc.:

Wisconsin Public Power, Inc.
1425 Corporate Center Drive
Sun Prairie, WI 53590-9109
Representative: Pat Connors
Alternative: Tim Noeldner
Telephone: 608-834-4500
Fax: 608-837-0274

If to Northern States Power Company:

Northern States Power Company, a
Minnesota corporation, and Northern
States Power Company, a Wisconsin
corporation, jointly d/b/a Xcel Energy
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401
Representative: Doug Jaeger
Alternative: Greg Chamberlain
Telephone: 612-215-4612
Fax: 612-215-4544

APPENDIX F

PROJECT DESCRIPTION

Approximately 150 miles of 345 kV line from the southeast Twin Cities to a new substation in the vicinity of Rochester to the LaCrosse area plus two new 161 kV lines, totaling approximately 50 miles, to serve the Rochester area.

Second Amendment of

Cap X

Confidentiality Agreement

WHEREAS, the undersigned entities (the "Participants") executed a CapX Confidentiality Agreement dated as of July 21, 2006 (the "Agreement") in connection with proposed transmission line projects involving one or more Participants that may be located in and around the State of Minnesota (the "CapX 2020 Projects"); and

WHEREAS, the Agreement ~~has~~had a termination date of December 31, 2006; and

WHEREAS, the Participants anticipated that the Agreement would be superceded by more definitive agreements (the "Project Development Agreements") with respect to the CapX 2020 Projects that were expected to be executed prior to December 31, 2006; and

WHEREAS, the Participants executed an Amendment of Cap X Confidentiality Agreement, effective as of December 31, 2006, to extend the termination date of the Agreement to February 28, 2007.

WHEREAS, the Participants do not expect the execution process by all Participants to be completed by ~~December 31, 2006~~February 28, 2007; and

WHEREAS, the Participants wish to extend the termination date of the Agreement as provided in this amendment.

NOW, THEREFORE, the Participants agree to amend the Agreement as follows:

1. Section 4(b) of the Agreement, as amended, shall be modified by deleting "~~December 31, 2006~~February 28, 2007" and inserting in its stead "~~February 28,~~March 30, 2007."

2. Except as expressly modified herein, no other changes or modifications to the Agreement are hereby made and the Agreement, as previously amended, shall continue in full force and effect as modified herein.

3. This Amendment of CapX Confidentiality Agreement shall be effective as of ~~December 31, 2006~~February 28, 2007.

4. This amendment may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Second Amendment of

Southeast Twin Cities-Rochester-La Crosse Transmission Project

Memorandum of Understanding

WHEREAS, the undersigned participants (the "Participants") executed a Memorandum of Understanding (the "MOU") with respect to a proposed transmission line project, known as the Southeast Twin Cities-Rochester-La Crosse Transmission Project (the "Project"), which ~~has had~~ a termination date of December 31, 2006; and

WHEREAS, the Participants indicated in the MOU that it was viewed as temporary in nature and would be superceded by a more definitive agreement (the "Project Development Agreement") that was expected to be executed prior to December 31, 2006; and

WHEREAS, the Participants executed an Amendment of Southeast Twin Cities-Rochester-LaCrosse Transmission Project Memorandum of Understanding, effective as of December 31, 2006, to extend the termination date of the MOU to February 28, 2007, and increase the total Development Costs authorized to be incurred under the MOU; and

WHEREAS, the Participants expect the form of the Project Development Agreement to be in substantially final form ~~by December 22, 2006, on or about February 28, 2007,~~ but do not expect the execution process by all Participants to be completed by ~~December 31, 2006~~ February 28, 2007; and

WHEREAS, the Participants wish to avoid any disruption of the ongoing development work regarding the Project.

NOW, THEREFORE, the Participants agree to amend the MOU as follows:

1. Section 5 of the MOU, as amended, entitled "Termination" shall be modified by deleting "~~December 31, 2006~~ February 28, 2007" and inserting in its stead "~~February 28,~~ March 30, 2007."

2. ~~Appendix C of the MOU entitled "ESTIMATED DEVELOPMENT COSTS BUDGET" shall be deleted in its entirety and the attached Appendix C shall be inserted in its stead.~~ 3. Except as expressly modified herein, no other changes or modifications to the MOU are hereby made and the MOU, as previously amended, shall continue in full force and effect as modified herein.

4. This Second Amendment of Southeast Twin Cities-Rochester-La Crosse Transmission Project Memorandum of Understanding shall be effective as of ~~December 31, 2006~~ February 28, 2007.

5. This amendment may be executed in one or more counterparts, each of which

shall be deemed an original, but all of which together shall constitute one and the same instrument.



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, that the Board requests the Common Council to approve the following agreement, subject to review by the City Attorney of any final revisions, with Dairyland Power Cooperative, Southern Minnesota Municipal Power Agency, Wisconsin Public Power, Inc., and Xcel Energy, and that the Mayor and the City Clerk are authorized to execute the agreement for:

Project Development Agreement for Twin Cities – Rochester – LaCrosse Transmission Project

The amount of the agreement not-to-exceed ONE MILLION NINE HUNDRED EIGHTY THOUSAND AND 00/100THS DOLLARS (\$1,980,000.00). Passed by the Public Utility Board of the City of Rochester, Minnesota, this 27th day of February 2007.

President

Secretary