

132 FERC ¶ 61,086
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Xcel Energy Services, Inc.

Docket No. ER10-1377-000

ORDER ACCEPTING AND SUSPENDING PROPOSED AMENDMENTS TO
ELECTRIC TRANSMISSION SERVICE AGREEMENTS AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 30, 2010)

1. On May 28, 2010, Xcel Energy Services, Inc. (Xcel), on behalf of Northern States Power Company-Minnesota (NSP-Minnesota),¹ filed to amend eight grandfathered service agreements (GFAs) that include Rate Schedule Transmission Service Tm-1 (Tm-1) between NSP-Minnesota and Tm-1 Customers,² which would increase the rates for Tm-1 Customers. To allow the Tm-1 Customers time to adjust to the revised rates, Xcel requests that the Commission accept the amendments to become effective on August 1, 2010, but suspend the proposed rates for a maximum five-month period until January 1, 2011. In this order, we accept and suspend the proposed rates, to become effective on January 1, 2011, subject to refund, as requested, and establish hearing and settlement judge procedures.

¹ NSP-Minnesota is a wholly-owned subsidiary of Xcel. NSP-Minnesota is a transmission-owning member of Midwest Independent Transmission System Operator, Inc. (Midwest ISO).

² The eight customers include City of Ada, Minnesota; City of Fairfax, Minnesota; City of Marshall, Minnesota; City of Sauk Centre, Minnesota; City of St. James, Minnesota; City of Sleepy Eye, Minnesota; City of Hillsboro, North Dakota; and Minnesota Municipal Power Agency (collectively, Tm-1 Customers).

I. Background and Description of Filing

2. Xcel provides wholesale transmission service to its Tm-1 Customers pursuant to interconnection and interchange agreements and transmission agreements, which together constitute the GFAs.³

3. All of the GFAs at issue here incorporate the Tm-1 service schedule, which contains the rates NSP-Minnesota charges for transmission service under the GFAs. In the instant filing, Xcel proposes to increase the Tm-1 rates for wholesale transmission service and ancillary services so that they equal the Midwest ISO Tariff rates for such services within the NSP system pricing zone.⁴ The rates will also be subject to a true-up pursuant to the Midwest ISO Tariff, which Xcel states will ensure that the Tm-1 Customers do not pay more than the cost to serve them. In addition, Xcel proposes to pass through to Tm-1 Customers (excluding the City of Marshall)⁵ the costs Xcel incurs for Schedule 10-FERC (FERC Annual Charges Recovery) under the Midwest ISO Tariff as a result of providing service to the Tm-1 Customers. For the City of Marshall, Xcel proposes to pass through the FERC regulatory assessment costs billed to NSP-Minnesota for service it provides to the City of Marshall.

³ In order to accommodate transmission service provided under certain existing long-term contracts that were executed before September 16, 1998 (the GFAs), Midwest ISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) includes provisions that generally allow service under these GFAs to continue pursuant to the agreements rather than under the Tariff. Midwest ISO lists the GFAs in Attachment P to the Tariff. The service agreements that Xcel proposes to amend in this proceeding are listed as the following GFAs in Attachment P: GFA No. 352 with the City of Ada, Minnesota; GFA No. 354 with the City of Fairfax, Minnesota; GFA No 356 with the City of Marshall, Minnesota; GFA No. 358 with the City of Sauk Centre, Minnesota; GFA No. 359 with the City of St. James, Minnesota; GFA No. 361 with the City of Sleepy Eye, Minnesota; GFA No. 355 with the City of Hillsboro, North Dakota; and GFA No. 362 with Minnesota Municipal Power Agency.

⁴ The NSP system pricing zone (Zone 16) primarily consists of facilities owned by NSP-Minnesota and NSP-Wisconsin (together, NSP), but it also includes certain facilities owned by Great River Energy and Southern Minnesota Municipal Power Agency.

⁵ For the City of Marshall, Midwest ISO does not bill Xcel for Schedule 10-FERC charges, because the Commission has determined that the GFA for the City Marshall is outside the Midwest ISO energy market. *See, Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,011 (2006).

4. In addition to the revisions to the Tm-1 service schedule, Xcel proposes to make what it characterizes as corrections or updates to the terms of certain other service schedules to the GFAs. For example, Xcel states that certain of the GFAs include a settlement agreement, as an attachment, whose term has expired. Therefore, Xcel proposes to delete the copy of the settlement agreement. Xcel also proposes to delete certain service schedules to the GFAs that include provisions related to the calculation of generation reactive power charges that are now out of date and inconsistent with the proposed Schedule 2 charges. In addition, Xcel proposes to update certain administrative information to reflect changes to personnel.

5. Xcel states that the primary reason for its filing is to set the transmission and certain ancillary services rates at a level that will allow NSP-Minnesota to collect revenues sufficient to recover significant increases in its costs to provide such services to Tm-1 Customers. Xcel estimates that based on 2009 rates and loads, the cumulative increase over the current Tm-1 rates equals about \$5.3 million per year, or a 114 percent rate increase.

6. Xcel views the proposed changes to the GFAs as a transitional mechanism. Xcel believes that the Tm-1 Customers should convert to service under the Midwest ISO Tariff as promptly as practicable. Xcel states that since the GFAs are each nearing the end of their initial term, it anticipates that it will issue a notice of termination for each of the GFAs later in 2010, pursuant to the notice term for the applicable GFA.⁶ Upon termination of its GFA, a Tm-1 Customer would transition to transmission service under the Midwest ISO Tariff.⁷

7. Xcel proposes an effective date of August 1, 2010 for the amendments to the GFAs and the proposed Tm-1 service schedules. However, Xcel states that, because of the magnitude of the requested rate increase, it will not contest a five-month suspension period, allowing the proposed revisions to become effective January 1, 2011, subject to refund.

8. Xcel requests that the Commission waive any failure to comply strictly with the Commission's filing requirements because of Xcel's good faith attempt at compliance

⁶ Xcel explains that the termination provisions of each GFA are different. Xcel Filing at 11; Moeller Test. at 20.

⁷ NSP-Minnesota commits to work with GFA Customers and Midwest ISO to assist in the transition once a GFA is terminated. In addition, NSP-Minnesota and Xcel would work with any Tm-1 Customer that indicates a desire to terminate the GFA earlier than the stated notice period and transition to Midwest ISO Tariff service (*See* Xcel Filing at 12).

with such requirements. Xcel also requests waiver of any requirement to submit cost-of-service statements. Specifically, Xcel requests waiver of the following sections of the Commission's regulations: sections 35.13(d)(1)-(2) (Period I and II data for Statements AA through BM), section 35.13(d)(5) (work papers related to Period I and Period II data), and section 35.13(h) (cost of service statements). Xcel argues that good cause for such waivers exists because detailed statements of costs of service are not needed when the proposed rates are formulaic and will be based on actual costs, as calculated pursuant to the Midwest ISO Tariff. Xcel points out that the Commission has routinely granted such waiver requests in similar proceedings in which a party has proposed to implement a formula rate.⁸

II. Notice of Filings and Responsive Pleadings

9. Notice of Xcel's filing was published in the *Federal Register*, 75 Fed. Reg. 33,291 (2010), with interventions and comments due on or before June 18, 2010. On June 17, 2010, Minnesota Municipal Power Agency (MMPA) filed a motion to intervene, reject, protest, and deny waivers, and a request for maximum suspension time and for a hearing (MMPA's Protest). On June 18, 2010, Central Minnesota Municipal Power Agency (CMMPA) filed a motion to intervene and protest, and Missouri River Energy Services (Missouri River) filed a motion to intervene and conditional protest. On July 2, 2010, Xcel filed a motion for leave to answer and answer to the protests of MMPA, CMMPA, and Missouri River.

III. Request to Reject Filing and Protests

10. MMPA states that Xcel's proposed rate increase exceeds the cost to serve MMPA and therefore is not just and reasonable under section 205 of the Federal Power Act (FPA).⁹ MMPA adds that Xcel's proposed rate increase is unsupported by cost of service information and also violates Order No. 888's comparability standard.¹⁰ MMPA contends that the Midwest ISO Tariff rate that Xcel is proposing to apply to Tm-1

⁸ Xcel Filing at 13, n.20.

⁹ 16 U.S.C. § 824d (2006).

¹⁰ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

transmission service includes cost recovery for transmission facilities owned by transmission owners other than NSP, and MMPA maintains that it has no contractual right to use the facilities of non-NSP transmission owners.

11. MMPA asserts that Xcel's filing is unsupported by cost of service information, leaving MMPA with no information from which to test the reasonableness of Xcel's proposed rates. MMPA also states that it is unable to determine the separate costs for service over just the NSP-owned facilities or identify costs relating to facilities in the NSP pricing zone owned by other transmission owners. If the filing is not rejected, MMPA requests that the Commission deny Xcel's request for waiver of the filing requirements.¹¹ In addition, MMPA states that Xcel's filing changes Xcel's return on equity and that Xcel has failed to support this proposed change. For example, MMPA states that NSP-Wisconsin recently settled for a 10.4 percent return on equity for its Wisconsin wholesale formula rate in Docket No. ER10-922-000, which is lower than the 12.38 percent return on equity Xcel proposes in this proceeding.¹² MMPA requests a five month suspension if the filing is not rejected, thereby suspending the rate increase until January 1, 2011. In addition, if not rejected outright, MMPA requests that the Commission set the case for hearing and settlement proceedings.¹³

12. MMPA argues that Xcel's filing also violates Order No. 888's comparability standard, because MMPA's service under the Tm-1 rate is limited by contract to service only over NSP-owned facilities. In contrast, MMPA states that NSP-Minnesota's merchant function purchases Midwest ISO network service for deliveries to NSP's native load customers at the NSP system pricing zone rate, which is the same rate NSP is now proposing for Tm-1 service. This lack of comparability, according to MMPA, stems from the fact that the transmission service purchased by the NSP's merchant is usable for deliveries from any source located in or delivered to the Midwest ISO footprint, while Tm-1 service is restricted to deliveries from sources located on or delivered directly to the NSP-owned system.

13. CMMPA protests the proposed rate increase due to the size of the requested 119.93 percent increase rate increase, and it protests the proposed and requests a full five month's suspension of the proposed rates pending a full Commission investigation.¹⁴ Missouri River also supports suspending the effectiveness of the proposed rates until January 1, 2011.

¹¹ MMPA Protest at 7, 13.

¹² MMPA Protest at 14-15.

¹³ MMPA Protest at 16.

¹⁴ CMMPA Protest at 3.

14. Missouri River asserts that its members have been pursuing alternatives to mitigate the effect of the proposed rate changes, and that it is working with two of the municipalities to seek termination of the Tm-1 agreements with NSP-Minnesota so that Missouri River can enter into Midwest ISO network integration transmission service (NITS) agreements with those two cities as network loads. Missouri River states that it is important that the termination provisions of the revised Tm-1 agreements be clarified so that it and its members can pursue termination and conversion to Midwest ISO NITS agreements.

IV. Xcel's Answer

15. Xcel responds that the proposed Tm-1 rates are just and reasonable because they are the same rates that the Commission approved as just and reasonable in the Midwest ISO Tariff for transmission service within the NSP system pricing zone. Xcel argues that its arrangement with MMPA, which it states grants MMPA flexible, firm transmission service over NSP's transmission system without paying multiple charges, is network service.¹⁵ Xcel states that its transmission facilities are under the functional control of Midwest ISO, and the rates charged for service over those facilities are cost-based rates as set forth in the Midwest ISO Tariff. Xcel asserts that, because the transmission facilities in the NSP system pricing zone are networked, all loads located in the zone benefit from all networked transmission facilities in the zone, making the zonal rate just and reasonable for network service.¹⁶ Xcel contends that the facilities owned by Great River Energy, Southern Minnesota Municipal Power Agency, and Central Minnesota Municipal Power Agency are network transmission facilities embedded within the NSP system, and are used by transmission customers in a manner similar to the use of NSP system facilities within the zone. According to Xcel, the annual transmission revenue requirement for all facilities in the NSP system pricing zone will be determined pursuant to the cost-based Attachment O formula rates applicable to the transmission owner facilities under the Midwest ISO Tariff. NSP, Xcel explains, incurs costs for the use of these facilities under Commission-accepted joint pricing zone agreements. Therefore, Xcel states that it is reasonable for Tm-1 Customers to pay for the use of the facilities in a manner similar to the other network transmission service customers in the NSP system pricing zone. Moreover, Xcel states, the NITS rate for the NSP system pricing zone excludes the cost of the NSP system transmission facilities located in other Midwest ISO pricing zones, so the Tm-1 Customers would not pay the cost of those facilities.¹⁷

¹⁵ Xcel Answer at 7-8, citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,646 and *Entergy Services v. FERC*, 375 F.3d 1204, 1206 (2004).

¹⁶ Xcel Answer at 9.

¹⁷ Xcel Answer at 9.

16. Xcel also states that, while there are transmission facilities in the NSP system pricing zone that are not owned by NSP, there are also customers with loads located on those non-NSP facilities that pay the NSP system pricing zone rate. The existence of those third-party facilities, Xcel maintains, was recognized in the settlement of Docket No. OA97-25-000, et al., which set the NSP system annual transmission revenue requirement through a “black box” settlement that included a \$10 million annual payment to Great River Energy, Southern Minnesota Municipal Power Agency, and others for their transmission facilities embedded within the NSP system.¹⁸ Xcel states that with the advent of the Midwest ISO Tariff, formula rates and pricing zones, the structure for providing the payments must be modified. Xcel further explains that the calculation of rates is provided pursuant to cost-based rate schedules on file with the Commission under section 205 of the FPA (the Midwest ISO Tariff, the Midwest ISO Transmission Owners Agreement, and the Joint Pricing Zone Agreement between NSP-Minnesota, Great River Energy, and Southern Minnesota Municipal Power Agency) and that even if an exact separation of costs among all of the facilities in the NSP system pricing zone were not calculated, the cost causation principle does not require exacting precision in a ratemaking agency’s allocation decision.¹⁹ For these reasons, Xcel contends, the proposed Tm-1 rate is just and reasonable and should not be rejected.

17. Xcel states that it complies with Order No. 888’s comparability principle because: (1) service over the NSP system is offered to all eligible customers under the Midwest ISO Tariff, and (2) NSP’s merchant function takes transmission service pursuant to the Midwest ISO Tariff.²⁰ Therefore, according to Xcel, any comparability issue can only arise with respect to the service that MMPA chooses to take and MMPA has chosen not to avail itself of service over the NSP facilities pursuant to the Midwest ISO Tariff. Xcel argues that the fact that MMPA continues to take transmission service under a GFA does not compel a conclusion that Xcel has violated the comparability principle.²¹ Xcel maintains that access to the rest of the Midwest ISO system is a benefit that inures to transmission customers taking service under the Midwest ISO Tariff because it eliminates pancaked rates under a regional transmission operator tariff.

18. Xcel maintains that the Commission should approve the use of the NSP system pricing zone rate for the Tm-1 Customers without the need for specific cost of service

¹⁸ Xcel Answer at 10.

¹⁹ Xcel Answer at 10 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1371 (D.C. Cir. 2004)).

²⁰ Xcel Answer at 11.

²¹ Xcel Answer at 12.

support because the proposed rates have already been approved by the Commission as just and reasonable.²² In addition, Xcel explains that it is not proposing to change its return on equity because it is proposing to derive the Tm-1 rate by reference to the Attachment O cost of service formula in the Midwest ISO Tariff and NSP has not proposed to change the return on equity used in the Midwest ISO formula. Xcel asserts that the rate filing cited by MMPA (Docket No. ER10-992-000) is a rate filing by NSP-Wisconsin, a separate legal entity from NSP-Minnesota, the NSP company making the proposed rate filing here. In addition, the case to which MMPA refers relates to production (power sales) rates and not transmission service rates.²³

19. Xcel states that it and NSP-Minnesota will continue to work with the City of Marshall with respect to its integration into Midwest ISO.²⁴

V. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²⁵ timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²⁶ prohibits an answer to a protest, unless otherwise permitted by the decisional authority. We will accept Xcel's answer because it has provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

22. Xcel's proposed rate increase raises issues of material fact that cannot be resolved on the record before us, and that are more appropriately addressed through hearing and settlement judge procedures. Our preliminary analysis indicates that Xcel's proposal to modify Tm-1 rates has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. However, we

²² NSP Answer at 13-15.

²³ NSP Answer at 16.

²⁴ NSP Answer at 17.

²⁵ 18 C.F.R. § 385.214 (2010).

²⁶ 18 C.F.R. § 385.213(a)(2) (2010).

will not reject Xcel's filing as requested by MMPA. Instead, we will accept Xcel's proposal for filing, suspend it until January 1, 2011, as requested by all parties, subject to refund, and set it for hearing and settlement judge procedures.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²⁷ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.²⁸ The settlement judge shall report to the Chief Judge and the Commission within thirty days of the date of his/her appointment concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Xcel's filing is hereby accepted for filing and suspended for a five month period, to become effective January 1, 2011, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning Xcel's filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge

²⁷ 18 C.F.R. § 385.603 (2010).

²⁸ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.